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THE

LAWS OF ENGLAND.

VOLUME XVIII.

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THE

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BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XVIII.

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JURIES.
LAND IMPROVEMENT.
LAND TAX.
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For Action - - - *See title* ACTION.
Barristers - - - ,, BARRISTERS.
Blasphemy - - - ,, CRIMINAL LAW AND PROCEDURE.

For Contempt of Court	*See title*	CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL.
Costs	,,	PRACTICE AND PROCEDURE; SOLICITORS.
Criminal Offences	,,	CRIMINAL LAW AND PROCEDURE.
Discovery	,,	DISCOVERY, INSPECTION, AND INTERROGATORIES.
Evidence	,,	EVIDENCE.
Judgments and Orders	,,	JUDGMENTS AND ORDERS.
Limitation	,,	LIMITATION OF ACTIONS; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Married Women	,,	HUSBAND AND WIFE.
Master and Servant	,,	MASTER AND SERVANT.
Medical Profession	,,	MEDICINE AND PHARMACY.
Parliament, Members of	,,	PARLIAMENT.
Practice and Procedure	,,	COURTS; JUDGMENTS AND ORDERS; PLEADING; PRACTICE AND PROCEDURE.
Public Officers	,,	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Seditious Libels	,,	CRIMINAL LAW AND PROCEDURE.
Slander of Title	,,	TORT.
Tort, Principles of	,,	TORT.
Trade	,,	TRADE AND TRADE UNIONS.
Trade Marks	,,	TRADE MARKS, TRADE NAMES, AND DESIGNS.

LIBRARIES.

See LITERARY AND SCIENTIFIC INSTITUTIONS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

LICENCES.

See ALIENS; ANIMALS; AUCTION AND AUCTIONEERS; BANKRUPTCY AND INSOLVENCY; BILLS OF SALE; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; BURIAL AND CREMATION; CLUBS; CONSTITUTIONAL LAW; COPYHOLDS; COPYRIGHT AND LITERARY PROPERTY; CORPORATIONS; COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; CUSTOM AND USAGES; EASEMENTS AND PROFITS À PRENDRE; ECCLESIASTICAL LAW; ELECTRIC LIGHTING AND POWER; EXPLOSIVES; FISHERIES; FOOD AND DRUGS; GAME; GAMING AND WAGERING; HUSBAND AND WIFE; INTOXICATING LIQUORS; LANDLORD AND TENANT; LUNATICS AND PERSONS OF UNSOUND MIND; MARKETS AND FAIRS; MEDICINE AND PHARMACY; MINES, MINERALS, AND QUARRIES; PATENTS AND INVENTIONS; PAWNS AND PLEDGES; PUBLIC HEALTH AND LOCAL ADMINISTRATION; REAL PROPERTY AND CHATTELS REAL; REVENUE; SHIPPING AND NAVIGATION; STREET AND AERIAL TRAFFIC; TELEGRAPHS AND TELEPHONES; THEATRES AND OTHER PLACES OF ENTERTAINMENT; TRADE AND TRADE UNIONS; TRESPASS.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.* [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909 (current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland) fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol. 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.) ..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.) ..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.) ..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap. ..	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug. ..	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig. ..	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.) ..	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning..	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols. 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
Eq. Rep.	Equity Reports, 3 vols., 1853—1855
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867
F. (Ct. of Sess.) ..	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906
Fac. Coll. (with date) ..	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols. 1752—1825

Fac. Coll. (N. s.) (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841
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Clubs, Sale of Intoxicating Liquor in - - ,, CLUBS.
Fairs - - - - ,, MARKETS AND FAIRS.
Gaming on Licensed Premises - - - ,, GAMING AND WAGERING.
Guests - - - - ,, BAILMENT; INNS AND INNKEEPERS.
Habitual Drunkard - ,, CRIMINAL LAW AND PROCEDURE.
Infants and Children - ,, INFANTS AND CHILDREN.
Innkeepers - - - ,, INNS AND INNKEEPERS.
Music and Dancing Licences - - - ,, THEATRES AND OTHER PLACES OF ENTERTAINMENT.
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Punishment of Drunkards	,,	CRIMINAL LAW AND PROCEDURE.
Racecourses - - -	,,	GAMING AND WAGERING; THEATRES AND OTHER PLACES OF ENTERTAINMENT.
Rating - - - -	,,	RATES AND RATING.
Theatres - - -	,,	THEATRES AND OTHER PLACES OF ENTERTAINMENT.

Part I.—Definitions.

Intoxicating liquor.

1. "Intoxicating liquor" means (unless inconsistent with the context) spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without an excise licence (*a*).

Beer.

"Beer" includes ale, porter, spruce beer, black beer, and any other description of beer (*b*), and any liquor which is made or sold as a description of beer or as a substitute for beer, and which at any time on analysis of a sample thereof is found to contain more than 2 per cent. of proof spirit (*c*). A liquor called botanic beer, brewed from sugar, herbs, and water, without hops or malt, and containing 6 per cent. of proof spirit, is beer under this description (*d*).

Cider.

"Cider" includes perry (*e*).

Spirits.

"Spirits" means (unless inconsistent with the context) spirits of any description, and includes all liquors mixed with spirits, and all mixtures, compounds, or preparations made with spirits (*f*).

Any fermented liquor containing a greater proportion than 40 per cent. of proof spirit is deemed and taken to be spirits (*g*).

British spirits.

"British spirits" means (unless inconsistent with the context) spirits liable to a duty of excise (*h*).

The spirits called *aqua vitæ* in Scotland are deemed and taken to be British spirits to all intents and purposes (*i*).

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 110.

(*b*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 2; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.

(*c*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 4 (1); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52. In the Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64) (see s. 32, *ibid.*), and the Beerhouse Act, 1840 (3 & 4 Vict. c. 61) (see s. 20, *ibid.*), "beer" includes beer, ale, and porter.

(*d*) *Howorth* v. *Minns* (1886), 56 L. T. 316.

(*e*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 32; Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 20; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.

(*f*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3. As to sweet spirits of nitre, see *Bailey* v. *Harris* (1849), 12 Q. B. 905; *A.-G.* v. *Bailey* (1847), 1 Exch. 281.

(*g*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 21, which is somewhat ambiguous, and the definition may possibly extend only to cases "as against the person who shall sell or offer the same for sale." Proof spirit means that which contains 50·76 per cent. of water, as against 49·24 per cent. of pure alcohol (*Newby* v. *Sims*, [1894] 1 Q. B. 478, *per* DAY, J., at p. 481).

(*h*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3.

(*i*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 15.

PART I.
Definitions.

"Foreign spirits" (unless inconsistent with the context) means all spirits and strong waters liable to a duty of customs (*k*). Foreign spirits.

2. "Wine" means wine imported into Great Britain or Ireland (*l*). Wine.

All liquor sold or offered for sale by any person as being foreign wine or under the name by which any foreign wine is usually designated or known, is as against the person who sells or offers the same for sale deemed and taken to be foreign wine (*m*). But foreign wine sold under some other name is still foreign wine (*n*). If a wine is asked for by a name by which a foreign wine is usually sold and a bottle is supplied labelled with the name of the wine, but with the word "British" added, this is deemed as against the seller to be foreign wine, and such a sale is not covered by a licence to sell sweets (*o*). Foreign wine.

"Sweets" means any liquor which is made from fruit and sugar or from fruit or sugar mixed with any other material, and which has undergone a process of fermentation in the manufacture thereof, and includes British wines, mead, and metheglin (*p*). Sweets.

3. "Sale by retail" in respect of any intoxicating liquor means (if not inconsistent with the context) the sale of that liquor in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors, and any expression referring to sale by retail is to be construed accordingly (*q*). Sale by retail.

The sale of spirits in any quantity less than two gallons or less than one dozen reputed quart bottles is deemed sale by retail (*r*).

4. "Licence" means (unless inconsistent with the context) a licence granted by the Commissioners of Customs and Excise or by an officer duly authorised by them; and "licensed," as applied to an excise trader, means a person holding a licence so granted for the purpose of his business (*a*). Licence.

5. Justices' licence" means (unless inconsistent with the context) a justices' licence for the sale of any intoxicating liquor granted in accordance with the Licensing (Consolidation) Act, 1910 (*b*). Justices' licence.

"Justices' on-licence" means a justices' licence for the sale of any intoxicating liquor for consumption on the premises (*b*). On-licence.

"Justices' off-licence" means a justices' licence for the sale of any intoxicating liquor not to be consumed on the premises (*b*). Off-licence.

(*k*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3.
(*l*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.
(*m*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 21.
(*n*) *Richards* v. *Banks* (1887), 58 L. T. 634.
(*o*) *Ibid.* In this case "best sherry" was asked for, and the label was "best pale sherry, British."
(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.
(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 110.
(*r*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 104. As to the scope of a retailers' licence, see p. 13, *post*.
(*a*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3. The licence here defined is commonly called an "excise licence."
(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 110.

PART I. Definitions.

Publican's licence.

Beerhouse licence.

Licensed premises.

Fully-licensed premises.

Beer-house.

Premises.

"Publican's licence" means the on-licence to be taken out by a retailer of spirits (*c*).

"Beerhouse licence" means the on-licence to be taken out by a retailer of beer (*c*).

"Licensed premises" means (unless inconsistent with the context) premises in respect of which a justices' licence has been granted and is in force (*d*).

"Fully licensed premises" means premises to which a publican's licence is attached (*e*).

"Beerhouse" means premises to which a beerhouse licence is attached (*e*).

"Premises," when used with reference to an excise trader, means any building or place used by him in the course of his business and of which entry is required to be made (*f*).

Part II.—Licences.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Statutory Restrictions on Sale.*

Necessity for licences.

6. The sale of intoxicating liquors, although perfectly lawful at common law (*g*), is subject to certain statutory restrictions, and a licence from the excise authorities is necessary before any person may manufacture, deal in, or sell by retail any intoxicating liquor (*h*).

In most cases, as will hereafter appear (*i*), a licence or certificate from justices must also be obtained for production to the excise authorities before an excise licence permitting the sale of any intoxicating liquor by retail can be granted (*k*).

SUB-SECT. 2.—*Exemption of Privileged Bodies.*

Exempted bodies.

7. The rights of certain bodies which hold old privileges in respect of the sale of wine are unaffected by modern general legislation with regard to obtaining either an excise licence or a justices' licence (*l*).

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 110.

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.

(*f*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3. For the definition of "premises" in relation to value of licensed premises, see p. 61, *post*.

(*g*) *R.* v. *Fawkner* (1669), 2 Keb. 506; resolution of judges (1624), Hut. 99.

(*h*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), ss. 2, 26, much altered, however, by later enactments; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 50.

(*i*) See pp. 10 *et seq.*, *post*.

(*k*) See Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1. The reasons for restricting the sale of intoxicating liquors are the obtaining of revenue and the prevention of drunkenness (see titles to Excise Licences Act, 1825 (6 Geo. 4, c. 81); Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27); Dalton, County Justice, c. 7, p. 26; Preamble to the Licensing Act, 1872 (35 & 36 Vict. c. 94)).

(*l*) Stat. (1756-7) 30 Geo. 2, c. 19, ss. 9—12 (repealed by Statute Law Revision Act, 1870 (33 & 34 Vict. c. 69); Excise Licences Act, 1825 (6 Geo. 4, c. 81),

8. The chancellor or vice-chancellor of the University of Oxford (*m*) formerly had the right to license three vintners to sell wine, the licence to be for life (*n*). This right is now vested in the corporation of the city of Oxford (*o*). The wine licence issued under this privilege includes the right to sell sweets or made wines without an excise licence (*p*). Oxford University. Oxford Corporation.

9. The chancellor, masters, and scholars of the University of Cambridge (*q*) have, or by delegation the vice-chancellor has, the right to license four vintners to sell wine (*r*), but not the right to license alehouses (*s*). The justices, however, may close an alehouse at any time on complaint in writing made by the vice-chancellor to the clerk to the justices in the proper manner (*t*). Cambridge University.

10. The mayor and burgesses of the borough of St. Albans have the right under charters of Elizabeth and James I. to grant licences for three wine taverns, the resulting income to go to the support of a free grammar school (*u*). Borough of St. Albans.

11. All who are free of the Company of Vintners of the City of London (*v*), except such as are freemen of the company by redemption only and not by patrimony or apprenticeship (*w*), have a Vintners Company.

s. 30; Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 36 (now repealed); Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, 64), s. 29; Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 22; Licensing Act, 1842 (5 & 6 Vict. c. 44) s. 6 (now repealed); Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 45; Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 20 (now repealed); Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 72 (now repealed); Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 48; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (a).

(*m*) As to which see titles CHARITIES, Vol. IV., pp. 140, 228, 283; EDUCATION, Vol. XII., p. 94.

(*n*) Art. 11 of Charter of 11 Car. 1, dated 3rd March, 1635 (O.S.), set out in Anthony à Wood's History and Antiquities of the University of Oxford, published in English by John Gutch, 1796, Vol. II., at pp. 399, 400; and see stat. (1736), 10 Geo. 2, c. 19, ss. 2—4 (repealed by the Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 1).

(*o*) See Oxford Corporation Act, 1890 (53 & 54 Vict. c. ccxxiii.), s. 119: the Universities (Wine Licences) Act, 1743 (17 Geo. 2, c. 40), s. 11, is to be construed accordingly.

(*p*) *Roberts* v. *Twining* (1909), 73 J. P. 317.

(*q*) As to which see title CHARITIES, Vol. IV., pp. 140, 228, 283; EDUCATION, Vol. XII., p. 95.

(*r*) Stat. (1736) 10 Geo. 2, c. 19, ss. 2—4 (repealed by the Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 1); Universities (Wine Licences) Act, 1743 (17 Geo. 2, c. 40), s. 11; Cambridge Award Act, 1856 (19 & 20 Vict. c. xvii.), s. 11.

(*s*) Cambridge Award Act, 1856 (19 & 20 Vict. c. xvii.), s. 8. The Vice-Chancellor once exercised this power; see *R.* v. *Archdall* (1838), 8 Ad. & El. 281.

(*t*) Cambridge Award Act, 1856 (19 & 20 Vict. c. xvii.), s. 9.

(*u*) Historical Antiquities of Hertfordshire, by Sir H. Chauncy, Serjeant-at-law, London, 1700, p. 454 (1826, Vol. II., p. 294); History and Antiquities of the County of Hertford, by Robert Clutterbuck, London, 1815, Vol. I., p. 49, referring to *A.-G.* v. *Marks* (*Ann*) (1804) (unreported); see also stat. (1756-7) 30 Geo. 2, c. 19, s. 12 (repealed by Statute Law Revision Act, 1870 (33 & 34 Vict. c. 69)).

(*v*) Incorporated by letters patent under the great seal dated 2nd February (1612), 9 Jac. 1. A "vintner" is one who sells wine, and includes one who sells only for consumption off the premises (*Wells* v. *Attenborough* (1871), 24 L. T. 312).

(*w*) Stat. (1756-7) 30 Geo. 2, c. 19, ss. 10, 11 (repealed); Alehouse Act, 1828

SECT. 1. In General.

right (*a*) to sell wine (1) within the City of London and three miles thereof; (2) in all cities and "port-towns" in England (*b*); (3) in all other cities and "throughfare" towns (*b*) on the road between London and Dover and the road between London and Berwick where any of the company inhabit, and to keep taverns and sell wines by wholesale or retail (*c*).

Statutory liability.

Every person claiming by reason of freedom of the mystery of Vintners of the City of London, or of any right or privilege of such mystery, to be entitled to sell foreign wine by retail to be consumed on the premises within the metropolitan police district without licence, is subject to all the provisions of all Acts made for the regulation of persons so licensed, except those provisions which refer to the taking out of a justices' or excise licence (*d*).

When excise licence necessary.

No freeman of the company may sell wine in more than one separate and distinct house or premises at the same time without the proper excise licence, nor may he sell wine without a licence unless he has previously made the necessary entry (*e*) of the premises with the proper excise authorities (*f*).

No place is exempt, and if a place is included in no particular licensing district a licence may be granted by the proper authorities for any licensing district of the county of which it forms a part (*g*).

SECT. 2.—*Excise Licences.*

SUB-SECT. 1.—*In General.*

General division.

12. Excise licences may conveniently be divided into three general classes: (1) Manufacturers' licences; (2) wholesale dealers' licences; (3) retail licences.

SUB-SECT. 2.—*Manufacturers' Licences.*

Licences.
Distiller.
Rectifier.
Brewer.

13. A licence may be taken out annually—

(i.) by a distiller of spirits (*h*);
(ii.) by a rectifier or compounder of spirits (*i*);
(iii.) by a brewer of beer for sale (*j*);
(iv.) by a brewer other than a brewer for sale (*j*).

(9 Geo. 4, c. 61), s. 36 (repealed); Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (c).

(*a*) Under the letters patent referred to in note (*v*), p. 9, *ante*.

(*b*) *Inland Revenue* v. *Pope* (1888), 52 J. P. 682.

(*c*) *Thomas* v. *Sorrel* (1667), 1 Lev. 217.

(*d*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 41.

(*e*) As required by the Excise Management Act, 1834 (4 & 5 Will. 4, c. 51), s. 5.

(*f*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 16.

(*g*) *Wright* v. *Harris* (1885), 49 J. P. 180, 628. The spot in question was a barren rock at a considerable distance from the county of which it formed a part.

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., A.

(*i*) *Ibid.*; the Commissioners may refuse to grant a licence for rectifying or compounding spirits on any premises in which from their situation with respect to a distillery they think it inexpedient to allow such business to be carried on (Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 88 (4)); see pp. 147, 153, *post*.

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., A.

14. Any person who brews beer for the use of any other person at any place other than the premises of the person for whose use the beer is brewed, and any person licensed to deal in or retail beer, who brews beer, is deemed to be a brewer for sale (*k*). Persons deemed to be brewers for sale.

15. If any person brews beer without having in force a proper licence, all worts, beer, and vessels, utensils, and materials for brewing in his possession are forfeited (*l*). Brewing without licence.

The occupier of a house of an annual value not exceeding £8 may brew beer solely for his own domestic use without taking out a manufacturer's licence (*m*).

16. A licence may be taken out annually by a maker of sweets for sale (*n*). Maker of sweets.

The Commissioners (*o*) may make regulations prohibiting the manufacture for sale of British wines, or sweets, or made wines, except by persons holding a licence and having made entry for the purpose, and for fixing the date of the expiration of the licence, and may by those regulations apply any enactments relating to brewers of beer to manufacturers for sale of British wines, or sweets, or made wines; and if any person acts in contravention of or fails to comply with any of those regulations, the article in respect of which the offence is committed is forfeited, and the person committing the offence is liable in respect of each offence to an excise penalty of £50 (*p*).

17. A manufacturer's licence, except in the case of a licence to a brewer not for sale, authorises not only the manufacture of the liquor to which it applies in accordance with the licence, but also wholesale dealing (subject in the case of a spirit manufacturer's licence to the provisions of the Spirits Act, 1880 (*q*)) in any such liquor which is the produce of the manufacture of the holder of the licence at the premises where the liquor is manufactured, and elsewhere by the manufacturer, or a servant or agent of the manufacturer, if the liquor is supplied to the purchaser direct from the premises where it is manufactured (*r*). Manufacturer's licence authorises wholesale dealing.

SUB-SECT. 3.—*Wholesale Dealers' Licences.*

18. A licence may be taken out annually by a wholesale dealer in (1) spirits, (2) beer, (3) wine, or (4) sweets (*s*). Dealers' licences.

A wholesale dealer's licence authorises the sale at any one time to

(*k*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 19. "Brewer" in this Act means a brewer of beer (*ibid.*, s. 2).

(*l*) *Ibid.*, s. 10 (3).

(*m*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., A, Provisions applicable to Manufacturers' Licences, 2.

(*n*) *Ibid.*, Sched. I., A.

(*o*) The Commissioners empowered by this provision are the Commissioners of Inland Revenue, but see note (*a*), p. 17, *post*.

(*p*) Revenue Act, 1906 (6 Edw. 7, c. 20), s. 7 (2).

(*q*) 43 & 44 Vict. c. 24.

(*r*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., A, Provisions applicable to Manufacturers' Licences, 1; Sched. I., B, Provisions applicable to Wholesale Dealers' Licences, 2.

(*s*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., B.

SECT. 2. Excise Licences.

one person, in the case of spirits, wine, or sweets, of any quantity not less than two gallons or not less than one dozen reputed quart bottles, and in the case of beer or cider, of any quantity not less than four and a half gallons or not less than two dozen reputed quart bottles; but not of any less quantities (*t*).

If the amount sold at one time is at least equal in quantity to the prescribed amounts, the size of the bottles in which it is sold is immaterial (*u*).

Justices' licence unnecessary.

19. A justices' licence is not required in order to obtain these excise licences, the sales permitted being sales by wholesale (*a*).

When wholesale dealer's licence unnecessary.

20. A wholesale dealer's licence need not be taken out by the holder of a manufacturer's licence so far as respects the sale of liquor as already mentioned (*b*).

The holder of a wholesale wine dealer's licence may deal wholesale in sweets without any further licence (*c*).

When excise licence unnecessary.

21. An excise licence is not needed for the sale of foreign goods or commodities whilst such goods or commodities remain in the warehouse in which they have been deposited, according to law, before payment of customs duties thereon, provided that every such sale be of not less than one entire cask or package of the liquors so warehoused (*d*), and that any such sale of foreign wine or spirits be not less in quantity at one time than 100 gallons thereof respectively (*e*).

But a ship's stores merchant who sells foreign wine or spirits in a quantity of less than 100 gallons at one time to a foreign-going vessel is a dealer in wine and requires an excise licence, even though he keeps the wine in a customs bond within the meaning of the above provision (*f*).

Additional retail licences no longer granted.

22. The additional retail licences formerly granted for the sale of spirits, or liqueurs, or beer to a dealer in spirits or beer, and the licence for the sale of table beer, and the combined licence for the sale by retail of wine and beer can no longer be granted (*g*).

(*t*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., B, Provisions applicable to Wholesale Dealers' Licences, 1.

(*u*) *Fairclough* v. *Roberts* (1890), 24 Q. B. D. 350.

(*a*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 51 (3), Sched. I., B; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (i); and see *R.* v. *Jenkins* (1891), 61 L. J. (M. C.), 57.

(*b*) See the text, *supra*; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., B, Provisions applicable to Wholesale Dealers' Licences, 2.

(*c*) *Ibid.*, Sched. I., B, Provisions applicable to Wholesale Dealers' Licences, 3,

(*d*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 12.

(*e*) Excise Act, 1860 (23 & 24 Vict. c. 113), s. 5.

(*f*) *Tinwell* v. *Mayhook*, [1904] 2 K. B. 790.

(*g*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 51 (2). This enactment appears to have rendered obsolete the decisions in *R.* v. *De Rutzen* (1875), 1 Q. B. D. 55 (as to resident holder and occupier, as to which see now Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), s. 2), and *Shoolbred & Co.* v. *St. Pancras Justices* (1890), 24 Q. B. D. 346 (as to holding a licence to deal in game).

SUB-SECT. 4.—*Retailers' Licences.*

(i.) *In General.*

Retailer's licence.

23. A retailer's licence authorises the sale at any one time to one person, in the case of spirits, wine, or sweets, of any quantity not exceeding two gallons or not exceeding one dozen reputed quart bottles, and in the case of beer or cider, of any quantity not exceeding four and a half gallons or not exceeding two dozen reputed quart bottles; but not of any larger quantities (*h*).

(ii.) *On-Licences.*

Spirit on-licence.

24. An excise on-licence may be taken out annually by a retailer of spirits (*i*). This licence permits the sale by retail of beer, cider, wine, and sweets, as well as spirits (*k*).

In order to obtain this excise licence it is necessary to produce a justices' licence (*l*).

All persons retailing the spirits called in Scotland *aqua vitæ* must first take out a licence to retail spirits, and they are in all respects subject to all the same rules, regulations, and restrictions to which the holders of such licences are subject or liable (*m*).

Beer on-licence.

25. An excise on-licence may be obtained for the sale by retail in any house or premises specified in such licence (*n*) of beer, ale, and porter (*o*), this licence covering also the sale by retail of cider (*p*), but no such licence can be granted to a sheriff's officer or officer executing the legal process of any court of justice (*q*).

This licence does not authorise any person to take out or hold any licence for the sale of wine or spirits, or sweets, or made wines, or mead, or metheglin (*a*), and it is only granted on production of a justices' licence (*b*).

Cider on-licence.

26. An excise on-licence may be taken out annually by a retailer of cider (*c*) and perry (*d*).

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C., Provisions applicable to Retailers' Licences, 1.

(*i*) *Ibid.*, Sched. I., C. This licence is called in *ibid.*, s. 52, "publican's licence."

(*k*) *Ibid.*, Sched. I., C, Provisions applicable to Retailers' On-Licences, 2.

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.

(*m*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 15, as modified by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions applicable to Retailers' On-Licences, 2.

(*n*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 1; Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 1; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C. This licence is in *ibid.*, s. 52, called a "beerhouse licence."

(*o*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 1; Finance (1909-10 Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions applicable to Retailers Licences, 3.

(*p*) *Ibid.*, Sched. I., C, Provisions applicable to Retailers' Licences, 3.

(*q*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 2. As to disqualifications, see pp. 54 *et seq.*, *post.*

(*a*) Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 16.

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, I.

(*d*) *Ibid.*, s. 52.

SECT. 2. Excise Licences.

Wine on-licence.

27. An excise on-licence may be taken out annually by a retailer of wine (*e*) and by any person (except a sheriff's officer, or officer executing the legal process of any court (*f*)).

This licence includes authority to sell by retail sweets as well as wine without taking out any further retailer's licence (*g*), and it is only granted upon production of a justices' licence (*h*).

Sweets on-licence.

28. An excise on-licence may be taken out annually by a retailer of sweets (*i*), or made wines, or of mead or metheglin (*j*).

A retailer's on-licence authorises sale by retail of the liquor to which the licence extends for consumption either on or off the premises (*k*).

(iii.) *Off-Licences.*

Spirit off-licence.

29. An excise off-licence may be taken out annually by a retailer of spirits (*l*).

The holder of this licence may not sell spirits in open vessels, nor in any quantity less than one reputed quart bottle (*m*). The maximum amount authorised by this licence is a sale at any one time to one person of spirits in any quantity not exceeding two gallons or not exceeding one dozen reputed quart bottles (*n*).

A justices' licence is not required for this excise licence if taken out by a spirit dealer, provided that the premises are exclusively used for the sale of intoxicating liquors or of intoxicating liquors and mineral waters or other non-intoxicating drinks, and have no internal communication with the premises of any person who is carrying on any other trade or business (*o*). If the premises do not comply with these conditions, the dealer must obtain a justices' licence before he can obtain the additional retail excise licence (*p*).

Beer off-licence.

30. An excise off-licence may be taken out annually by a retailer of beer (*q*).

The provisions with respect to this licence are the same as those relating to a beer retail on-licence (*r*), except as to place of consumption.

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, I.

(*f*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 8. As to persons disqualified, see pp. 54 *et seq.*, *post*.

(*g*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions applicable to Retailers' Licences, 4.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.

(*i*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 2; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, I.

(*j*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 2.

(*k*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions applicable to Retailers' On-Licences, 1.

(*l*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, II.

(*m*) *Ibid.*, Sched. I., C, Provisions applicable to Retailers' Off-licences, 2.

(*n*) *Ibid.*, Sched. I., C, Provisions applicable to Retailers' Licences, 1 (a).

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (1).

(*p*) *Ibid.*, s. 1.

(*q*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 1; Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 1; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, II.

(*r*) See p. 13, *ante*.

31. An excise off-licence may be taken out annually by a retailer of cider (*s*), which includes perry (*t*).

Cider off-licence.

The provisions with respect to this licence are the same as those relating to a cider retail on-licence (*a*), except as to place of consumption.

32. An excise off-licence may be taken out annually by a retailer of wine (*b*). A person holding this licence may not sell wine in open vessels nor in any quantity less than one reputed pint bottle (*c*).

Wine off-licence.

A justices' licence is not required for this excise licence if taken out by a wine dealer, provided that the premises are exclusively used for the sale of intoxicating liquors, or of intoxicating liquors and mineral waters or other non-intoxicating drinks, and have no internal communication with the premises of any person carrying on any other trade or business (*d*). If the premises do not comply with these conditions a justices' licence must be produced (*e*).

A person holding this licence may sell sweets as well as wine without taking out any further retailer's licence (*f*).

33. An excise off-licence may be taken out annually by a retailer of sweets (*g*).

Sweets off-licence.

This licence authorises the sale of sweets in any quantity not exceeding two gallons or not exceeding one dozen reputed quart bottles, but not in any larger quantities (*h*). In order to obtain this excise licence it is necessary to produce a justices' licence (*i*).

34. A retailer's off-licence (whether for spirits, beer, cider, wine, or sweets) must not be granted to the holder of a retailer's on-licence if the off-licence authorises the sale of any liquor which the holder of the on-licence is not authorised to sell by retail under his on-licence, and any retailer's off-licence granted in contravention of this provision is void (*k*).

Off-licence must not contravene on-licence granted to same person:

A retailer's off-licence authorises the sale by retail of the liquor to which the licence extends for consumption off the premises only (*l*).

(*s*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, II.; Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 15.

(*t*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.

(*a*) See p. 13, *ante*.

(*b*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, II.

(*c*) *Ibid.*, Sched. I., C, Provisions applicable to Retailers' Off-Licences, 3. See as to the former law, *Palmer* v. *Thatcher* (1878), 3 Q. B. D. 346; *Josselyn* v. *Parson* (1872), L. R. 7 Exch. 127.

(*d*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 51 (3); Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (1). See as to the former law, *R.* v. *Bishop* (1886), 50 J. P. 167.

(*e*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.

(*f*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions applicable to Retailers' Licences, 4.

(*g*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 2; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, II.

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions relating to Retailers' Licences, 1 (a).

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.

(*k*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., C, Provisions applicable to Retailers' Licences, 2.

(*l*) *Ibid.*, Sched. I., C, Provisions applicable to Retailers' Off-Licences, 1.

SECT. 2. SUB-SECT. 5.—*Exemptions.*

Excise Licences.

Doctors, chemists, and druggists.

35. Medical practitioners, chemists, and druggists are, by the practice of the excise authorities, not required to have a licence for the sale of spirits made up in medicine. The Spirits Act, 1742 (*m*), does not, nor does anything therein contained, extend to any physicians, apothecaries, surgeons, or chemists as to any spirits which they may use in the preparation of medicines for sick persons only (*m*).

In any case, no justices' licence is required for the sale of spirits made up in medicine and sold by medical practitioners or chemists and druggists (*n*).

Spruce beer; black beer.

36. Nothing in the Licensing (Consolidation) Act, 1910 (*o*), affects or applies to spruce beer and black beer. It thus appears to be unnecessary to obtain a justices' licence in order to sell them, but an excise licence to sell beer is required if it contains more than 2 per cent. of proof spirit (*p*).

SECT. 3.—*Justices' Licences.*

Justices' licences really certificates.

37. Justices' licences are in reality certificates which authorise the excise authorities to grant excise licences in pursuance of them (*q*).

They are all retail licences, and may authorise the granting of the particular excise licence which is required (*r*).

Separate licences of justices are not required in the case of separate excise licences, and a justices' licence comprehends permission to the licensee to take out as many excise licences as are specified in such justices' licence (*s*).

General power.

38. The licensing justices may at their general annual licensing meeting grant justices' licences to such persons as in the execution

(*m*) 16 Geo. 2, c. 8, s. 12. These words remain unrepealed, although the rest of the Act was finally repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59). It is true that where any Act passed after 30th August, 1889, repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed are, unless the contrary intention appears, construed as references to the provisions so re-enacted (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1); and see title STATUTES); but there is no such provision with regard to Acts repealed before 1889, and it therefore seems impossible to read the Spirits Act, 1742 (16 Geo. 2, c. 8), s. 12, as though it now referred to excise licences required by the Excise Licences Act, 1825 (6 Geo. 4, c. 81), or by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8). But see the Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 31, which is repealed by the Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91). As to doctors, chemists, and druggists generally, see title MEDICINE AND PHARMACY.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (h).

(*o*) Spruce beer differs slightly from black beer. The former is obtained by boiling the green tops of the black spruce (*abies nigra*) in water, concentrating the decoction, and adding treacle or sugar, and yeast. The latter is made from the buds of the Norway spruce (*abies excelsa*) (Chamber's Encyclopædia 1867, art. "Spruce, Essence of").

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (d); Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 2; Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 4 (1).

(*q*) See Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.

(*r*) See *ibid.*, s. 65 (1).

(*s*) *Ibid.*, s. 42 (3).

of their powers under the Licensing (Consolidation) Act, 1910 (*t*), and in the exercise of their discretion, they deem proper (*t*), and the High Court will not interfere with their discretion (*u*), even though the person to whom they grant the licence appears not to be carrying on and not to intend to carry on the business for which he obtains the licence (*v*).

Part III.—Grant of Licences.

SECT. 1.—*Excise Licences.*

SUB-SECT. 1.—*By whom granted.*

By whom granted.

39. Every excise licence authorised to be taken out by the Excise Licences Act, 1825 (*w*), if taken out within the limits of the head office of excise in London, is granted under the hands and seals of two or more of the Commissioners (*a*), or of such persons as they employ for that purpose, and the requisite duty must be paid at such head office at the time of granting the licence (*w*).

Within limits of excise in London.

40. Every such licence taken out elsewhere is granted under the hands and seals of the collector and supervisor of excise within the collection and district, and the requisite duty must be paid to such collector at the time of granting the licence (*w*).

Elsewhere.

Delivery of licence upon payment of duty.

41. Such Commissioners (*a*) and the persons employed by them, and every collector or other person having charge of the collection, and supervisor, are respectively authorised and required to grant and deliver every such licence to the person applying for and legally entitled to receive the same forthwith upon payment of the duty thereupon imposed, free from all poundage, fee, gratuity, or any other payment whatsoever (*b*).

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 9. The drafting of the Act seems to render of no value the decision in *R.* v. *Wilkinson* (1864), 10 L. T. 370, that justices cannot restrict an innkeeper's licence to sale for consumption off the premises.

(*u*) *Leeds Corporation* v. *Ryder*, [1907] A. C. 420; *Re Nuttall*, *R.* v. *Sherrard* (1888), 4 T. L. R. 540.

(*v*) *Leeds Corporation* v. *Ryder*, *supra*; *Re Nuttall*, *R.* v. *Sherrard*, *supra*; but see *R.* v. *Bingham* (1813), 1 Burn's Justice, 24th ed., p. 48; 30th ed., p. 120; *R.* v. *Holmes* (1881), 45 J. P. 372; *R.* v. *Allmey* (1871), 35 J. P. 534 (a railway arch). It seems that a limited company cannot hold a licence, but that the licence may be held on its behalf by its secretary or other duly authorised officer (*R.* v. *Lyon* (1898), 14 T. L. R. 357, C. A.).

(*w*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 6.

(*a*) *I.e.*, the Commissioners of Customs and Excise. It should be noted that, as from 1st April, 1909, the management of excise duties, and the care and management of all matters theretofore dealt with by the collectors of Inland Revenue, are transferred to the Commissioners of Customs and Excise; see Finance Act, 1908 (8 Edw. 7, c. 16), s. 14; Excise Transfer Order, 1909, 15th February (*London Gazette*, 1909, 16th February, 1212). By the same order all statutory references to "Collector of Customs," "Collector of Inland Revenue," "Collector of Excise" are to be construed, so far as relates to matters transferred under the order, as referring to "Collector of Customs and Excise," the same rule applying to the word "officer," and from the date of coming into operation of the said order the Commissioners of Customs are styled "the Commissioners of Customs and Excise."

(*b*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 6. As to amounts of various duties, see title REVENUE.

SECT. 1.
Excise Licences.

Wine retail licences.

Grant by customs and excise officers.

42. Almost identical provisions exist in regard to the grant of wine retail licences (*c*).

But any licence specified in the First Schedule to the Finance (1909-10) Act, 1910 (*d*), may be granted on payment of the appropriate duty by any officer of customs and excise authorised to grant the licence by the Commissioners (*d*), and if the duty exceeds £60 half only of the duty need be paid at the time of obtaining the licence (*e*).

SUB-SECT. 2.—*Different Kinds of Grant.*

New licence.

43. If any person begins to carry on any business for which an excise licence is required, he not having before taken out any such licence, such licence may be granted for the remainder of the current year in which it is taken out, ending the 10th October next following, upon payment of a proportional part of the duty thereupon imposed, according to the quarter of the year in which the licence is taken out (*f*).

Renewal.

But no person who at any time has taken out an excise licence for the carrying on of any business for which an excise licence is required, and who in any subsequent year after such licence has expired takes out a new licence for the carrying on of the same business, whether on the same or on other premises, is deemed to be a person beginning to carry on such business, so as to entitle him to take out such licence upon payment of a proportional part only of the duty; but he must pay the whole duty, unless the period of time between the expiration of the former licence and the taking out of the new licence is at least a period of two years (*g*).

Continuation of business beyond expiration of licence.

44. Every person who has taken out excise licences for the brewing of beer, or the distilling or making of low wines (*h*) or spirits, or for selling beer, cider, or perry by retail to be consumed on the premises, or for selling spirits or foreign wine, or sweets or made wines, or mead or metheglin, by retail, under or by virtue of the Excise Licences Act, 1825 (*i*), and who intends to continue the business for which such licence was granted beyond its expiration, must take out a fresh licence for the year following, and must so renew the same from year to year so long as he continues such business, and must pay the duty imposed thereupon at the time and place provided (*j*).

Special transfer.

45. If the premises in respect of which any excise licence has been granted are burnt down or otherwise destroyed, or rendered uninhabitable by fire or other unavoidable cause or accident, the persons authorised to grant licences within the district or place in which such premises were situate may, upon due notice thereof, by indorsement on such licence, or otherwise, as the Commissioners (*k*)

(*c*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 10.
(*d*) 10 Edw. 7, c. 8, s. 49 (1). As to these licences, see p. 10, *ante*.
(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 49 (3).
(*f*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 17.
(*g*) *Ibid.*, s. 18.
(*h*) "Low wines" means spirits of the first extraction conveyed into a low wines receiver (Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3).
(*i*) 6 Geo. 4, c. 81.
(*j*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 16.
(*k*) As to the Commissioners, see note (*a*), p. 17, *ante*.

direct, authorise the person authorised to carry on business by such licence at the premises so destroyed or rendered uninhabitable, to carry on such business at any other premises in the same district or place, of which due entry must be thereupon made by him at the time of removal thereto: provided always, that where he is by law required to be duly authorised by justices to keep a common inn, alehouse, or victualling house, the persons so authorised to grant licences may not authorise him as aforesaid, unless he produces to them such authority from justices of the peace, as by law required in that behalf, to keep a common inn, alehouse, or victualling house, in premises to which he desires to remove (*l*).

Ordinary transfer.

46. Upon the death of any person licensed under or by virtue of any law of excise, or upon his removal from the premises at which he was authorised by such licence to carry on the business mentioned therein, the persons authorised to grant licences may authorise, by indorsement on such licence or otherwise, as the Commissioners (*m*) direct, the executors or administrators, or the wife or child of such deceased person, or the assignee of such person so removing, who shall be possessed of and occupy the premises before used for such purpose, in like manner to carry on the same business, in or upon the same premises during the residue of the term for which the licence was originally granted, without taking out any fresh licence or payment of any additional duty or any fee thereupon: provided that a fresh entry of the premises at which such business continues to be so carried on is thereupon made by and in the name of the person to whom such authority is granted; but no such authority is to be granted for the sale of beer, cider, or perry, or sweets, or made wines or sweets, mead, or metheglin by retail to be consumed upon the premises for which the original licence was granted, except where a proper justices' certificate, made after the death or removal of the former occupier of the premises, is produced, approving of the person to whom such certificate is given (*n*).

Provisions as to licences granted under: (i.) The Refreshment Houses Act, 1860;

47. The foregoing provisions relating to the transfer of excise licences in the case of the removal of any person from the premises at which he is licensed extend to licences granted under the Refreshment Houses Act, 1860 (*o*): provided that no licence granted under that Act for the sale of foreign wine to be consumed upon the premises may be transferred by the officers of excise, unless the assignee of such licence be duly licensed to keep a refreshment house, nor unless he produces to such officers a certificate from a justice of the peace acting for the city, borough, town, or place in which the premises are situated, that such justice does not object to the transfer being made; and, further, that no licence so transferred may authorise the assignee to carry on the business mentioned therein for a longer period than five weeks from the date of transfer, unless he has in the meantime qualified himself to

(*l*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 11.
(*m*) As to the Commissioners, see note (*a*), p. 17, *ante*.
(*n*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 21.
(*o*) 23 & 24 Vict. c. 27; namely, wine retail licences and refreshment house licences; as to the latter, see pp. 92, 93, *post*.

SECT. 1. Excise Licences.

become the holder of a licence of the like kind according to the provisions of that Act (*p*).

(ii.) The Beerhouse Acts.

48. Upon the death of any person licensed to sell beer or cider under the Beerhouse Act, 1830 (*q*), the Beerhouse Act, 1834 (*r*), or the Beerhouse Act, 1840 (*s*), before the expiration of the licence, the person authorised to grant licences may authorise by indorsement or otherwise, as the Commissioners (*t*) direct, his executors or administrators, his widow or child, who are possessed of and occupy the dwelling-house and premises before used for such purpose, to continue to retail beer and cider in the same house and premises during the residue of the term for which the licence was originally granted without taking out any fresh licence or payment of any additional duty thereon; and also at the expiration of such licence, in case the residue of the said term is less than three calendar months from the death of the person licensed, to grant a new licence to such executors, administrators, or widow, on payment of the proper licence duty and entering into the usual bond (*u*).

SUB-SECT. 3.—*Duration of Licence.*

Duration.

49. Manufacturers' excise licences expire on the 30th September, and wholesale dealers' licences expire on the 30th June in every year, and any other licences specified in the First Schedule to the Finance (1909-10) Act, 1910 (*v*), which are to be taken out annually, expire on the 30th September, provided that where a retailer's off-licence for the sale of any liquor is held by the holder of a wholesale dealer's licence for the sale of the same liquor, the retailer's licence expires on the same day as the wholesale dealer's licence (*w*).

SUB-SECT. 4.—*Extent of Licence.*

(i.) *As to Persons.*

Partnership.

50. Persons in partnership and carrying on their trade or business in one place or set of premises only are not obliged to take out more than one licence by or under the authority of the Excise Licences Act, 1825 (*x*), in any one year for the purpose of carrying on such trade or business (*x*).

Persons trading in partnership, and in one house or premises only, are not obliged to take out more than one licence in any one year for selling any beer by retail under the Beerhouse Act, 1830 (*y*), provided that no one licence granted by virtue of that Act may authorise any person to sell any beer, ale, or porter under the provisions of that Act, in any house or place other than the place

(*p*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 15.
(*q*) 11 Geo. 4 & 1 Will. 4, c. 64.
(*r*) 4 & 5 Will. 4, c. 85.
(*s*) 3 & 4 Vict. c. 61.
(*t*) As to the Commissioners, see note (*a*), p. 17, *ante*.
(*u*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 8.
(*v*) 10 Edw. 7, c. 8.
(*w*) *Ibid.*, s. 49 (2).
(*x*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 7. As to partnership generally, see title PARTNERSHIP.
(*y*) 11 Geo. 4 & 1 Will. 4, c. 64.

mentioned in the licence and in respect whereof the licence is granted (*z*).

(ii.) *As to Premises.*

One set of premises.

51. No one licence taken out under or by authority of the Excise Licences Act, 1825 (*a*), by any persons except auctioneers and maltsters, authorises such persons to carry on the business mentioned in such licence in more than one separate and distinct set of premises, such premises being all adjoining or contiguous to each other and situate in one place, and held together for the same business, and of which they have made lawful entry to carry on therein their business at the time of granting such licence, but a separate and distinct licence must be taken out by all such persons to carry on their business in any other premises: provided that where the amount or rate of such licence depends upon the quantity of goods made or manufactured by the persons to whom the licence is granted, such quantity is computed from the respective goods only made or manufactured by them at the premises in respect of which the licence is granted, and does not include goods made or manufactured by them at any other premises, for which a separate and distinct licence is required (*a*).

Every excise licence for the sale of any intoxicating liquor only authorises the person to whom the licence is granted to carry on the business mentioned therein in one set of premises, to be specified in the licence (*b*).

SECT. 2.—*Justices' Licences.*

SUB-SECT. 1.—*Meetings for granting Justices' Licences.*

Classification.

52. These may be divided into (1) the general annual licensing meeting (*c*), (2) statutory adjournments of the annual meeting, and (3) special sessions, called transfer sessions.

General annual licensing meeting.

53. For the purpose of granting justices' licences the licensing justices for every licensing district must, within the first fourteen days of February in every year, hold a special session called the general annual licensing meeting (*d*).

Appointment of time of meeting.

The licensing justices must hold a meeting at least twenty-one days before the general annual licensing meeting and appoint the day, hour, and place at which the general annual licensing meeting is to be held (*e*).

Licensing district.

54. A licensing district is a petty sessional division of a county, and a borough having a separate commission of the peace. Where a county is not divided into petty sessional divisions the whole county, excluding the area of any borough having a separate

(*z*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 10.
(*a*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 10.
(*b*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 9.
(*c*) As to the general power to grant licences at this meeting, see p. 17, *ante*; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 9.
(*d*) *Ibid.*, s. 10 (1).
(*e*) *Ibid.*, s. 10 (2).

SECT. 2. Justices' Licences.

commission of the peace, is deemed to be a petty sessional division (*f*). The City of London is deemed a borough (*g*).

Adjournment.

55. The licensing justices may at any general annual licensing meeting adjourn the meeting to such day and place within the licensing district as they think fit for meeting the convenience of persons intending to apply for justices' licences, and a day and place for at least one such adjourned meeting must be so appointed (*h*).

Adjourned meeting deemed to be continuation of general annual licensing meeting.

Every such adjourned meeting is deemed to be a continuation of the general annual licensing meeting, and must be held within one month from the date of the original meeting, and the first adjourned meeting must not be held on any one of the five days next after the date of the original meeting; but where an applicant for a justices' licence through inadvertence or misadventure fails to comply with any preliminary requirements of the Licensing (Consolidation) Act, 1910 (*i*), the licensing justices may, upon such terms as they think proper, postpone the consideration of his application to a subsequent meeting, and if at that meeting they are satisfied that such terms have been complied with, may consider the question of the grant of the licence as if such preliminary requirements had been properly complied with (*j*).

Meeting for postponed application.

A meeting held for a postponed application under this provision may be held if necessary after the date on which an adjourned general annual licensing meeting may be held, and, as far as that application is concerned, the power of the licensing justices may be exercised as at an adjourned general annual licensing meeeting (*k*).

Notice of licensing meetings.

56. When the licensing justices have appointed the day, hour, and place of the general annual licensing meeting, the clerk must within five days send copies of notice thereof to the proper police officers (*l*), who must cause a copy to be fixed on the door of the church or chapel of the Church of England (*m*) of any parish in the licensing district, or, where there is no such church or chapel,

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2 (1). "County" includes any riding, part, or division of a county having a separate commission of the peace and a separate quarter sessions (*ibid.*, s. 110). The areas of the counties of Surrey and Middlesex are not altered for licensing purposes by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 95 (2). The transfer of an outlying district of a county to another county under the Police Act, 1840 (3 & 4 Vict. c. 88), s. 2, is only for the purposes of that Act, and cannot transfer the licensing jurisdiction in that district to the justices of such other county (*R.* v. *Worcestershire Justices*, *R.* v. *Warwickshire Justices*, [1899] 1 Q. B. 59, C. A.).

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2 (4).

(*h*) *Ibid.*, s. 10 (3).

(*i*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*j*) *Ibid.*, s. 10 (4).

(*k*) *Ibid.*, and see *R.* v. *Groom, Ex parte Cobbold*, [1901] 2 K. B. 157.

(*l*) In the metropolitan police district and in the City of London the high constable takes the place of the police officers.

(*m*) See *Ormerod* v. *Chadwick* (1847), 16 M. & W. 367; *Caiger* v. *St. Mary, Islington, Vestry* (1881), 50 L. J. (M. C.) 59, 64; and title ECCLESIASTICAL LAW, Vol. XI., p. 788.

on some other public and conspicuous place in the parish, and the clerk must also cause a copy to be served on every licensing justice and on the holders of justices' licences in the district, and on any person who has applied for a justices' licence.

The same procedure must be followed as respects notice of any adjournment of a general annual licensing meeting, but a copy of the notice need not be served on holders of justices' licences or on applicants for justices' licences who are not required to attend at the adjourned meetings (*n*).

The due publication of the above notices seems to be a condition precedent to the jurisdiction of justices to grant licences (*o*).

Adjourned application cannot be heard after end of statutory period.

57. The enactment that the adjourned meetings are to be held within one month from the date of the general annual licensing meeting is not merely directory but imperative, and licensing justices have no power to adjourn the hearing of an application to a day subsequent to the end of the statutory period (*p*), unless the hearing before the end of the statutory time is prevented by the difficulties of the justices themselves, and by the justices being unable to cope with the business (*q*).

A general annual licensing meeting, or an adjourned licensing meeting, is quite distinct from a "special sessions" (*r*).

Appointment of transfer sessions.

58. At the general annual licensing meeting in each year the licensing justices must appoint a day, hour, and place for not less than four nor more than eight special sessions (called transfer sessions) to be held in their district during the ensuing year, at periods as near as may be equally distant, and the transfer of a justices' licence and the special removal of a justices' licence cannot be authorised except at transfer sessions or at a general annual licensing meeting (*s*).

Notice thereof.

When the day, hour, and place for transfer sessions have been appointed, the same procedure must be followed for the purpose of giving notice thereof as is directed for the purpose of giving notice of a general annual licensing meeting (*t*).

SUB-SECT. 2.—*Different Kinds of Grant.*

(i.) *In General.*

Different kinds of grant.

59. The different kinds of grant which can be made at the general annual licensing meeting, or an adjournment thereof, are as

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 10 (5); High Constables Act, 1869 (32 & 33 Vict. c. 47), s. 3.

(*o*) *R.* v. *James* (1848), 12 J. P. 262.

(*p*) *R.* v. *Groom, Ex parte Cobbold*, [1901] 2 K. B. 157; *R.* v. *Bristol Licensing Justices, Ex parte Whiting* (1903), 89 L. T. 474; and see *Webber* v. *Birkenhead Justices* (1897), 61 J. P. 664; *R.* v. *London County Justices and London County Council*, [1893] 2 Q. B. 476, C. A.

(*q*) See *R.* v. *London County Justices and London County Council, supra*; *R.* v. *Bristol Licensing Justices, Ex parte Whiting, supra*.

(*r*) *R.* v. *Newcastle-on-Tyne Licensing Justices* (1887), 51 J. P. 244, C. A., *per* Lord ESHER, M.R., and FRY, L.J., at p. 245; see also *Ex parte Martin* (1876), 40 J. P. 133.

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 22 (1).

(*t*) *I bid.*, s. 22 (2); as to such procedure, see p. 22, *ante*.

SECT. 2. Justices' Licences.

follows :—(1) New licence (*a*); (2) renewal (*b*); (3) removal (ordinary or special) (*c*); (4) transfer (*d*); (5) provisional grant of a new licence (*e*); and (6) provisional ordinary removal (*f*).

(ii.) *New Licence.*

New licence.

60. "A new justices' licence" is a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer (*g*).

If the licence is not for the sale of the same kind of liquor, or does not contain the same conditions of sale, the licence is a new licence. Thus, a licence to sell spirits upon premises previously licensed for the sale of wine and beer only is a new licence (*h*), and where the licence previously held is a "six-day" licence, an application for a licence without the "six-day" condition is an application for a new licence (*i*).

(iii.) *Renewal.*

Renewal.

61. "The renewal of a justices' licence" means, for the purposes of the Licensing (Consolidation) Act, 1910 (*j*), a justices' licence granted at a general annual licensing meeting by way of renewal of a similar licence which was in force in respect of the premises at the date of the application (*j*).

Where an application is made for the grant of a licence in respect of premises in respect of which a similar licence is not in force at the date of the application, but was in force at the date of the general annual licensing meeting in the previous year, the application is deemed an application for renewal, and the grant of the application is to be treated as a renewal if the licensing justices are satisfied that the applicant had reasonable cause for not making his application at the previous general annual licensing meeting (*j*).

Application by transferee.

62. A licence may be transferred in certain circumstances from the holder to some other person (*k*), and if such transfer takes place the transferee becomes a licence-holder, and can therefore

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 12 (1); see the text, *infra*.

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (1); see the text, *infra*.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 24; see p. 25, *post*.

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 22 (1); see p. 26, *post*.

(*e*) Licensing (Consolidation) Act 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (1); see p. 30, *post*.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (4); see p. 31, *post*.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 12 (1); see the text, *infra*, and p. 26, *post*.

(*h*) *Marwick* v. *Codlin* (1874), L. R. 9 Q. B. 509.

(*i*) *R.* v. *Crewkerne Licensing Justices* (1888), 21 Q. B. D. 85, C. A.; followed in *Ellis* v. *Lincoln Licensing Justices* (1888), 52 J. P. 88.

(*j*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (1).

(*k*) See p. 26, *post*.

apply for a renewal of his licence at the next general annual licensing meeting.

If a new tenant comes into the premises and applies for a licence at the general annual licensing meeting, or an adjournment thereof, such new tenant may apply for the renewal of the old licence (*l*).

Application by new tenant.

63. A licence is not a "renewal" unless a licence in respect of the premises existed during the year before the application for such renewal (*m*).

When licence is not a "renewal."

64. If a provisional grant of a licence has been obtained, and there has been no order making such provisional grant final, the provisional licence may be renewed, even though the premises have been completed and an application to the licensing justices for an order declaring the licence final has been made and refused; but the renewed licence will still be provisional only (*n*).

Renewal of provisional grant.

(iv.) *Removal, Ordinary or Special.*

65. The removal of a justices' licence is its removal from the premises in respect of which it was granted to other premises (*o*). Such removal may, subject to certain limitations, be authorised by the licensing justices at their discretion, either on an application for the purpose made on any ground (called an ordinary removal), or on an application made on the special ground (and called a special removal): (1) that the licensed premises are or are about to be pulled down or occupied under an Act for the improvement of highways, or for any other public purpose; or (2) that the licensed premises have been rendered unfit for use for the business there carried on under the licence by fire, tempest, or other unforeseen and unavoidable calamity (*p*).

Removal.

Ordinary removal.

Special removal.

(*l*) *R.* v. *Market Bosworth Licensing Justices* (1887), 56 L. J. (M. C.) 96; *Symons* v. *Wedmore*, [1894] 1 Q. B. 401; and see *Leeds Corporation* v. *Ryder*, [1907] A. C. 420; *R.* v. *Liverpool Justices* (1883), 11 Q. B. D. 638, C. A. But see the remarks of Lord ESHER, M.R., upon the use of the word "renewal" in his judgment in *R.* v. *Liverpool Justices*, *supra*, in *Price* v. *James*, [1892] 2 Q. B. 428, C. A., at p. 433, and *R.* v. *West Riding of Yorkshire Justices*, *Ex parte Hill* (1895), 59 J. P. 278, *per* CAVE, J.

(*m*) *Ex parte Tarbath* (1874), 31 L. T. 513, *per* BLACKBURN, J. Formerly it made no difference that the old tenant had not given up possession to the owner, and that the owner had applied at the next general annual licensing meeting after he had regained possession, but probably the new provision as to the definition of renewal (see p. 24, *ante*) makes a difference in this respect (*Ex parte Tarbath*, *supra*). Formerly, also, if a licensee became personally disqualified or had his licence forfeited in such a way as to bring the case within the provision corresponding to the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 87, and an applicant on behalf of the owner obtained a temporary authority to sell under that provision, but failed in the further application to the next special sessions, a subsequent application at the next general annual licensing meeting could not be made for the renewal of the licence (*Stevens* v. *Green* (1889), 23 Q. B. D. 143), but apparently the new definition of renewal (see p. 24, *ante*) has altered this.

(*n*) *R.* v. *London County Justices* (1889), 24 Q. B. D. 341; as to provisional grants, see p. 30, *post*.

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 24 (1).

(*p*) *Ibid.*, s. 24 (2). As to a private building scheme, see *R.* v. *Northumberland Justices* (1879), 43 J. P. 271.

SECT. 2. Justices' Licences.

Premises authorised.

66. An ordinary removal may be authorised to any premises within the same licensing district as the already licensed premises, or to any premises within a licensing district within the same county, by the licensing justices of the district to which it is desired to remove the licence (*q*).

A special removal may be authorised to any premises within the same licensing district as the already licensed premises, being in the opinion of the licensing justices fit and convenient premises for the purpose (*r*).

Objection to removal.

67. Justices cannot make an order for an ordinary removal unless they are satisfied that no objection to the removal is made by the owner of the premises from which the licence is to be removed, or by the holder of the licence, or by any other person whom the justices may determine to have the right to object to the removal (*s*). Subject as aforesaid, the licensing justices have the same power to make an order for removal as they have to grant new licences (*t*).

But if an application is made for a new licence by the licensee of other premises, who undertakes to give up his licence for such other premises if his application for a new licence is granted, this is not an application for a "removal," and the justices have jurisdiction to grant the licence in the face of an objection by the owners of the other premises (*a*).

Applicant for special removal must be duly licensed.

68. If the application is made for a special removal the applicant must have been duly licensed in respect of the premises pulled down; he has no right to make the application if he held only a temporary authority to sell intoxicating liquors at the time when the house was pulled down, or even if he had obtained, subsequently to the house being pulled down but prior to his application for a special removal, a transfer of the licence (*b*).

(v.) *Transfer.*

Transfer.

69. "The transfer of a justices' licence" is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence (*c*).

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 24 (3).
(*r*) *Ibid.*, s. 24 (4).
(*s*) *Ibid.*, s. 26 (5).
(*t*) *Ibid.*, s. 26.
(*a*) *Laceby* v. *Lacon & Co.*, [1899] A. C. 222.
(*b*) *R.* v. *West Riding of Yorkshire Justices, Ex parte Shaw*, [1898] 1 Q. B. 503.
(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (1). "Transfer," as used in the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 40 (2), included only those cases named in the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 14, in which the transferor was the applicant (*R.* v. *Wiltshire (Tisbury Division) Licensing Justices* (1893), 9 T. L. R. 185; *R.* v. *Hughes*, [1893] 2 Q. B. 530), but the distinction between those cases in which the applicant is the transferor and those in which the applicant is the transferee became unimportant, having regard to the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 16 (3); see now the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 25.

To whom transfer may be granted.

70. An application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows:—It can only be granted in the following cases, and in each case only to the persons stated, namely: (1) In case of the death of the holder of the licence, a transfer to his representatives or to the new tenant or occupier of the premises; (2) in case of the incapacity of the holder of the licence to carry on business thereunder owing to sickness or other infirmity, a transfer to his assigns or to the new tenant or occupier of the premises; (3) in case of the bankruptcy of the holder of the licence, a transfer to his trustee or to the new tenant or occupier of the premises; (4) in case of occupation of the premises being given up by the holder of the licence or his representatives, a transfer to the new tenant or occupier of the premises, or to the person to whom the representatives or assigns have, by sale or otherwise, *bonâ fide* conveyed or made over the interest in the premises; (5) in case of wilful omission or neglect of the occupier of the premises, who is about to quit them, to apply for a renewal of the licence, a transfer to the new tenant or occupier; (6) in cases where the owner of the licensed premises, or some person on his behalf, on the forfeiture of the licence, or the personal disqualification of the holder of the licence, has obtained temporary authority under the Licensing (Consolidation) Act, 1910 (*d*), to carry on business until the next transfer sessions and applies for a transfer at those sessions, a transfer to the owner or any person applying on his behalf, which may be granted as if the licence to be transferred were, notwithstanding forfeiture, still valid (*d*).

It is not necessary that the licensed person should give up possession to the landlord; the ordinary case of a transfer from one tenant to another is included (*e*).

Transferee must be a fit and proper person.

71. In addition to the occurrence of circumstances which gives jurisdiction to transfer a licence, the transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence (*f*).

Transfer after expiration of previous licence.

72. If any of the events occur which give jurisdiction to grant a transfer, justices may grant it even after the expiration of the last licence (*g*). In other words, their jurisdiction depends on the happening of certain events and does not depend on the date when the remedy is sought (*h*). But if a licensed person applies at the general annual licensing meeting for a renewal of

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (2) (a), Sched. IV. See *Stevens* v. *Green* (1889), 23 Q. B. D. 143, *per* CAVE, J., at p. 147.

(*e*) *R.* v. *Middlesex Justices* (1871), L. R. 6 Q. B. 781, *per* MELLOR, J., at p. 784; and see Mr. Poland's argument, as reported 40 L. J. (M. C.) 184.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (2) (b).

(*g*) *R.* v. *Liverpool Justices* (1883), 11 Q. B. D. 638, C. A., overruling *Ex parte Todd* (1878), 3 Q. B. D. 407, and *White* v. *Coquetdale Justices* (1881), 7 Q. B. D. 238.

(*h*) *R.* v. *Liverpool Justices, supra*; *Baldwin* v. *Dover Justices*, [1892] 2 Q. B. 421.

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his licence, which is refused, and continues in occupation until after the date when his licence expires, a new occupier cannot obtain a licence at special sessions (*i*).

Premises left unused.

73. If for a number of years prior to an application for a transfer no intoxicating liquor has been sold on the premises in question, and the licensee has not occupied them, justices have no power to grant the transfer (*k*).

Death of licensee having no representative.

74. If a duly licensed person dies before the expiration of his licence, leaving no personal representatives or heir-at-law, and the landlord thereupon comes into possession of the licensed premises and puts in a new tenant, the new tenant may obtain the grant of a licence apparently upon the ground that the dead licensee has in these circumstances given up occupation of the licensed premises (*l*).

Licence becoming void.

75. If a licence has been granted which for some reason is void, as, for example, because the person to whom it was granted has been convicted of felony, justices cannot grant a transfer of such licence to another person, although properly qualified (*m*).

Transfer to new tenant where licensee convicted.

76. Where a licence-holder is convicted for permitting his premises to be a brothel, or for some other offence, upon conviction for which the licence becomes void, though a renewal of the licence cannot be obtained, yet justices may grant a transfer to a new tenant if the old licence-holder removed or gave up possession before such conviction. But they have no power to make such a grant if the licence-holder did not yield up possession until after conviction (*n*).

Transfer of licence not authorising sale of excisable liquor.

77. If a licence has been granted by way of renewal at a general annual licensing meeting to an applicant upon an understanding that he shall not sell excisable liquor under it, the licensing justices have power in certain circumstances to grant a transfer to a new tenant (*o*).

Assignment to new tenant before expiration of licence.

78. If the licensee yields up possession of and assigns the licensed premises to a new tenant before the expiration of his licence, the justices may grant a transfer, even though the old tenant has applied for and been refused a renewal of his licence at the general annual meeting (*p*). If a licensee yields up possession before the expiration of his licence, whereupon a new tenant applies for a transfer, which is refused, if another new tenant

(*i*) *Simpkin* v. *Birmingham Justices* (1872), L. R. 7 Q. B. 482; *R.* v. *London County Justices*, [1903] 2 K. B. 19, C. A.

(*k*) *R.* v. *Cotham*, [1898] 1 Q. B. 802.

(*l*) *Davies* v. *Evans* (1898), 77 L. T. 688.

(*m*) *R.* v. *Vine* (1875), L. R. 10 Q. B. 195, 200.

(*n*) See the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (2) (a), Sched. IV.

(*o*) *Wilson* v. *Crewe Justices*, [1905] 1 K. B. 491; but see *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A., and especially the judgment of FLETCHER MOULTON, L.J., at p. 531. See also *R.* v. *West Riding of Yorkshire Justices, Ex parte Shaw*, [1898] 1 Q. B. 503.

(*p*) *R.* v. *Middlesex Justices* (1871), L. R. 6 Q. B. 781.

applies at the next general annual licensing meeting for a renewal, which is also refused, the justices may nevertheless grant a transfer to a third new tenant who subsequently applies at special sessions (*q*).

If a licensee yields up possession before the expiration of his licence, and a new tenant applies (also before the expiration of the old licence) for a transfer which is refused, and then applies for a new licence at the general annual licensing meeting, which is refused, the licensing justices cannot refuse to hear a subsequent application for a transfer by a second new tenant (*r*).

Effect of refusal at general meeting.

But if a new tenant applies at the general annual licensing meeting for a renewal, which is refused on the merits, the same new tenant cannot afterwards apply for a transfer (*s*). So where a licence-holder gives up possession to a new tenant, and then on behalf of and with the assent of the new tenant applies at the general annual licensing meeting for a renewal, which is refused upon the merits, a transfer cannot afterwards be granted to the same new tenant (*t*).

Application by second and subsequent tenants.

79. One new tenant having applied for and failed to obtain a transfer, a second, third, fourth etc. new tenant may come in, each of whom may in turn apply (*u*).

Neglect to apply to general meeting.

80. If a new tenant obtains a transfer before the expiration of the old licence, and neglects to apply for a renewal at the ensuing general annual licensing meeting, he cannot again apply for a transfer to himself (*x*). Where, however, a transfer is refused, and an appeal to quarter sessions is dismissed, subject to the statement of a special case, and before the High Court decides the special case a new licensing year has begun, a transfer may be granted to the same tenant upon a second application (*y*).

Transfer to new tenant where previous tenant fails to apply at general meeting.

81. If a licensee gives up possession before his licence expires, and a new tenant enters into possession, and applies, before the expiration of the licence, for a transfer, which is refused, and the new tenant being about to quit the house at the time of the next general annual licensing meeting does not apply for a licence, justices are entitled, subsequently to such general annual licensing meeting, to grant a transfer to another new tenant (*z*).

(*q*) *Baldwin* v. *Dover Justices*, [1892] 2 Q. B. 421.
(*r*) *R.* v. *Upper Goldcross Justices* (1889), 62 L. T. 112.
(*s*) *R.* v. *West Riding of Yorkshire Justices, Ex parte Hill* (1895), 59 J. P. 278.
(*t*) *R.* v. *Taylor* (1872), L. R. 7 Q. B. 487.
(*u*) *Ex parte Todd* (1878), 3 Q. B. D. 407, *per* MANISTY, J., and COCKBURN, C.J., at p. 411; see also *R.* v. *Liverpool Justices* (1883), 11 Q. B. D. 638, C. A.
(*x*) *R.* v. *Powell*, [1891] 2 Q. B. 693, C. A.
(*y*) *R.* v. *Welby* (1890), 54 J. P. 183.
(*z*) *R.* v. *Liverpool Justices* (1883), 11 Q. B. D. 638, C. A. The decision in this case was based upon the ground that "the occupier," namely, the tenant who entered into possession in June, "being about to quit the same," had "wilfully omitted or had neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell" excisable liquors: and in order to meet the contention that such tenant, not being a person who had previously held a licence, could not apply for "a licence to continue to sell," it was said that such tenant would have been entitled to apply for a

SECT. 2. Justices' Licences.

Licence to woman who subsequently marries.

82. A licence to a woman continues valid although she marries and makes no agreement to carry on the business separately from her husband; and the husband may apparently obtain a transfer (*a*).

Conditions for giving up licence on quitting premises.

83. If a licence has been granted upon a condition embodied in the licence that the licence should be given up upon the licensee leaving the premises, this condition does not take away jurisdiction to grant a transfer to another person (*b*).

Regulations to prevent repeated applications.

84. For the purpose of preventing repeated applications for the transfer or special removal of a justice's licence, the licensing justices may, at the general annual licensing meeting, make regulations determining the time which must elapse after the hearing of one application for the transfer or special removal before another such application may be made in respect of the same premises. But the justices may, for good cause shown, dispense with the observance of these regulations in any particular case (*c*).

The special provisions of the Licensing (Consolidation) Act, 1910, affecting the renewal of an old on-licence, apply also to the transfer of an old on-licence (*d*).

(vi.) *Provisional Grant.*

Provisional grant.

85. Any person interested in premises about to be constructed, or in the course of construction, for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises, may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of those premises; and the justices and confirming authority, if satisfied with the plans of the house submitted to them, and that if the premises had been actually constructed in accordance with those plans they would, on application, have granted a licence in respect thereof, may make a provisional grant and order of confirmation accordingly (*e*).

Effect.

86. A provisional grant and order of confirmation is of no validity until declared to be final by an order of the licensing justices, made after such notice has been given as may be required by the justices at a general annual licensing meeting or transfer sessions. The declaration must be made if the justices are satisfied

"renewal" at the general annual licensing meeting, and might, therefore, have applied for "a licence to continue to sell." It is to be noticed, however, that the attention of their Lordships does not appear to have been called to the fact that the case came within the enactment because the licensed person had removed or yielded up possession before the expiration of his licence, and that the applicant in November might, therefore, apply as a new tenant under another provision of the same enactment.

(*a*) *Hazell* v. *Middleton* (1881), 45 J. P. 540.

(*b*) *Oldham Justices* v. *Gee* (1902), 86 L. T. 389.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 28.

(*d*) For these, see p. 63, *post*.

(*e*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (1). As to the necessity of confirmation and the confirmation authority, see p. 50, *post*.

that the house has been completed in accordance with such plans as aforesaid, and are also satisfied that no objection can be made to the character of the holder of the provisional licence (*f*).

Confirmation not on terms of provisional grant.

87. If justices make a provisional grant of a licence on the understanding that some more suitable site will be found, but the order is drawn up as for the proposed site, and a confirmation of the provisional grant is obtained upon the same understanding, and the justices do not afterwards assent to any other site, it appears that, if the applicant builds on the site originally suggested, he may be entitled to have the provisional grant made final (*g*).

Justices are bound to make the order final if the building is in substantial accordance with the plans (*h*).

Renewal.

88. A provisional grant of a licence may be renewed (*i*).

Power extends to on-licences only.

89. The power to make a provisional grant of a licence for the sale of intoxicating liquors extends only to on-licences (*k*).

(vii.) *Provisional Order for Removal.*

In what cases granted.

90. An application may be made for a provisional order sanctioning the removal of a licence if the premises to which it is desired that the licence should be removed are about to be constructed or in the course of construction; but the provisional order sanctioning removal is of no validity until declared to be final by an order of the licensing justices made after such notice has been given as may be required by the justices at a general annual licensing meeting or a special licensing session. The declaration must be made if the justices are satisfied that the house has been completed in accordance with the plans (*l*), and are also satisfied with the character of the holder of the provisional order sanctioning removal (*m*).

SUB-SECT. 3.—*Duration of Licences.*

Duration of justices' licence.

91. A justices' licence is, unless it is previously forfeited or becomes void under some statutory provision, in force from the 5th April after the granting thereof for one year next ensuing and no longer, or, in the case of a licence granted for a term, until the expiration of the term (*n*): a licence granted by way of transfer or special removal continues in force only until the 5th April following the day on which it is granted (*n*).

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (2); *R.* v. *Pownall* (1890), 63 L. T. 418, *per* Lord COLERIDGE, C.J.

(*g*) *R.* v. *Cox* (1884), 48 J. P. 440; but the case is an unsatisfactory one and is confused by a question of bias on the part of one of the justices, who refused to make the order final.

(*h*) *R.* v. *London County Justices* (1889), 24 Q. B. D. 341; *R.* v. *Pownall*, *supra*.

(*i*) *R.* v. *London County Justices*, *supra*, *per* Lord COLERIDGE, C.J., at p. 345.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24) s. 33 (1), (4).

(*l*) As to the plans, see p. 30, *ante*.

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (4).

(*n*) *Ibid.*, s. 41.

SECT. 2. Justices' Licences.

Licence for term.

92. The licensing justices may, if they think fit, instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years, and where a licence is so granted for a term, any application for a re-grant of the licence on the expiration of the term is treated as an application for the grant of a new licence, not as the application for renewal, and during the continuance of the term the licence does not require renewal, and any transfer or special removal of the licence has effect, subject to any conditions attached thereto on the grant, for the remainder of the licence (*o*).

Provisional grant for a term.

93. The power to grant a new on-licence for a term includes power to make a provisional grant of such a licence, and such a grant may be for a term of seven years from the date when such provisional grant is declared to be final (*p*).

Forfeiture.

94. A licence granted for a term may (without prejudice to any other provisions as to forfeiture) be forfeited, if any condition imposed is not complied with, by order either of a court of summary jurisdiction, made on complaint (*q*), or, if the holder of the licence is convicted of any offence committed by him as such, by the court by whom he is convicted (*r*).

SUB-SECT. 4.—*Extent of Licence: Premises covered.*

Alterations and additions.

95. If alterations or additions have been made in licensed premises, a question may arise as to the identity of the old and the new premises, and consequently whether a renewal of the licence can be granted.

The identity of premises before and after additions and alterations seems to be a question of fact for the justices, who have a considerable latitude in deciding what extent and kind of alterations constitute merely accessory improvements and what substantially new premises (*s*).

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14 (2). "Old on-licences" are described *ibid.*, Sched. II., as justices' on-licences which were in force on the 15th August, 1904, including (1) licences granted by way of renewal of a licence so in force, and (2) licences which, though not in force at that date, had been before that date provisionally granted and confirmed under the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 22, in cases where the provisional grant and order for confirmation was subsequently declared final, whether the licence continues to be held by the same person or has been or may be transferred to any other person or persons. But the expression "on-licence" here used does not include licences for the sale of wine alone or sweets alone.

(*p*) *R.* v. *Johnstone*, [1906] 1 K. B. 228.

(*q*) As to the general procedure by complaint, see title MAGISTRATES.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14 (4).

(*s*) See *R.* v. *Smith* (1866), 15 L. T. 178; *Mahon* v. *Gaskell* (1878), 42 J. P. 582; *R.* v. *Raffles* (1876), 1 Q. B. D. 207; *R.* v. *Pownall* (1890), 63 L. T. 418; *Ballam* v. *Wiltshire*, *R.* v. *Hampshire Justices* (1879), 44 J. P. 72; *R.* v. *Sheffield Justices* (1899), 63 J. P. 595, C. A.; see also judgments of LAWRANCE and COLLINS, JJ., in *R.* v. *Bradford Justices* (1896), 74 L. T. 287; but compare *Deer* v. *Bell*, *Deer* v. *Cheshire* (*Wirral Division*) *Licensing Justices* (1895), 64 L. J. (M. C.) 85.

Justices may insert into a renewal a clause prescribing the metes and bounds of the licensed premises (*t*).

Defining boundaries in renewal.

If licensed premises have been altered, the justices must, upon application for the renewal of the licence, decide whether the premises, as altered, are or are not still the same premises as before, and must not grant a licence in such a form that the person to whom the grant is made is unable to tell whether his renewal has been granted or refused (*a*).

SUB-SECT. 5.—*Structure of Licensed Premises.*

(i.) *Consent to Alterations.*

Consent to alterations.

96. No alteration in any licensed premises in respect of which a justices' on-licence is in force, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where liquor is sold and any other part of the premises, or any street or other public way, must be made without the consent of the licensing justices either at the general annual licensing meeting or at transfer sessions (*b*). The licensing justices may, before giving their consent, require plans of the proposed alterations to be deposited with their clerk at such time as they may determine (*c*). If any such alteration is made, save under the order of some lawful authority, without such consent, a court of summary jurisdiction, on complaint, may by order declare the licence to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition (*d*).

(ii.) *Alteration ordered by Justices upon Renewal.*

Order for alterations.

97. On any application for the renewal of a justices' on-licence, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and on renewing any such licence they may, by order, direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed (*e*). If any such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises can be made within the next five years (*f*). If the licensed person makes default in complying with any such order, he is liable, on summary conviction, to a fine

(*t*) *Stringer* v. *Huddersfield Justices* (1875), 33 L. T. 568. Whether after such metes and bounds have been prescribed any addition is necessarily excluded from the effect of the licence seems doubtful; see judgments of QUAIN and MELLOR, JJ., as reported in S. C. 40 J. P. 22, 23.

(*a*) *R.* v. *Bradford Justices* (1896), 74 L. T. 287.

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 71 (1).

(*c*) *Ibid.*, s. 71 (2).

(*d*) *Ibid.*, s. 71 (3).

(*e*) *Ibid.*, s. 72 (1).

(*f*) *Ibid.*, s. 72 (3).

SECT. 2. Justices' Licences.

not exceeding 20*s.* for every day during which the default continues (*g*).

Nature of alterations which may be ordered.

98. The alterations which may be ordered under this power are confined to structural alterations, and the provision does not authorise the justices to order the licensee to conduct his business in a particular way, such as that a particular door should not be used for trade purposes (*h*).

If, however, the alterations ordered are structural the power to order such alterations is not confined to parts of the premises where liquor is actually sold or consumed (*i*).

No order on transfer.

99. Justices have no power to make an order for alterations upon an application for the transfer of a licence (*k*).

SUB-SECT. 6.—*What Justices can grant Licences.*

(i.) *In Counties.*

Licensing authority. County.

100. In counties, as respects a licensing district being a petty sessional division of a county, the licensing justices are the justices acting in and for the petty sessional division (*l*).

(ii.) *In Boroughs.*

Borough.

101. In a borough which is a licensing district (*m*) the licensing justices are (1) in a county borough, for all purposes, the borough licensing committee (*n*); (2) in a borough not being a county borough, and having at the time appointed (*o*) for the appointment of the borough licensing committee ten or more justices (whether disqualified from acting under the Licensing (Consolidation) Act, 1910 (*p*), or not), the borough licensing committee, so far as respects the grant of new licences and ordinary removals, and, for other purposes, the borough justices; in a borough, not being a county borough, and not having ten justices acting at the same time, for all purposes, the borough justices (*q*).

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 72 (4). As to the enforcement of orders made by courts of summary jurisdiction, see title MAGISTRATES.

(*h*) *Smith* v. *Portsmouth Justices*, [1906] 2 K. B. 229, C. A.

(*i*) *Bushell* v. *Hammond*, [1904] 2 K. B. 563, C. A. Structural alterations, including the rearrangement of the bar, ordered by the licensing justices upon renewal of the licence, are improvements within the meaning of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, as extended by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, on which capital moneys may be expended with the sanction of the court (*Re Gurney's Marriage Settlement, Sullivan* v. *Gurney*, [1907] 2 Ch. 496).

(*k*) *R.* v. *Merioneth Justices, Ex parte Kisbey* (1908), 99 L. T. 89.

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2 (2) (a).

(*m*) That is, in a borough having a separate commission of the peace (*ibid.*, s. 2 (1)).

(*n*) For this purpose the City of London is deemed a county borough (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2 (4)).

(*o*) See the text, *infra*.

(*p*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*q*) *Ibid.*, s. 2 (3) (a). As to justices of the peace generally, see title MAGISTRATES.

Appointment.

102. The borough licensing committee must be appointed by the borough justices during the last fortnight in January in every year. It must consist of such number of borough justices as the appointing justices determine, not being less than seven in a county borough, and not being less than three nor more than seven in any other borough. The quorum is three. Members of the retiring committee may be reappointed, and retiring members may continue to act until their successors are appointed (*r*).

Power of metropolitan police magistrate to act.

103. Beyond the limits of the jurisdiction of the metropolitan police courts a metropolitan police or stipendiary magistrate may act as one of the justices empowered to grant or confirm licences so far as regards any licensing district wholly or partly within his jurisdiction (*s*).

Cinque Ports.

104. The justices of the county have not any authority as licensing justices in any of the principal Cinque Ports (*t*), or in the two ancient towns (*u*). In those ports and towns the justices of the port or town are the licensing justices, and the corporate and non-corporate members and liberties of any of those ports or towns, not being within the limits of a borough having a separate commission of the peace, are treated as part of the port or town (*v*).

The justices of the five boroughs of Hastings, Sandwich, Dover, Hythe, and Rye have all the jurisdiction, powers, and authorities of justices for a county relating to the granting of licences or authorities to persons to keep inns, alehouses or victualling houses or to sell excisable liquors by retail within any of the corporate or non-corporate members or liberties of the five boroughs respectively, not being within the limits of a borough having a separate commission of the peace (*w*).

SUB-SECT. 7.—*Procedure of Licensing Justices.*

Procedure.

105. Any power or duty of licensing justices or justices acting in or for a borough, including a county borough, whether those justices are described as the whole body of justices or otherwise, may be exercised or performed by a majority of justices present at a meeting assembled for the purpose (*a*).

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 3.

(*s*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 39.

(*t*) Hastings, Sandwich, Dover, Hythe, and Romney; and see title COURTS, Vol. IX., pp. 127—129.

(*u*) Winchelsea and Rye.

(*v*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2 (5); and compare the Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 24, which deals with offences.

(*w*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 248 (1), (4). Other enactments relating to the Cinque Ports are:—Cinque Ports Act, 1811 (51 Geo. 3, c. 36); Cinque Ports Act, 1855 (18 & 19 Vict. c. 48); Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 256; Municipal Corporations Act, 1883 (46 & 47 Vict. c. 18), ss. 13, 14; Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39), Sched.; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 48 (4).

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 7 (1).

SECT. 2. Justices' Licences.

The majority of the justices who are present, that is, who hear and consider the case, not the majority of those who vote in the decision, determine the question. Hence the whole number of justices present must be counted in order to see if there is a majority in favour of the application being granted (*b*).

If the justices are equally divided, they may apparently adjourn the hearing to another day, when other justices may be present (*c*), but the chairman has no casting vote (*d*). If there is not a majority in favour of the application, then the application is deemed to be refused (*e*). But if, after a vote of the justices present has been taken, it appears that they are equally divided, but a majority accepts a decision in accordance with the view of the chairman, such a decision is valid, and the High Court will not interfere (*f*).

Practice as to form of licence.

106. Every licence must be signed by the majority of the justices who are present when the licence is granted, or sealed or stamped with an official seal or stamp, in such form as the licensing justices may direct, affixed under their authority, and verified in each case by the signature of their clerk. Any seal or stamp purporting to be so affixed and verified must be received in evidence without further proof (*g*).

Duty of justices with regard to entries in register.

107. On any application for the grant (either as a new licence or by way of renewal, or transfer), or removal of a justices' licence, the licensing justices must have regard to any entries in the register of licences relating either to the person by whom, or to the premises in respect of which, the licence is to be held (*h*).

Evidence.

All evidence must be given in open court (*i*).

All evidence upon an application by a licence-holder for the renewal of his licence must be taken on oath (*k*), even if the objection to the renewal is started by one of the justices themselves (*l*).

It is not clear whether justices must act only upon the sworn

(*b*) *Garton* v. *Southampton Licensing Justices* (1893), 9 T. L. R. 430, *per curiam*.

(*c*) See *Bodmin* v. *Warligen* (1748), 2 Bott's Poor Law, by Const (6th ed. by Pratt), 756; *R.* v. *Belton* (1848), 11 Q. B. 379; compare *Bagg* v. *Colquhoun*, [1904] 1 K. B. 554.

(*d*) *R.* v. *Rogers* (1892), 56 J. P. 183; and see *R.* v. *Fladbury* (*Inhabitants*) (1839), 10 Ad. & El. 706.

(*e*) *Garton* v. *Southampton Licensing Justices, supra*.

(*f*) *R.* v. *Rogers, supra*.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 43 (1), (2). As to forgery of licence, see p. 129, *post*.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 52.

(*i*) *R.* v. *Redditch Justices* (1885), 2 T. L. R. 193; and see *R.* v. *Newcastle-upon-Tyne Licensing Justices* (1887), 3 T. L. R. 351, C. A., *per* Lord ESHER, M.R.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (6); *R.* v. *Eales*, *Eales* v. *Philpotts* (1880), 42 L. T. 735; and see *R.* v. *Newcastle-upon-Tyne Licensing Justices, supra, per* Lord ESHER, M.R., who seems also to have said that all evidence taken at special sessions must be upon oath, and the parties must have an opportunity of questioning the witnesses upon oath.

(*l*) *Gascoyne* v. *Risley* (1888), 36 W. R. 605.

evidence and not upon their own local knowledge (*m*). But proceedings upon an application for renewal will not be invalidated if the justices have become acquainted with the general circumstances of the case, and use that information to bring to the minds of persons before them the points they have to deal with (*n*). Facts may, however, be admitted (*o*).

Upon an application for a new licence justices may decline to hear evidence in opposition to the grant of such licence if the witness refuses to give it upon oath (*p*).

Objection to application.

108. Upon an application for the renewal, or the transfer, of a licence, if objection is taken to the renewal or transfer upon certain grounds (*q*), the question for the justices to consider is not whether they will grant or refuse the application, but whether they will grant it or refer it for the consideration of the compensation authority (*r*). They cannot refer an application without some evidence (*s*) in support of the objection to the renewal of the particular licence in question (*a*). But if such evidence is given, as, for example, that the house is one which it is undesirable to licence in the public interest, that the public will suffer no inconvenience if it be closed, or that owing to its situation the police are unable to exercise proper supervision over it, or that it is a small house with a diminishing business, the justices can refer the question of the renewal of its licence to the compensation authority (*b*).

Statement in licence or transfer on application being referred.

109. Where the licensing justices refer the question of the renewal or transfer of a licence to the compensation authority (*c*), those justices must grant the renewal or transfer of the licence in accordance with the terms of the application, but must insert in the licence or transfer a statement as to such renewal or transfer of the licence being provisional (*d*).

Parties who must attend hearing.

110. In the case of an application for the transfer of a justices' licence the person, if any, holding the licence, and the person to whom it is proposed that the licence shall be transferred, must

(*m*) *R.* v. *Howard*, [1902] 2 K. B. 363, C. A., the Court of Appeal not deciding the question, although the Divisional Court (see S. C. (1902), 18 T. L. R. 614) had done so.

(*n*) *R.* v. *Howard*, [1902] 2 K. B. 363, C. A.

(*o*) See *R.* v. *Kent Justices* (1877), 41 J. P. 263.

(*p*) *R.* v. *Sharman, Ex parte Denton*, [1898] 1 Q. B. 578.

(*q*) For these, see p. 43, *post*.

(*r*) As to the compensation authority, see p. 68, *post*.

(*s*) Which must be on oath if the licence-holder is applying for the renewal of his licence (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (6)).

(*a*) *R.* v. *Tolhurst, Ex parte Farrell*, *R.* v. *Cox, Ex parte West*, [1905] 2 K. B. 478; *Raven* v. *Southampton Justices*, [1904] 1 K. B. 430 (decided when licensing justices had power to refuse a renewal on the ground of non-requirement).

(*b*) See *R.* v. *Drinkwater, Ex parte Conway* (1905), 22 T. L. R. 12, C. A.; *R.* v. *Johnson, Ex parte Whitmore* (1906), 71 J. P. 59.

(*c*) Under Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 19 (1).

(*d*) Licensing Rules, 1904, rr. 41, 44 (Statutory Rules and Orders, 1904, pp. 266, 274).

SECT. 2. Justices' Licences.

attend the transfer sessions at which the application is heard; and the agreement or other assurance, if any, under which the licence is to be transferred and held, must be produced to the licensing justices (*e*). But the licensing justices may, for good cause shown, dispense with the attendance of either or both of such persons (*e*).

The licensing justices, on such an application, may in their discretion adjourn the consideration thereof (*e*).

Adjournment.

111. For the purpose of compelling the attendance of any person or any witness, the licensing justices have all the powers of a court of summary jurisdiction (*f*).

Attendance of witnesses.

Licensing justices may compel the attendance of witnesses within the jurisdiction by *subpœna* issued out of the Crown office, and the King's Bench Division will grant an attachment if the *subpœna* is disobeyed, and apparently, if any difficulty arises from the witnesses being out of the jurisdiction, the court will supply the defect (*g*).

No power as to costs.

112. No power is given by statute to the justices to make any order as to costs upon an application for a licence.

SUB-SECT. 8.—*Fees in respect of Licences.*

Fees.

113. The applicant must pay to the clerk of the licensing justices (1) for matters to be done by the clerk on the grant of a new justices' licence, or on the removal or transfer of a justices' licence, or on the renewal of a justices' spirit on-licence, 6*s.* 6*d.*; on the renewal of any other justices' licence, 4*s.*; (2) for the service of notices, 1*s.*

Penalty for excessive demand.

If the clerk demands or receives from any person in respect of these matters any greater fee or anything of greater value than the sums authorised, being in the whole 7*s.* 6*d.* or 5*s.*, as the case may be, he is liable in respect of each offence to a fine not exceeding £5 (*h*).

No additional fee can be claimed even though it has been paid under a local practice for many years (*i*), and the clerk is not entitled to receive a fee for the administration of the oath to a witness called to give evidence in opposition to the grant of a justices' licence (*k*).

(*e*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 25 (1). As to the absence of applicant when caused by sickness or infirmity, see p. 42, *post*.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 25 (2). As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*g*) *R.* v. *Lydeard St. Lawrence* (*Inhabitants*) (1841), 11 Ad. & El. 616, *per* Lord DENMAN, C.J., at p. 627; *R.* v. *Greenaway* (1845), 7 Q. B. 126; and see titles CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 303; EVIDENCE, Vol. XIII., pp. 577, 590.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 45.

(*i*) *Morgan* v. *Palmer* (1824), 2 B. & C. 729.

(*k*) *Whittuck* v. *Withy*, [1907] 2 K. B. 526.

Part IV.—Application for Licences.

SECT. 1.—*Excise Licences.*

SECT. 1. Excise Licences.

Notice of application.

114. All persons who have taken out any excise licence for brewing of beer, or distilling or making of low wines or spirits, or for selling beer, cider, or perry by retail to be consumed on the premises, or for selling spirits or foreign wine, or sweets or made wines, or mead or metheglin, by retail, and who intend to continue the trade for which such licence was granted beyond its time of expiration, must give notice in writing, at least twenty-one days before the expiration of the current licence, of their intention to continue the business for which it was before granted, to the persons authorised to grant licences for the district or place at which such business is carried on; and in cases where the excise licence is so renewed and such notice has been given, the new licence bears date from the day of the expiration of the current licences; but in case where such notice has not been given, and in all other cases than as aforesaid, the licence bears date from the day of the application therefor, even though delivered at any day subsequent to the date of the application (*l*).

SECT. 2.—*Justices' Licences.*

SUB-SECT. 1.—*Notice of Application.*

(i.) *At Annual Meeting.*

Notice of application.

115. A person applying for a new justices' licence must advertise notice of his application in some paper circulating in the place in which the premises to which the notice relates are situated, on some day not more than four and not less than two weeks before the application is made, and on such day or days if any as may be from time to time fixed by licensing justices (*m*); and within twenty-eight days before the application is made must cause notice of his application to be affixed and maintained between the hours of 10 a.m. and 5 p.m. of two consecutive Sundays on the door of such premises, and on the door of the church or chapel of the parish or place in which the premises are situated, or if there is no such church or chapel, on some other public or conspicuous place within the parish or place (*n*); and must, not less than twenty-one days before the application is made, give notice in writing of his intention to apply for the licence to one of the overseers of the parish in which the premises to which the notice relates are situated, to the superintendent of police of the district, and to the clerk of the licensing justices (*o*).

(*l*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 16.
(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 15 (1) (a).
(*n*) *Ibid.*, s. 15 (1) (b).
(*o*) *Ibid.*, s. 15 (1) (c)

SECT. 2. Justices' Licences.

The notices must set forth the name and address of the applicant, a description of the licence or licences for which he intends to apply, and a description of the situation of the premises in respect of which the application is to be made (*p*).

If the evidence produced of the proper posting of the necessary notices of application upon the church and shop door does not satisfy the justices that the statutory provisions have been complied with, the High Court will not interfere (*q*).

Time.

The time for which notices are calculated is the date of the general annual licensing meeting or of any adjournment at which the application is actually made (*r*); and in counting the days for notice, the day of notice and the day of meeting must be excluded (*s*).

Deposit of plans.

116. If the application is for a new justices' on-licence the applicant must also, not less than twenty-one days before the application is made, deposit with the clerk of the licensing justices a plan of the premises in respect of which the application is to be made (*t*).

Second application.

117. An applicant for a licence, whose application at the general annual licensing meeting has been heard on the merits and refused, cannot make a second application at an adjourned meeting in the same circumstances, even though he is prepared with additional evidence (*u*). But a second application can be made by a new applicant (*v*), or by the same applicant if the circumstances are different (*w*).

Notices for different kinds of licence.

If notices are given of applications for two different kinds of licence, and at the general annual licensing meeting only one licence is dealt with, the applicant can apply at an adjourned meeting for the other licence (*a*).

If notices given for the general annual licensing meeting prove defective, new notices may be given for an adjourned meeting (*b*).

Service of notices.

118. The notices to an overseer and to the superintendent of police may be served personally or, if sent by post, by registered letter. The other notices before mentioned (*c*) may be served personally or sent by post (*d*).

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 15 (2).
(*q*) *R.* v. *Hayhurst, Ex parte Machin* (1897), 61 J. P. 88.
(*r*) *Drake's Case* (1869), L. R. 5 Q. B. 33; *R.* v. *Pownall*, [1893] 2 Q. B. 158.
(*s*) *R.* v. *Shropshire Justices* (1838), 8 Ad. & El. 173; *R.* v. *Aberdare Canal Co.* (1850), 14 Q. B. 854, 868; *Young* v. *Higgon* (1840), 6 M. & W. 49; *Chambers* v. *Smith* (1843), 12 M. & W. 2; *Norton* v. *Salisbury* (*Town Clerk*) (1846), 4 C. B. 32; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; *Mercantile Investment and General Trust Co.* v. *International Company of Mexico* (1891), [1893] 1 Ch. 484, n., C. A.
(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 15 (1) (d).
(*u*) *Ex parte Rushworth* (1869), 23 L. T. 120.
(*v*) *Drake's Case, supra.*
(*w*) *Ex parte Maughan* (1875), 1 Q. B. D. 49.
(*a*) *R.* v. *Armstrong, Ex parte Duffy* (1896), 65 L. J. (M. C.) 35.
(*b*) *R.* v. *Caulfield* (1882), 46 J. P. 756.
(*c*) See p. 39, *ante.*
(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 108 (1). Subject to any express provision, all notices or documents required

The proper place for leaving notice for a superintendent of police, if he is not served personally, is his actual residence or business office, and service merely at one of the police stations in his division where he occasionally calls is not sufficient (*e*).

Service on superintendent of police.

Where a petty sessional division includes a borough, and the borough has a chief constable of its own, while there is another superintendent of police for the rest of the division, notice is rightly served on the chief constable of the borough, when the premises, in respect of which the notice is given, are within the borough (*f*).

Strict accuracy.

Strict verbal accuracy in notices should not be insisted on by the justices if the meaning is reasonably clear (*g*); nor will a clerical error in a notice deprive the justices of jurisdiction to hear and grant the application, if it has not misled the recipient (*h*). Even though a notice is ambiguous, if it is not necessarily bad, the justices must hear the application (*i*).

Clerical error.

Contents.

The description of the situation of the house or shop required in the notice is only such a description of its situation as suffices to identify it (*k*).

No door.

If premises are not completed and the door has not been put in, the affixing of the notice of application to floorboards in the doorway is sufficient (*l*).

Provisional grant and confirmation.

119. A provisional grant and confirmation of a licence is subject to the same conditions as to the giving of notices and generally as to procedure as those to which the grant would be subject if not provisional, except that where a notice is required to be put up on a door of a house the notice may be put up in a conspicuous position on any part of the premises (*m*).

Ordinary removal.

120. Notice of an application for an ordinary removal of a justices' licence must be given in the same manner as notice of an application for a new licence (*n*), and a copy of the notice must be personally served upon, or sent by registered letter to, any registered owner of the premises from which the licence is to be removed, and to the holder of the licence, unless he is also the applicant (*o*).

by that Act to be given, served, or sent may be served personally or sent by post (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 108 (1)).

(*e*) *R.* v. *Riley* (1889), 53 J. P. 452.

(*f*) *R.* v. *Birley* (1891), 55 J. P. 88.

(*g*) *R.* v. *Over Darwen Justices, Ex parte Slater* (1878), 39 L. T. 444, *sub nom. R.* v. *Blackburn Hundred Justices*, 42 J. P. 775; *R.* v. *Over Darwen Justices, Ex parte Gibson* (1878), 39 L. T. 445.

(*h*) *Ex parte Clayton* (1899), 63 J. P. 788.

(*i*) *R.* v. *Lyon* (1898), 14 T. L. R. 357, C. A.

(*k*) *R.* v. *Penkridge Justices* (1892), 61 L. J. (M. C.) 132.

(*l*) *R.* v. *Sharpe, Ex parte Ellis* (1898), 42 Sol. Jo. 572. As to notice for provisional licence, see *infra*, and p. 48, *post*.

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (3); and see *R.* v. *Sharpe, Ex parte Ellis* (1898), 42 Sol. Jo. 572.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 26 (3).

(*o*) *Ibid.*, ss. 26 (4), 108 (1).

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An application for a provisional ordinary removal of a licence is subject to the same conditions as to the giving of notices as an application for the provisional grant of a new licence (*p*).

Provisional ordinary removal.

Renewal of justices' licence.

121. Where an application is made for the grant of a justices' licence by way of renewal only, no notice of application is requisite (*q*).

(ii.) *At Transfer Sessions.*

Application for transfer of justices' licence.

122. The applicant for a transfer of a justices' licence must, fourteen days prior to one of the transfer sessions, or to a general annual licensing meeting (*r*), serve a notice of his intention to make the application upon one of the overseers of the parish in which the premises in respect of which his application is to be made are situated, and upon the superintendent of police of the district.

Notice.

The notice must be signed by the applicant or by his authorised agent, and must set forth the name of the person to whom it is proposed the licence shall be transferred, together with the place of his residence and his trade or calling during the six months preceding the time of serving such notice (*s*).

Form of notice on application for special removal.

In the case of an application for a special removal the notice must, instead of setting forth the description of the person to whom the licence is to be transferred, set forth descriptions of the premises from which and to which it is proposed to remove the licence, and the person making the application must, in addition to giving

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notice in the manner required with respect to a transfer, cause to be fixed on some Sunday within six weeks next before the transfer sessions or general annual licensing meeting, at some time between the hours of 10 a.m. and 4 p.m., a notice of the application on the door of the premises to which it is proposed to remove the licence, and on the door of the church or chapel of the parish or place in which the premises are situated, and where there is no such church or chapel, on some other public and conspicuous place within the parish or place (*t*).

Absence of applicant on hearing.

123. If an applicant for a justices' licence, including a renewal or transfer or removal, is hindered by sickness or infirmity, or any other reasonable cause, from attending in person at any general annual licensing meeting, or adjournment thereof, or any transfer sessions at which his personal attendance is required, the licensing justices, if satisfied (by evidence on oath, if they think it necessary) that the applicant is hindered from attending, by good and sufficient cause, may grant the licence or authorise the removal of the licence, notwithstanding that the applicant is not present, and deliver any

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 33 (4).

(*q*) See *R.* v. *Gepp* (1882), 46 J. P. 761.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 22 (1). For the definitions of "transfer sessions" and "general annual licensing meeting," see pp. 21 *et seq.*, *ante*.

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 25 (3); *R.* v. *Bath Justices, Ex parte Spiers and Pond, Ltd.* (1908), 99 L. T. 54.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 22 (1), 27; see *R.* v. *Nicholson*, [1899] 2 Q. B. 455, C. A.; *R.* v. *Bath Licensing Justices, Ex parte Spiers and Pond, Ltd.* (1908), 72 J. P. 356.

licence, order, or authority required to any person authorised by the applicant to receive it (*a*).

SUB-SECT. 2.—*Notice of Opposition.*

(i.) *At Annual Licensing Meeting or Adjournment.*

Opposition.

124. In the case of any application, except an application by the holder of a justices' licence for the renewal of his licence, any member of the public may appear before the licensing justices and oppose the application (*b*).

On application for new licence.

In the case of a new licence, any person who has appeared before the licensing justices and opposed the grant, and no other person, may appear and oppose the confirmation of the grant by the confirming authority (*c*); but no notice of opposition before either the licensing justices or the confirming authority is required (*d*).

If, however, upon an application for a provisional licence the justices really make up their minds to grant the licence, but indicate that they will take time to consider the plans and the proper amount to be paid in respect of monopoly value, they may at an adjourned meeting refuse to reopen the whole question and to hear objections to the grant of the licence by persons who appear to oppose the application for the first time at such adjourned meeting (*e*).

Notice of opposition.

125. Where the holder of a justices' licence applies for the renewal of his licence the licensing justices cannot entertain any objection to, nor take any evidence with respect to, the renewal thereof, unless written notice of an intention to oppose such renewal, stating in general terms the grounds on which it is opposed, has been served on such holder not less than seven days before the commencement of the general annual licensing meeting (*f*), or any adjournment thereof at which the application is made (*g*), even if given after the commencement of the general annual licensing meeting (*h*).

Rehearing.

If a mandamus is issued to justices to rehear and determine such an application for the renewal of a licence, a new notice of opposition

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 11.

(*b*) See *Boulter* v. *Kent Justices*, [1897] A. C. 556, *per* Lord HERSCHELL, at p. 569. If the chief constable in a borough opposes a licence, even though he does so at the direction of the borough council or watch committee, he cannot get his expenses allowed out of the borough fund, at any rate when there is no surplus (*Tynemouth Corporation* v. *A.-G.*, [1899] A. C. 293; and see p. 85, *post*).

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 13 (2). It is just possible that this restriction also applies to an application for the confirmation of an ordinary removal (see *ibid.*, s. 26). As to the confirming authority, see p. 50, *post*.

(*d*) *R.* v. *Bird, Ex parte Needes*, [1898] 2 Q. B. 340.

(*e*) *Ex parte Fearn and Boucher* (1905), 69 J. P. 177, C. A.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (3).

(*g*) See *R.* v. *Howard* (1889), 23 Q. B. D. 502; *R.* v. *Anglesey Justices*, [1892] 1 Q. B. 850; *R.* v. *Altrincham, Cheshire, Justices* (1894), 11 T. L. R. 3; *R.* v. *Anglesea Justices* (1895), 65 L. J. (M. C.) 12.

(*h*) *R.* v. *Armstrong, Ex parte Duffy* (1896), 65 L. J. (M. C.) 35, *per* HAWKINS, J.

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may be given before such rehearing, and the justices have the same powers as if the case were being heard for the first time (*i*).

Consideration of objections.

126. Justices have no right, without an adjournment, to consider an objection not raised by the notice of opposition (*k*).

If a notice of opposition states that the applicant has been convicted of an offence, this is a notice of objection to his character (*l*). If it states that the house is disorderly, evidence of convictions against previous tenants of the house for offences under the Licensing Acts is admissible (*m*).

Applicant for licence under temporary authority.

127. A person who has obtained a temporary authority from justices at petty sessions to sell any intoxicating liquor (*n*), applying for a licence at the general annual licensing meeting, is not a licensed person applying for the renewal of his licence, and is not entitled to any notice of opposition (*o*).

Time.

128. The time to which the notice of opposition is calculated is the date at which the application is made (*p*).

Service.

129. Notice of opposition may be served personally or sent by post (*q*). Personal service is not necessary, and it is a question of fact for the justices in each case whether the notice came in time to the hands of the applicant (*r*).

Proof of notice.

As due service of notice of opposition is a condition precedent to giving the justices jurisdiction to hear an objection to a renewal of this kind, the objector must first prove his notice if called upon to do so (*s*).

Adjournment even if no notice given.

130. The licensing justices may, even though no notice of opposition has been given, adjourn, under their common law powers, the consideration of an application for the renewal of a licence, and, if a proper notice of opposition is served seven days before the day on which the adjourned application is heard, may then entertain objections raised by such notice (*t*). But justices cannot adjourn the hearing of an application until a date subsequent to the end of the statutory period during which the adjourned meetings can be

(*i*) *R.* v. *Howard* (1889), 23 Q. B. D. 502.

(*k*) *Whiffen* v. *Malling*, [1892] 1 Q. B. 362, C. A., *per* Lord ESHER, M.R., at p. 368, and *per* LOPES, L.J., at p. 369.

(*l*) *R.* v. *Lancaster Justices* (1891), 7 T. L. R. 428, C. A., affirming on this point the decision of the Divisional Court, reported *sub nom. Re O'Brien, R.* v. *Lancashire Justices* (1891), 64 L. T. 562; *R.* v. *Birmingham Justices* (1876), 40 J. P. 132, C. A.

(*m*) *R.* v. *Miskin Higher Justices*, [1893] 1 Q. B. 275.

(*n*) See Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88; and pp. 47 *et seq.*, *post*.

(*o*) *Price* v. *James*, [1892] 2 Q. B. 428, C. A.; *R.* v. *Pirehill North Justices* (1886), 2 T. L. R. 387, C. A.

(*p*) *R.* v. *Anglesey Justices*, [1892] 1 Q. B. 850; *R.* v. *Altrincham, Cheshire, Justices* (1894), 11 T. L. R. 3; *R.* v. *Anglesea Justices* (1895), 65 L. J. (M. C.) 12; *R.* v. *Armstrong, Ex parte Duffy* (1896), 65 L. J. (M. C.) 35; and compare p. 40, *ante*.

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 108 (1). As to service of notice, see also p. 40, *ante*.

(*r*) *Ex parte Portingell*, [1892] 1 Q. B. 15, C. A.

(*s*) *Gascoyne* v. *Risley* (1888), 36 W. R. 605.

(*t*) *R.* v. *Anglesea Justices*, *supra*.

held if notice of opposition has been duly given (*a*). If they do so adjourn, a mandamus will be granted (*a*).

The licensing justices may also, on an objection (*b*) being made, notwithstanding that no notice has been given of intention to oppose the renewal, adjourn the consideration of the renewal to a future day fixed by them (whether more or less than one month after the general annual licensing meeting) and require (for some special cause personal to the applicant (*c*)) the attendance of the holder of the licence on that day, when the case will be heard and the objection considered as if the prescribed notice had been given (*d*).

Hearing of objections.

131. An objection need not be upon oath (*e*), and need not state the ground of objection (*f*). But the objection must be taken in open court (*g*), even if the justices themselves be the objectors (*h*). It is not sufficient to object to the renewal before the justices in their private room (*i*).

Objections by justices.

132. Any one of the justices may make an objection himself, on which the justices may adjourn the hearing of the application (*k*); and the mere fact that a justice has taken the objection will not disqualify him from sitting to hear the case when it comes up for decision (*k*).

If one of the justices raises an objection to the grant to an applicant for a renewal of his licence the justices cannot decide the case without adjournment (*l*), at any rate unless the applicant waives his right to an adjournment (*m*).

Notice of adjournment to licensee.

133. If the justices, on an objection being made, adjourn the hearing to a future day, they must give the licence-holder notice

(*a*) *Webber* v. *Birkenhead Justices* (1897), 61 J. P. 664.

(*b*) The reading of a report of the head constable, which contains the passage "I respectfully ask that the renewal of [a certain beerhouse] may be withheld until the adjourned meeting" is an objection within the meaning of the section (*Hawkins* v. *Bridgwater Justices*, [1900] 2 Q. B. 382).

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (2). "Cause personal to himself" does not mean some personal misconduct. "Personal" means "individual," as distinguished from the class to which he belongs (*Sharp* v. *Wakefield*, [1891] A. C. 173, *per* Lord BRAMWELL, at p. 184). The cause is to be a cause for requiring the individual to be present, and the fact that objection was taken to the renewal of his licence would be such a cause (*Sharp* v. *Wakefield*, *supra*, *per* Lord HERSCHELL, at pp. 186, 187).

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (4).

(*e*) *R.* v. *Redditch Justices* (1885), 2 T. L. R. 193. As to the hearing of objections, notwithstanding the absence of notice of intention to oppose renewal, see p. 44, *ante*.

(*f*) *Dakin* v. *Parker*, [1894] 2 Q. B. 556, C. A.

(*g*) *R.* v. *Kingston Justices, Ex parte Davey* (1902), 86 L. T. 589.

(*h*) *R.* v. *Anglesea Justices* (1895), 65 L. J. (M. C.) 12; *R.* v. *Howard*, [1902] 2 K. B. 363, C. A.

(*i*) *R.* v. *Merthyr Tydvil Justices* (1885), 14 Q. B. D. 584; *R.* v. *Bartlett* (1885), 49 J. P. 772.

(*k*) *R.* v. *Howard*, *supra*. See *R.* v. *Farquhar* (1874), L. R. 9 Q. B. 258; *R.* v. *Eales*, *Eales* v. *Philpotts* (1880), 42 L. T. 735; *R.* v. *Merthyr Tydvil Justices*, *supra*, *per* SMITH, J., at p. 587; *Baxter* v. *Leche* (1898), 79 L. T. 138; but compare *R.* v. *Anglesea Justices*, *supra*.

(*l*) *Gascoyne* v. *Risley* (1888), 36 W. R. 605.

(*m*) *Ruddick* v. *Liverpool Justices* (1876), 42 J. P. 406, *per* HANNEN, J.

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to attend on that day. If the notice to attend does not purport to be given on behalf of the justices it is not a good notice, but the applicant may waive this point by attending and taking part in the proceedings on that day (*n*). The notice to attend may be given by the clerk to the justices or by the superintendent of police, but in either case must state that it is given by the direction of the justices sitting at the general annual licensing meeting, giving the date (*o*). If, however, an objector sends another notice to the applicant setting forth his grounds of objection more than seven days before the adjourned meeting, such notice of objection need not state that it is given by the direction of the justices (*p*).

No notice of objection after statutory adjournment.

134. Neither justices nor objector need, after a statutory adjournment on objection being made, send the licence-holder notice of the grounds of objection (*q*); but if the latter has been prejudiced by the absence of notice of the grounds of objection he may probably be entitled to a further adjournment (*r*); or if there has been no time for an adjournment within the statutory period of holding adjournments of the general annual licensing meeting (*s*), the justices may refuse to hear the objection (*t*).

Further adjournment.

If the objector gives a notice which sets forth the grounds of objection, he will be confined to the grounds set forth (*u*); at any rate unless a further adjournment is obtained.

When the application is determined on the day to which it is thus adjourned, the justices must give the applicant an opportunity of answering any evidence which may be brought against him (*v*).

Application by person other than licensee.

135. Where a renewal is applied for by a person other than the licence-holder (*a*), no notice of opposition need be given (*b*).

Reference to compensation authority.

136. Licensing justices cannot, in case of an applicant applying for the renewal of his licence, consider the question of reference to the compensation authority unless notice of opposition has been duly served or the justices have duly adjourned the case in accordance with the provisions above set out (*c*).

(*n*) *Whiffen* v. *Malling*, [1892] 1 Q. B. 362, C. A.; *Baxter* v. *Leche* (1898), 79 L. T. 138. But see *Ringland* v. *Lowndes* (1864), 17 C. B. (N. S.) 514, Ex. Ch., reversing on this point the decision in the court below (*Ringland* v. *Lowndes* (1863), 15 C. B. (N. S.) 173).

(*o*) *Whiffen* v. *Malling*, *supra*, *per* Lord ESHER, M.R., at p. 370.

(*p*) *Baxter* v. *Leche*, *supra*.

(*q*) *Ruddick* v. *Liverpool Justices* (1876), 42 J. P. 406, *per* HANNEN, J.: "No notice is to be given where the objection has been taken by the magistrates themselves"; *Baxter* v. *Leche*, *supra*.

(*r*) *Dakin* v. *Parker*, [1894] 2 Q. B. 556, C. A., *per* KAY, L.J.; *Baxter* v. *Leche*, *supra*.

(*s*) As to such statutory periods see pp. 21, 22, *ante*.

(*t*) *Baxter* v. *Leche*, *supra*; but see Licensing (Consolidation) Act (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (4).

(*u*) *Whiffen* v. *Malling*, *supra*.

(*v*) *R.* v. *Redditch Justices* (1885), 2 T. L. R. 193.

(*a*) See *Symons* v. *Wedmore*, [1894] 1 Q. B. 401; *Leeds Corporation* v. *Ryder*, [1907] A. C. 420.

(*b*) *Price* v. *James*, [1892] 2 Q. B. 428, C. A.

(*c*) *R.* v. *Tolhurst*, *Ex parte Farrell*, *R.* v. *Cox*, *Ex parte West*, [1905] 2 K. B. 478, 485.

(ii.) *At Special Sessions.*

No notice of opposition required.

137. Where an application is made for a transfer or grant of a special removal at special sessions no notice of opposition is required.

Where an application is made on behalf of the owner (*d*) no notice of opposition is required (*e*).

Part V.—Temporary Authority to sell Intoxicating Liquors.

SECT. 1.—*Excise.*

SUB-SECT. 1.—*Until next Sessions.*

Protection order.

138. Where a protection order (*f*) has been granted by a court of summary jurisdiction the like authority may be given by the proper officer of customs and excise by indorsement on the excise licence (*g*).

SUB-SECT. 2.—*Pending Appeal.*

Authority to sell pending appeal.

139. If an appeal against the refusal of licensing justices to renew a licence is duly made, and the licence expires before the determination of the appeal, the Commissioners of Customs and Excise may, by order, permit the person the renewal of whose licence is refused to carry on his business during the pendency of the appeal upon such conditions as they think just; and subject to those conditions such person may, during the continuance of the order, carry on his business as if the renewal of the justices' licence had not been refused (*h*).

SECT. 2.—*Justices.*

SUB-SECT. 1.—*Authority until next Transfer Sessions.*

Protection order.

140. In any case where the transfer of a justices' licence may be authorised, a court of summary jurisdiction may, if it thinks fit, as respects any premises situated in its division on an application made for the purpose by any person (not being a person disqualified for the purpose) to whom it is proposed to transfer a justices' licence in respect of the premises, grant to him an authority (called a protection order) to carry on business on the premises, and to sell any intoxicating liquors which may be sold

(*d*) See Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 87, and p. 49, *post.*

(*e*) *R.* v. *Moore* (1881), 7 Q. B. D. 542.

(*f*) See the text, *infra.*

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (6).

(*h*) *Ibid.*, s. 89.

SECT. 2. Justices.

on the premises under any excise licence authorised by the justices' licence (*i*).

Duration.

A protection order remains in force until the next transfer sessions, or, if an application for a transfer in respect of the premises is adjourned at those transfer sessions, until the hearing of the adjourned application and no longer (*k*).

Form.

A protection order must be authenticated by an indorsement on the licence proposed to be transferred, signed, sealed, and stamped

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by or on behalf of the justices granting it, as though it were a justices' licence, and a fee of 2*s.* 6*d.*, and no more, is payable for every such indorsement (*l*).

Hearing of application.

141. Where a court of summary jurisdiction, on an application for a protection order, is satisfied by evidence submitted to it that the licence has been lost, mislaid, or wilfully and without legal right withheld by the holder thereof, the court may receive a copy thereof certified to be a true copy under the hand of the clerk to the licensing justices by whom the licence was granted (*m*).

On an application for a protection order the court may examine all necessary parties on oath (*n*).

Notice to the police.

142. A protection order cannot be granted unless the applicant for the order has, at least one week before the holding of the court to which the application is made, served on the superintendent of police for the district the like notice as is required in the case of an application for the transfer of a licence (*o*). But in any case of urgency the notice may be dispensed with if, in the opinion of the court, such notice to the police has been given as is reasonable in the circumstances (*p*).

Position of holder of protection order.

143. Any person to whom a protection order is granted is, while the order is in force, in the same position as regards regulation, government, or control as the holder of a justices' licence (*q*).

Applications within metropolitan district.

144. Any application for a protection order with respect to premises situated in a police court division of a metropolitan police magistrate must, except within the borough of Southwark, be made to that magistrate (*r*).

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (1). The outgoing tenant is entitled, in certain circumstances, even after the court has granted a temporary authority, to sell under his licence; see *Andrews* v. *Denton*, [1897] 2 Q. B. 37.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (2), replacing the Licensing Act, 1842 (5 & 6 Vict. c. 44), s. 1.

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (3).

(*m*) *Ibid.*, s. 43 (3). This alters the law as to wilful withholding as laid down in *Ex parte Phillips* (1877), 42 J. P. 279.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (4).

(*o*) As to these requirements, see p. 42, *ante*.

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 88 (5).

(*q*) *Ibid.*, s. 88 (7).

(*r*) *Ibid.*, s. 88 (8).

SUB-SECT. 2.—*Licence to sell pending Appeal from Conviction.*

Temporary licence pending appeal.

145. Where a justices' licence is forfeited on or in pursuance of a conviction for an offence, and an appeal is duly made against the conviction, the court by whom the conviction was made may, by order, grant a temporary licence to be in force during the pendency of the appeal upon such conditions as it thinks just (*s*).

SUB-SECT. 3.—*Temporary Authority to Owner.*

Protection order to owner.

146. Where any licensed person is convicted for the first time of any of the following offences (*t*):—(1) Making an internal communication between his licensed premises and any unlicensed premises; (2) forging a justices' licence or making use of a forged justices' licence; (3) selling spirits without licence; (4) any felony; and in consequence either becomes personally disqualified or has his licence forfeited, or where a justices' on-licence for a term is forfeited (*a*), or where a justices' licence is forfeited on account of alterations being made in the licensed premises without the consent of the licensing justices (*a*):—any owner of the premises, or any person on his behalf, may apply to a court of summary jurisdiction for a protection order, and the court may in its discretion grant to him such an order in the same manner and subject to the same provisions in and subject to which it may grant such an order to a proposed transferee pending a proposed transfer (*b*).

Procedure.

As an application by or on behalf of an owner for a temporary authority in these cases is made to a court of summary jurisdiction, the court has power to state a special case on a point of law for the opinion of the High Court, and must do so if requested in the requisite manner, unless it gives a certificate that the application for a case is frivolous (*c*).

SUB-SECT. 4.—*Continuance of Sale by Heirs etc.*

Heirs, executors etc.

147. If a holder of a justices' licence dies before the expiration of his licence, his heirs (*d*), executors, administrators or assigns, or if a licensed person is adjudged bankrupt, or his affairs are liquidated by arrangement before the expiration of his licence, the trustee (*e*), may sell and expose for sale any

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 90. As to the discretion of the court to refuse such temporary licence, see *R.* v. *Kearns, Ex parte Strickland* (1896), 60 J. P. 139.

(*t*) Whether the conviction be for the first or second time, provided that the licence is for the first time forfeited (*Ex parte Flinn & Sons*, [1899] 2 Q. B. 154). For offences generally, see pp. 107 *et seq.*, *post*.

(*a*) Under the provisions of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*b*) *Ibid.*, s. 87. As to the granting of a protection order to a proposed transferee, see p. 47, *ante*.

(*c*) *R.* v. *Bell, Ex parte Flinn & Sons* (1899), 15 T. L. R. 487.

(*d*) A person under twenty-one years of age (being an heir) is not disqualified. The justices should determine, in the event of the matter coming before them, whether he is of an age competent to conduct the business (*Rose* v. *Frogley* (1893), 62 L. J. (M. C.) 181).

(*e*) Where a licensed person, who has covenanted to permit his landlord to

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intoxicating liquor, if the sale or exposure for sale is made on the premises specified in the licence and takes place prior to the next transfer sessions, or, if the next transfer sessions are held within fourteen days next after the death of the licensed person or the appointment of a trustee in the case of his bankruptcy or the liquidation of his affairs by arrangement, if the sale is prior to the next transfer sessions but one (*f*).

The heir, executor, administrator or assign, or the trustee in bankruptcy, carrying on business under this proviso is, for the period limited, a licensed person (*g*).

Part VI.—Confirmation of Justices' Licences.

SECT. 1.—*What Licences require Confirmation.*

Confirmation.

148. Neither the grant by the licensing justices of a new licence nor of an ordinary removal of a justices' licence, whether for consumption on or off the premises, is valid unless it is confirmed by the confirming authority (*h*).

SECT. 2.—*The Confirming Authority.*

SUB-SECT. 1.—*In Counties.*

Confirming authority. In counties.

149. As regards a licensing district being a petty sessional division of a county, the confirming authority is the court of quarter sessions (*i*). But the confirming authority of a county may delegate any of its powers and duties to a committee appointed in accordance with rules made by it, and must so delegate its power of confirming the grant of a new justices' licence (*k*). It may make rules to be approved by a Secretary of State for the mode of appointment of those committees and for the number, quorum, and (so far as procedure is not otherwise provided for) the procedure of those committees (*l*).

re-enter on his bankruptcy, and to assign the residue of his licence to his landlord on the determination of the lease, becomes bankrupt, the licence must be handed over to the landlord, not to the trustee in bankruptcy (*Re Britnor, Ex parte Royle* (1877), 46 L. J. (BCY.) 85).

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65 (7). This proviso does not, however, cover the case of a new tenant who, when the licence-holder has left the premises during the existence of his licence and no one knows his whereabouts, enters and sells intoxicating liquors for his own benefit, even though the wife of the licence-holder has handed such new tenant the licence and given him a written authority to occupy the premises and sell on her behalf (*Owen* v. *Langford* (1891), 55 J. P. 484). "Any" intoxicating liquor must mean any intoxicating liquor of a kind covered by the justices' licence.

(*g*) *M'Donald* v. *Hughes*, [1902] 1 K. B. 94.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 12 (2) and s. 26 (last paragraph).

(*i*) *Ibid.*, ss. 2 (2) (b), 110.

(*k*) *Ibid.*, s. 6 (2).

(*l*) *Ibid.*, s. 6 (3).

In a county the same committee may be appointed for the purpose of the exercise of the powers and duties of quarter sessions, both as compensation authority and as confirming authority (*m*).

SUB-SECT. 2.—*In Boroughs.*

In boroughs.

150. In boroughs (*n*) having during the last fortnight in January in each year (*o*) ten or more justices, whether disqualified from acting under the Licensing (Consolidation) Act, 1910 (*p*), or not, the confirming authority consists of the whole body of borough justices (*q*).

Joint committee.

In boroughs not having ten such justices at the said time, the confirming authority is a joint committee (*q*) consisting of three justices of the county in which the borough is situated and three justices of the borough (*r*), or if there are not three qualified borough justices, then the deficiency is to be supplied by qualified county justices to be appointed by the confirming authority (*s*).

Appointment.

The three county justices are appointed by the confirming authority of the county, and the same county justices may be appointed members of more than one such joint committee (*t*). The three borough justices are appointed by the borough justices (*a*).

Casual vacancy.

A casual vacancy in the joint committee arising from death or resignation or otherwise may be filled up by the justices by whom the member whose place is vacated was appointed (*b*).

Quorum.

Five members form a quorum (*c*).

Chairman.

The senior justice on the joint committee present at any meeting is the chairman of the meeting, and in case of equal division of votes has a second vote (*d*).

No objection on ground of disqualification.

151. No objection can be made to any licence granted or confirmed by the borough justices or by a borough licensing committee or joint committee on the ground that the justices or committee of justices were not qualified to make the grant or confirmation (*e*).

Variation of conditions of licence.

152. On the confirmation of a new justices' on-licence, the confirming authority may, with the consent of the justices authorised

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 6 (4). As to the compensation authority, see p. 68, *post*.

(*n*) The City of London is for this purpose deemed a county borough (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2 (4)).

(*o*) *Ibid.*, ss. 2 (3), 3 (1).

(*p*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*q*) *Ibid.*, s. 2 (3) (b).

(*r*) *Ibid.*, s. 4 (1).

(*s*) *Ibid.*, s. 4 (4).

(*t*) *Ibid.*, s. 4 (2).

(*a*) *Ibid.*, s. 4 (3).

(*b*) *Ibid.*, s. 4 (5).

(*c*) *Ibid.*, s. 4 (6).

(*d*) *Ibid.*, s. 4 (7). Where the confirming authority is not a joint committee the chairman has not a second vote.

(*e*) *Ibid.*, s. 7 (2). As to qualifications and disqualifications of justices, see pp. 53 *et seq.*, *post*.

SECT. 2. The Confirming Authority.

to grant the licence, vary any conditions attached to the licence (*f*). But if these justices decline to give their consent to the variation the licence is not confirmed (*g*).

SECT. 3.—*Procedure of Confirming Authority.*

Procedure.

153. The confirming authority must make rules as to the proceedings to be adopted for confirmation of new justices' licences, and as to the costs to be incurred in such proceedings and the person by whom those costs are to be paid (*h*).

Powers.

The powers of the confirming authority as to the granting and refusing of applications appear to be the same as those of the justices who hear the applications in the first instance (*i*).

Hearing of application.

An application for the confirmation of the grant of a licence cannot be heard until twenty-one days at least have expired since the date of the grant of the licence (*k*).

Who may appear.

A person who has appeared before the licensing justices and opposed the grant of a new justices' licence, and no other person, may appear and oppose the confirmation of the grant by the confirming authority (*l*).

A rule directing that any person who desires to oppose the confirmation of a licence must, within seven days after the grant thereof, give notice in writing to the applicant or to the clerk to the justices of his intention to oppose such confirmation is *ultra vires* and void (*m*).

Evidence.

Additional evidence not laid before the licensing justices may be laid before the confirming authority.

Evidence given before the confirming authority must, it seems, be given upon oath (*n*).

Costs.

The confirming authority may award such costs as it thinks just to the party who succeeds in the proceedings before it, and costs so awarded may be recovered in the same manner as costs awarded on the dismissal of an information or complaint under the Summary Jurisdiction Acts (*o*).

The confirming authority must with respect to new justices' on-licences, in each year make such returns to the Secretary of State as he may require (*p*).

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14 (5).

(*g*) *R.* v. *Jackson* (1906), 96 L. T. 77, C. A.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 13 (4).

(*i*) *Re Annandale District, Cumberland, Licensing Committee* (1873), 37 J. P. 85; *R.* v. *Middlesex Licensing Committee, Ex parte Lindsay* (1878), 42 J. P. 469. But as to notices, see *R.* v. *Pownall*, [1893] 2 Q. B. 158, *per* WRIGHT, J., at pp. 163, 164. As to the powers of justices on hearing applications in the first instance, see pp. 21 *et seq.*, *ante*.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 13 (1).

(*l*) *Ibid.*, s. 13 (2).

(*m*) *R.* v. *Bird, Ex parte Needes*, [1898] 2 Q. B. 340.

(*n*) *R.* v. *Jackson* (1906), 71 J. P. 25, confirmed on appeal on another point, *ibid.*, C. A.

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 13 (3). As to such costs, see title MAGISTRATES. For an enumeration of the Summary Jurisdiction Acts, see note (*r*), p. 87, *post*.

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 46.

Part VII.—Qualifications and Disqualifications.

SECT. 1.—*Disqualification of Justices.*

SECT. 1. Disqualification of Justices.

Disqualification in respect of business.

154. No justice can act for any licensing purpose (*q*), or be appointed a member of any committee for licensing purposes (*r*), who is, or is in partnership with, or holds any share in any company which is, a common brewer, distiller, maker of malt for sale, or retailer of malt or of any intoxicating liquor, in the licensing district or in the district or districts adjoining to that in which such justice usually acts (*s*).

Offences which they may try.

But this provision does not prevent a justice from adjudicating in the case of persons charged with the offences of being found drunk in any highway or other public place, whether a building or not, or on any licensed premises, or of being guilty while drunk of riotous or disorderly conduct, or of being drunk while in charge in a highway or other public place of any carriage, horse, cattle, or steam engine, or of being drunk when in possession of loaded fire-arms, or of being drunk in a highway or other public place while having the charge of a child apparently under the age of seven years (*a*).

Interest in railway company.

155. A justice is not disqualified from acting for licensing purposes by reason only of his being interested in a railway company which is a retailer of intoxicating liquor (*b*).

Disqualification in respect of ownership.

156. No justice can act for any licensing purpose (*c*), in respect of any premises in the profits of which he is interested, or of which he is wholly or partly the owner, lessee, or occupier, or for the owner, lessee, or occupier of which he is manager or agent (*d*); unless his interest in such premises or the profits thereof is a legal interest only, and not a beneficial interest (*e*).

Penalty.

157. Any disqualified justice (*f*) who knowingly acts as a justice for any of the purposes for which he is disqualified, is liable in respect of each offence to a fine not exceeding £100, to be recovered

(*q*) That is, for any purpose under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*r*) That is, for any committee for the purposes of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*s*) *Ibid.*, s. 40 (1).

(*a*) *Ibid.*; and see Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12; Licensing Act, 1902 (2 Edw. 7, c. 28), s. 2.

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 40 (5).

(*c*) That is, any purpose under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*d*) *Ibid.*, s. 40 (2).

(*e*) *Ibid.*

(*f*) That is, any justice declared by the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), not to be qualified to act thereunder.

SECT. 1. Disqualification of Justices.

by action in the High Court (*g*); but he is not liable to a fine in respect of more than one such offence committed by him before the institution of any proceedings for the recovery of the fine (*h*).

A justice whose attention has been called to the illegality of his acting previously to his so acting, acts knowingly, even though from a false interpretation of the law he believes that he is justified in doing the act (*i*). But no act done by any disqualified justice is on that account invalid (*k*).

General interest and bias.

158. A justice who is an interested party and has a real bias must not take part in granting or refusing a licence (*l*), or in confirming or refusing to confirm it (*m*).

A disqualified justice cannot vote at a committee of justices for the election of a licensing committee (*n*).

SECT. 2.—*Disqualification of Justices' Clerks.*

Disqualification. Justices' clerks.

159. No clerk of licensing justices may himself, or by his partner, or clerk, conduct or act as solicitor or agent for any person, in any application for or in respect of a justices' licence or any other proceedings whatsoever under the Licensing Acts at any general annual licensing meeting, transfer sessions, or petty sessions held for the district for which he is the clerk, except so far as relates to the preparation of notices or forms, and any person contravening this provision is liable in respect of each offence to a fine not exceeding £100 (*o*).

Penalty.

SECT. 3.—*Qualified and Disqualified Persons.*

SUB-SECT. 1.—*As regards Excise Licences.*

Sheriff's officer.

160. No excise licence to sell beer, ale and porter by retail, or to sell wine to be consumed on the premises, can be granted to any person being a sheriff's officer or officer executing the legal process of any court of justice; and any licence granted to any such person is void to all intents and purposes (*p*).

Person disqualified by conviction.

161. Every person disabled by any conviction from holding or having a justices' publican's licence is also by such conviction disabled from taking out or having any excise licence to sell, and

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 40 (4). For an example of an action for a penalty under this provision, see *A.-G.* v. *Ball* (1902), 66 J. P. 553.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 40 (4).

(*i*) *A.-G.* v. *Willett* (1896), 60 J. P. 643.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 40 (3).

(*l*) *R.* v. *Kent Justices* (1880), 44 J. P. 298; *R.* v. *Fraser* (1893), 9 T. L. R. 613.

(*m*) *R.* v. *Ferguson* (1890), 54 J. P. 101.

(*n*) *A.-G.* v. *Willett, supra.*

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 49.

(*p*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 2; Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 8; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. VI.

from selling beer, cider, or perry by retail in any manner whatsoever under any excise licence; and if any such person, after such conviction, takes out or has any excise licence for any such purpose, it is absolutely null and void; and every person, who, after such conviction, sells any beer, cider, or perry by retail in any manner whatsoever, incurs the penalty for so doing without licence (*q*); and in all such cases in the prosecution for the recovery of such penalty a certificate from the clerk of the peace (*r*) of such conviction is on the trial in such prosecution legal evidence thereof. This certificate the clerk of the peace (*r*) is authorised and required, within one week after such conviction has been returned to his office, to deliver to the collector of excise, or other person authorised to grant excise licences within the district or place in which the conviction has taken place, setting forth a copy of such conviction, signed by himself, for which he must neither demand nor receive fee or reward. If any such clerk neglects or omits to deliver such certificate he forfeits for every such offence the sum of £10 (*s*).

Proof of conviction.

162. Every person who is (*t*) lawfully convicted of felony, or of selling spirits without licence (*a*), is for ever thereafter disqualified from selling beer or cider by retail, and no excise licence to sell beer or cider by retail can be granted to any person who has been so convicted. If any person, after having been so convicted, takes out or has any excise licence to sell beer or cider by retail, it is void to all intents and purposes (*b*).

Person disqualified cannot sell beer or cider by retail;

Every person who is convicted of felony or of selling spirits without licence (*c*) is for ever thereafter disqualified from selling wine by retail, and no excise licence to sell wine by retail can be granted to any person who has been so convicted. If any person, after having been so convicted, takes out or has any licence to sell wine by retail, it is void to all intents and purposes (*d*).

nor wine by retail.

163. It is not necessary that the premises should be a dwelling-house or that the licence-holder should be the real resident holder and occupier of the premises (*e*).

(*q*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 22.

(*r*) Or person acting as such.

(*s*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 22.

(*t*) After 7th August, 1840.

(*a*) That is, apparently, without excise licence. See Excise Licences Act, 1825 (6 Geo. 4, c. 81), ss. 26, 27.

(*b*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 7.

(*c*) That is, apparently, without excise licence. See Excise Licences Act, 1825 (6 Geo. 4, c. 81), ss. 26, 27.

(*d*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 22; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. VI.

(*e*) Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), s. 2. This renders unimportant decisions in *Munn* v. *Southall* (1862), 7 L. T. 356 (as to keeping an eating house); *R.* v. *De Rutzen* (1875), 1 Q. B. D. 55 (as to an additional retail licence held by holder of beer-dealer's licence); *R.* v. *Allmey* (1871), 35 J. P. 534 (as to a railway arch); *R.* v. *Manchester Justices*, [1899] 1 Q. B. 571; *Nix* v. *Nottingham Justices*, [1899] 2 Q. B. 294, C. A. (case of a manager).

SECT. 3. SUB-SECT. 2.—*As regards Justices' Licences.*

Qualified and Disqualified Persons.

Licence granted to disqualified person.

164. No justices' licence can be granted (whether it be a new licence, renewal, or transfer) to any disqualified person during the continuance of the disqualification, and no justices' licence can be granted in respect of or removed to any disqualified premises during the continuance of such disqualification. A justices' licence held by a person so disqualified or attached to premises so disqualified is void (*f*).

Disqualified persons.

Disqualified persons are (1) any sheriff's officer, or officer executing the legal process of any court of justice in England or Wales, while he is such officer; (2) any person convicted of felony (*g*), this disqualification continuing for the life of that person (*h*); (3) any person convicted of forging a justices' licence or making use of a forged justices' licence, knowing it to have been forged, this disqualification continuing for the life of that person; (4) any holder of a justices' licence convicted (*i*) of permitting his premises to be used as a brothel, this disqualification continuing for the life of that person; (5) any person ordered to be disqualified (*k*) on conviction for selling intoxicating liquor without a justices' licence, this disqualification continuing for the time mentioned in the order (*l*); (6) any person who by any other statutory disqualification is disqualified (*l*).

Disqualification on second conviction for certain offences.

165. Any person licensed for the sale of intoxicating liquors (*m*), or for keeping any place of public entertainment or public resort who has been convicted a second time for certain offences under the Prevention of Crimes Act, 1871 (*n*), is disqualified for a period of two years from receiving any such licence; and any licence granted in contravention of this provision is void (*a*).

Any person who is a second time convicted (*b*) of selling or suffering to be sold by retail ale or beer or any other excisable liquors without being duly licensed (*c*) so to do is rendered

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 34.

(*g*) Whether before or after 1870 (*R.* v. *Vine* (1875), L. R. 10 Q. B. 195). See the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 14, now repealed and re-enacted by the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 35, but the wording is slightly different, "during the lifetime" being substituted for "for ever."

(*h*) Or until free pardon (*Hay* v. *London* (*Tower Division*) *Justices* (1890), 24 Q. B. D. 561).

(*i*) Whether under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), or otherwise.

(*k*) Under the provision contained in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65.

(*l*) *Ibid.*, s. 35; see *e.g.*, *ibid.*, s. 65.

(*m*) It is not clear whether this means licensed by justices or licensed by the excise authorities.

(*n*) Namely, any offence under the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10. The offences are for harbouring thieves etc.; see p. 135, *post*.

(*a*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10.

(*b*) Under the Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 1.

(*c*) That is, apparently, licensed by justices; the Sale of Beer Act, 1795 (35 Geo. 3, c. 113), being a police law and not a revenue law (*R.* v. *Hanson* (1821), 4 B. & Ald. 519, *per* ABBOTT, C.J., at p. 521).

incapable of being thereafter licensed to keep an alehouse or to sell ale or beer or other excisable liquors by retail (*d*).

But where an applicant for an order sanctioning the removal of a justices' licence to sell intoxicating liquors has been previously convicted of selling spirits without an excise licence, the justices' licence to sell intoxicating liquors afterwards granted to him upon such application is not invalid and will not be quashed by the High Court (*e*).

Grant to dead man.

166. A justices' licence granted nominally to a man who is dead is null and void, even if obtained by his executors (*f*).

General discretion.

167. Subject to the above disqualifications justices may grant a licence to any person whom they think fit and proper (*g*).

SECT. 4.—*Qualified and Disqualified Premises.*

SUB-SECT. 1.—*As regards Excise Licences.*

Qualification of premises.

168. No excise licence to sell beer or cider by retail (*h*) can be granted in respect of any dwelling-house which is not, with the premises occupied therewith, of the annual value (*i*) of (1) £15 at the least if situated in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish or place, the population of which according to the last parliamentary census (*k*) exceeds 10,000, or within one mile, measured by the nearest public street or path from any polling place used at the last election for any town having the like population, and returning a member or members of Parliament (*l*); (2) £11, if situated within any city, cinque port, town corporate, parish or place, the population of which, according to such last parliamentary census (*k*), exceeds 2,500, and does not exceed 10,000, or within one mile, measured as above mentioned, from any polling place used at the last election for any town having the like population as last aforesaid, and returning a member or members of Parliament (*l*); (3) £8 if situated

(*d*) Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 1.

(*e*) *R.* v. *Roper, Ex parte Price* (1894), 63 L. J. (M. C.) 68.

(*f*) *Cowles* v. *Gale* (1871), 7 Ch. App. 12.

(*g*) As to the legality of a borough custom that only a burgess may carry on the business of an alehouse-keeper, see *Leicester Corporation* v. *Burgess* (1833), 2 Nev. & M. (K. B.) 131, and title CUSTOM AND USAGES, Vol. X., p. 247, note (*i*).

(*h*) Under the Beerhouse Acts, 1830 (11 Geo. 4 & 1 Will. 4, c. 64); 1834 (4 & 5 Will. 4, c. 85); and 1840 (3 & 4 Vict. c. 61).

(*i*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 46, *ad fin.* Formerly (under the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1) "rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate on a rent or annual value of" etc. Under this enactment it was held that one house partly in one parish and partly in another and rated in each in a sum of less than the qualifying sum (though at more than the qualifying sum when both taken together) was not qualified (*Jennings* v. *Manchester City Justices* (1870), 22 L. T. 412).

(*k*) See *Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446, C. A. The last census was taken on 2nd April, 1911 (see Census (Great Britain) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 27), s. 1).

(*l*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1. Extra parochial places are provided for in s. 4 (*ibid.*).

SECT. 4. Qualified and Disqualified Premises.

elsewhere, and every licence granted contrary to these provisions is null and void (*m*).

Exemption with regard to renewals.

169. But this does not prevent a person from obtaining, at the expiration of his existing licence, a renewed licence in respect of any house in which he was on the 7th August, 1840, duly licensed to retail beer or cider (*n*), notwithstanding such house may not be of the annual value (*o*) so prescribed; and the officers of excise duly authorised to grant licences may renew and continue to grant licences to such person (being in other respects properly qualified), so long as such person continues to be the real resident holder and occupier of the same house (*p*).

Dwelling-house communicating with shop.

170. If the dwelling-house in respect of which the licence is sought is occupied with and communicates with a shop, and the dwelling-house and shop together are of the requisite annual value, this is sufficient, even though other articles besides intoxicants are sold in the shop (*q*).

Areas which must be considered.

171. If a parish is part of a city, cinque port, or town corporate, or if a parish contains several townships or hamlets, or collections of houses which have acquired separate names, then the population of the larger area must be considered (*r*). So, if part of a parish is within a borough, the population of the whole parish, and not merely the part outside the borough, is to be considered (*s*); but if the house is situated in a collection of houses which has no local rights peculiar to itself, but has received a separate name, and such collection of houses comprises parts of several townships, the whole population of such collection of houses is to be considered (*t*).

Excise wine licence.

172. No excise licence to sell foreign wine by retail to be consumed on the premises can be granted for any refreshment house, which with the premises belonging thereto and occupied therewith is under the annual value (*u*) of (1) £10, or (2) £20 if situated in any city, borough, town, or place containing a population exceeding 10,000 according to the last parliamentary census; and every licence granted contrary to the provisions is void to all intents and purposes (*a*).

(*m*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1. Extra parochial places are provided for in s. 4 (*ibid.*).

(*n*) Under the Beerhouse Acts, 1830 (11 Geo. 4 & 1 Will. 4, c. 64) or 1834 (4 & 5 Will. 4, c. 85).

(*o*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 46, *ad fin.*

(*p*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 18.

(*q*) *Garetty* v. *Potts* (1870), L. R. 6 Q. B. 86.

(*r*) *Smith* v. *Redding* (1866), L. R. 1 Q. B. 489; *Washington* v. *Scott* (1865), 6 B. & S. 617; *Preston* v. *Buckley* (1870), L. R. 5 Q. B. 391; *Rice* v. *Slee* (1872), L. R. 7 C. P. 378.

(*s*) *Windsor* v. *Jeffery* (1866), 6 B. & S. 628.

(*t*) *R.* v. *Charlesworth* (1851), 20 L. J. (M. C.) 181.

(*u*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 46, *ad fin.*

(*a*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 8. As to last census, see *Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446, C. A., and note (*k*), p. 57, *ante*. As to refreshment houses, see pp. 92, 93, *post*.

Licence to disqualified premises void.

Disqualified premises.

173. A justices' licence cannot be granted in respect of, or removed to, any premises which are disqualified premises, during the continuance of the disqualification, and a justices' licence attached to disqualified premises is void (*b*).

Disqualified premises are premises (1) in respect of which the justices' licences of two persons (being persons neither of whom held a justices' licence in respect of the premises on the 10th August, 1872) are forfeited within two years, the disqualification to continue for one year from the date of the last forfeiture; and (2) in respect of which by any statute (*c*) a justices' licence cannot be granted (*d*).

Disqualification in respect of second conviction for certain offences.

174. Where two convictions for certain offences under the Prevention of Crimes Act, 1871 (*e*), have taken place within a period of three years in respect of the same premises, whether the persons convicted were or were not the same, the court must direct that for a term not exceeding one year from the date of the last of such convictions no licence for the sale of any intoxicating liquors, or for keeping any place of public entertainment or public resort, shall be granted to any person whatever in respect of such premises; and any licence granted in contravention of this provision is void (*f*).

Notice of disqualification to owner of premises.

175. In any case where the conviction of the holder of a licence involves the disqualification of the licensed premises, the court before whom the conviction takes place must cause notice of the disqualification to be served on any registered owner of the premises if that owner is not the occupier (*g*).

Requirements as to annual value in respect of on-licence.

176. Premises to which on the 10th August, 1872, a justices' on-licence was not attached are not qualified to receive a justices' on-licence unless (1) the premises are of the annual value of not less than (i.) £50, if situated within the administrative county of London, or within the four-mile radius of Charing Cross, or within any town containing a population of not less than 100,000; or if the licence is not a licence for the sale of spirits, £30; and (ii.) £30, if situated elsewhere and within a town containing a population of not less than 10,000, or, if the licence is not a licence for the sale of spirits, £20; and (iii.) £15, if situated elsewhere than as aforesaid, or, if the licence is not a licence for the sale of spirits, £12; and (2) the premises are, in the opinion of the licensing justices, structurally adapted to the class of licence

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 34.

(*c*) Other than the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*d*) *Ibid.*, s. 36.

(*e*) 34 & 35 Vict. c. 112, s. 10. See p. 135, *post.*

(*f*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10. It is not clear whether a justices' licence or an excise licence is here intended. The offences are for harbouring thieves etc. See p. 135, *post.*

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 86 (2).

SECT. 4. Qualified and Disqualified Premises.

which is required, and in particular unless the house contains, exclusive of the rooms occupied by the inmates thereof, if the licence authorises the sale of spirits, two rooms, and if the licence does not authorise the sale of spirits, one room, for the accommodation of the public (*h*).

Railway refreshment rooms are excepted from the above requirements as to annual value (*i*).

Requirements as to annual value in respect of premises licensed for sale of beer or cider on 10th August, 1872.

Premises to which on the 10th August, 1872, a justices' on-licence for the sale of beer or cider alone was attached, are not qualified to receive a justices' on-licence unless they are of the annual value of (1) £15, if situated in the administrative county of London, or within any town containing a population exceeding 10,000, or within a mile, to be measured by the nearest public street or path, from any polling place used at the last election for any town having a like population and returning a member of Parliament; and (2) £11, if situated in any town or parish the population of which exceeds 2,500 but does not exceed 10,000, or within a mile, to be measured by the nearest public street or path, from any polling place used at the last election for any town having the like population and returning a member of Parliament; and (3) £8, if situated elsewhere than as aforesaid (*j*).

Refreshment houses with wine on-licence.

Premises which on the 10th August, 1872, were refreshment houses to which was attached a justices' on-licence to sell wine by retail are not qualified to receive a justices' on-licence unless they are of the annual value of (1) £20, if the house is situated in any town containing a population exceeding 10,000; and (2) £10, if the house is situated elsewhere (*k*).

Application to premises licence of which has not been continuous.

These provisions apply to premises so licensed on the 10th August, 1872, even if there has been a break of two days in the continuity of the licence since the 10th August, 1872 (*l*), and apparently even if the break is for a longer period (*m*).

Exemptions from valuation requirements.

177. Fully-licensed premises to which a justices' licence was attached on the 10th August, 1872, are exempt from the necessity of any valuation qualification (*n*).

Premises in respect of which licences are held for the sale by retail of liqueurs, spirits, wine, or sweets for consumption off the premises, are not subject to any valuation qualification (*o*).

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 37 (1), (2), Sched. V., Part I.

(*i*) *Ibid.*, s. 37 (3).

(*j*) *Ibid.*, s. 37 (2), Sched. V., Part II., 1 (a), (b), (c).

(*k*) *Ibid.*, s. 37, Sched. V., Part II., (2). As to what is a refreshment house, see Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 6; *Taylor* v. *Oram* (1862), 1 H. & C. 370; *Howes* v. *Inland Revenue Board* (1876), 1 Ex. D. 385, C. A.; *Muir* v. *Keay* (1875), L. R. 10 Q. B. 594; *Kelleway* v. *Macdougal* (1881), 45 J. P. 207; *Munn* v. *Southall* (1862), 7 L. T. 356; and see p. 92, *post*.

(*l*) *Igoe* v. *Shann*, [1903] A. C. 320.

(*m*) See *Igoe* v. *Shann*, *supra*, *per* Lord HALSBURY, L.C., at p. 323.

(*n*) *R.* v. *Mann* (1873), L. R. 8 Q. B. 235.

(*o*) *R.* v. *Morison* (1891), 55 J. P. 87; *R.* v. *Bedwelty* (*Monmouthshire*) *Licensing Justices* (1874), 38 J. P. 807.

178. Premises are not qualified to receive a justices' off-licence for the sale of beer or cider unless they are of the annual value above mentioned required for premises to which on the 10th August, 1872, a justices' on-licence for the sale of beer or cider was attached (*p*).

Disqualification in respect of off-licence.

But no annual value is required in the case of a justices' off-licence granted to a beer-dealer by way of renewal from time to time of a justices' off-licence for the sale of beer which was in force on the 14th July, 1870, and was then held as a beer-dealer's additional licence (*q*).

Extent of premises.

179. "Premises" in relation to the value of licensed premises includes any offices, courts, yards, and gardens occupied together with the house in which the liquor is sold, except any such offices, courts, yards, or gardens as are proved to the satisfaction of the Commissioners of Customs and Excise to be used for any trade or business distinct from any trade or business carried on upon the premises by the licence-holder (*r*).

How population ascertained.

180. The population must be ascertained according to the last published census for the time being (*s*).

What is the annual value.

181. The annual value of premises for licensing purposes is the annual rent which a tenant might be reasonably expected, taking one year with another, to pay for the premises, if he undertook to pay all tenant's rates and taxes and tithe commutation rent-charge (if any), and if the landlord undertook to bear the cost of the repairs and insurance and other expenses (if any) necessary to maintain the premises in a state to command the said rent, and if no licence were granted in respect thereof; but no land shall be included in such premises other than any pleasure grounds or flower or kitchen garden, yard, or curtilage, usually held and occupied and used by the persons residing in and frequenting the house (*t*).

Means of ascertaining annual value.

The value is the value at the time of hearing the application, whether that be at the general annual licensing meeting or at an adjourned meeting (*u*).

The licensing justices are to take such means as may seem to them best for ascertaining the annual value of any premises, and

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 38, and Sched. V., Part III.; *R.* v. *Bury Justices* (1879), 43 J. P. 236. See *R.* v. *Cumberland Justices* (1881), 8 Q. B. D. 369. As to the annual value referred to, see p. 60, *ante*.

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 38.

(*r*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 52.

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 109; and see note (*k*), p. 57, *ante*.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 39 (2); compare *Baker* v. *Marsh* (1854), 19 J. P. 117. Curtilage may include a piece of vacant ground in front of a public-house, not fenced off from the street (*Marson* v. *London, Chatham and Dover Rail. Co.* (1868), L. R. 6 Eq. 101). But an orchard behind a dwelling-house and its outhouses is not within the curtilage (*Asquith* v. *Griffin* (1884), 48 J. P. 724).

(*u*) *R.* v. *Montagu* (1884), 49 J. P. 55.

SECT. 4. Qualified and Disqualified Premises.

may, if they think fit, order a valuation thereof to be made by a competent person appointed by them for the purpose, and may order the costs of the valuation to be paid by the applicant for a licence (*a*).

Part VIII.—Discretion to Grant or Refuse Licences.

SECT. 1.—*Excise Licences.*

Discretion of excise authorities.

182. There does not appear to be any discretion vested in the excise authorities as to the persons to whom excise licences shall be granted, every one being apparently entitled to an excise licence provided that he complies with all the statutory requirements and is not the subject of any statutory disqualification.

SECT. 2.—*Justices' Licences.*

SUB-SECT. 1.—*Absolute Discretion.*

Absolute discretion of justices.

183. There is an absolute discretion, except in one case (*b*), to refuse the grant of a justices' licence (whether a new licence, renewal, transfer, or special removal), or an order sanctioning the ordinary removal of a licence to sell intoxicating liquor by retail, whether it be for consumption on or off the premises (*c*); but in some cases the power to refuse a renewal or a transfer of a licence is vested in a committee of quarter sessions instead of in the justices acting for the licensing district (*d*).

Exercise of discretion.

This absolute discretion must be exercised according to law, and not in an arbitrary manner (*e*). But justices are not limited as to the kinds of objection they may make (*f*). A licence may be refused on the ground that there are already enough licensed houses in the district (*g*), or that the house is too far removed from police supervision (*h*), or that the house has been closed for some months (*i*), or is frequented by prostitutes (*k*), or is

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 39 (1).
(*b*) See p. 63, *post*.
(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 9, 26; *Ex parte Bendall* (1877), 42 J. P. 88; *R.* v. *Smith* (1878), 48 L. J. (M. C.) 38; *Ex parte Minnett* (1884), 51 J. P. 84; *R.* v. *Kay* (1882), 10 Q. B. D. 213.
(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 19.
(*e*) *Sharp* v. *Wakefield*, [1891] A. C. 173, *per* Lord HALSBURY, L.C., at p. 179; compare *R.* v. *Boteler* (1864), 4 B. & S. 959; *Rooke's Case* (1598), 5 Co. Rep. 99 b, 100 a.
(*f*) *Griffiths* v. *Lancashire Justices* (1887), 3 T. L. R. 672, *per* WILLS, J.
(*g*) *R.* v. *Lancashire Justices* (1870), L. R. 6 Q. B. 97; *R.* v. *Smith* (1878), 48 L. J. (M. C.) 38.
(*h*) *Sharp* v. *Wakefield*, *supra*; see, however, *R.* v. *Sylvester* (1862), 2 B. & S. 322.
(*i*) *Griffiths* v. *Lancashire Justices*, *supra*.
(*k*) *Sharp* v. *Hughes* (1893), 57 J. P. 104.

of a disorderly character (*l*); and the renewal of a licence may be refused on the ground that the house is of a disorderly character, even though the same objection has been taken at a previous transfer sessions, and the transfer nevertheless granted (*l*).

Improper exercise of discretion.

But justices must exercise their discretion in each case that comes before them, and cannot properly come to a resolution beforehand with regard to all applications of a particular class, for example, that they will refuse all new licences (*m*), or that they will refuse all licences for houses where prostitutes obtain refreshments (*n*), or that they will refuse a licence to everyone who does not agree to take out an excise licence for the sale of spirits (*o*).

Proceedings against justices.

No action lies against justices for the refusal to grant a licence (*p*), though criminal proceedings may be taken on account either of the granting or of the refusal of a licence if justices act corruptly (*q*).

SUB-SECT. 2.—*Limited Discretion.*

Limited discretion.

184. Licensing justices cannot refuse to an applicant the renewal of a justice's off-licence for the sale of wine, spirits, liqueurs, sweets, or cider, which was in force and held by the applicant on the 25th June, 1902, including any licences granted by way of renewal thereof from time to time to the applicant, except on one or more of the following grounds (*r*):—

Grounds for exercise of discretion.

(1) That the applicant has failed to produce satisfactory evidence of good character;

(2) That the house or shop in respect of which a licence is sought, or any adjacent (*s*) house or shop, owned or occupied by the applicant, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character;

(3) That the applicant's licence, previously held for the sale of wine, spirits, beer, or cider, has been forfeited for his misconduct, or that the applicant has, through misconduct, been at any time adjudged disqualified from receiving any such licence, or from selling any of the said articles;

(4) That the applicant, or the house in respect of which he applies, is not duly qualified as by law required (*t*);

(*l*) *Smith* v. *Shann*, [1898] 2 Q. B. 347.

(*m*) *R.* v. *Walsall Justices* (1854), 3 C. L. R. 100; *R.* v. *Sylvester* (1862), 31 L. J. (M. C.) 93, *per* WIGHTMAN, J., at p. 95.

(*n*) *Sharp* v. *Hughes* (1893), 57 J. P. 104.

(*o*) *R.* v. *Sylvester* (1862), 2 B. & S. 322; *Sharp* v. *Wakefield*, [1891] A. C. 173, *per* Lord HALSBURY, L.C., at p. 180.

(*p*) *Bassett* v. *Godschall* (1770), 3 Wils. 121.

(*q*) *R.* v. *Filewood* (1786), 1 Burn's Justice, 30th ed., 120; *R.* v. *Holland and Forster* (1787), 1 Term Rep. 692; *R.* v. *Young and Pitts* (1758), 1 Burr. 556; *R.* v. *Williams*, *R.* v. *Davis* (1762), 3 Burr. 1317; *R.* v. *Baylis* (1762), 3 Burr. 1318; *R.* v. *Hann and Price* (1765), 3 Burr. 1716; *R.* v. *Harries* (1811), 13 East, 270; *R.* v. *Temple* (1664), 1 Keb. 727; *R.* v. *Cornelius* (1744), 2 Stra. 1210.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 17, Sched. I., Part I.

(*s*) As to the meaning of adjacent, see *Wellington Corporation* v. *Lower Hutt Corporation*, [1904] A. C. 773, P. C.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 17, Sched. I., Part II. The above four objections are quite distinct from one another (*Whiffen* v. *Malling*, [1892] 1 Q. B. 362, C. A., *per* Lord ESHER, M.R.,

SECT. 2. Justices' Licences.

(5) That the applicant has sold surreptitiously under the licence, or has assisted in concealing or misrepresenting the nature of goods under the licence; or

(6) That the applicant has in any other way, in the opinion of the licensing justices, been guilty of misconduct in the management of his business under the licence (*a*).

Where premises have been altered.

185. If a house has been altered the justices must decide whether the alterations have or have not left the house the same as that previously licensed. If they decide that the house is the same, they are limited to the grounds above mentioned. If they come to the conclusion that the house is not the same, then they must deal with the application as if it were an application for a new licence (*b*).

Application must be for same licence as that previously held.

186. In order to limit the discretion of the justices to the grounds above named, the application must be for the same kind of licence as previously held, for example, if previously for the sale of wine, the application must not be for the sale of spirits or of cider (*c*).

Refusal on ground of character.

187. If an applicant for a licence proves his good character in spite of a conviction, his licence cannot be refused upon the ground of character, even though the justices do not think him a fit person (on grounds other than the ground of character) to hold a licence (*d*).

If the applicant does not produce evidence of good character, the justices may refuse to grant the licence, although no evidence has been called against the applicant's character (*e*), and even where evidence is given in his favour, if they think it is insufficient (*f*).

Evidence which has been given upon a charge against a licensee for an offence, of which charge the defendant was acquitted, can be called again and given before the licensing justices in order to establish that the house is of a disorderly character (*g*).

SUB-SECT. 3.—*Referring to Compensation Authority.*

When power to refuse renewal or transfer is vested in justices.

188. The power of actually refusing the renewal or transfer of a licence is vested in the justices acting for the licensing district only in the following cases:—

(1) If the application is for the renewal or transfer of a justices' off-licence.

at p. 368). The fourth of the grounds given in the text, so far as it relates to a valuation qualification, is not applicable to licences to sell by retail wine, sweets, spirits or liqueurs, for consumption off the premises, for, in the case of these licences, no such qualification is by law required (*R.* v. *Morison* (1891), 55 J. P. 87; *R.* v. *Bedwelty* (*Monmouthshire*) *Licensing Justices* (1874), 38 J. P. 807); see p. 60, *ante*.

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 17, Sched. I., Part II.

(*b*) *R.* v. *Bradford Justices* (1896), 74 L. T. 287, *per* COLLINS, J., at p. 289; *R.* v. *Sheffield Justices* (1899), 63 J. P. 595, C. A.

(*c*) *R.* v. *King* (1888), 20 Q. B. D. 430, C. A.; see also Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (1).

(*d*) *R.* v. *Lancaster Justices* (1891), 55 J. P. 580, C. A.; reversing, in part, S. C. 55 J. P. 279.

(*e*) *Ex parte Morgan* (1870), 23 L. T. 605.

(*f*) *R.* v. *Hanley Justices* (1877), 42 J. P. 102.

(*g*) *Latimer* v. *Birmingham Justices* (1896), 60 J. P. 660. The charge in this case was that of "suffering gaming."

(2) If the application is for the renewal or transfer of a justices' on-licence for the sale of wine alone or sweets alone (*h*).

(3) If the application is for the the renewal or transfer of a licence which was not in force on the 15th August, 1904, and had not at that date been provisionally granted and confirmed, or, though then in force, has not been continuously in force from that time up to the time of the application (*i*).

(4) If the application is for the renewal or transfer (*k*) of a justices' on-licence (not being for the sale of wine alone or sweets alone) in force on the 15th August, 1904, and thereafter continuously in force, but not being an old beerhouse licence (*l*), provided that the justices act upon one or more of the following grounds:—(i.) that the licensed premises have been ill-conducted; (ii.) that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price; (iii.) that the holder of a licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence; (iv.) that the licensed premises are structurally deficient or structurally unsuitable; (v.) grounds connected with the character or fitness of the proposed holder of the licence; (vi.) that the renewal or transfer would be void (*m*).

If licensed premises are carried on as such, but in circumstances which result, and are intended to result, in an almost complete loss of trade, the renewal of the justices' licence will not be void, and therefore the licensing justices are not entitled to refuse to renew it on the ground that the renewal would be void (*n*).

(5) If the application is for the renewal or transfer (*o*) of an old beerhouse licence (*p*), provided that the justices act upon one or more of the following grounds, namely:—(i.) that the applicant has failed to produce satisfactory evidence of good character; (ii.) that the house or shop in respect of which a licence is sought, or any adjacent house or shop, owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character; (iii.) that the applicant's licence previously held for the sale of wine, spirits, beer, or cider, has been forfeited for his misconduct, or that he has through misconduct been at any time adjudged disqualified from receiving any such licence, or from selling any of the said articles; (iv.) that

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 18, Sched. II., Part I.

(*i*) *Ibid.*; *Freer* v. *Murray*, [1894] A. C. 576, *per* Lord HERSCHELL, L.C., at p. 581.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (2) (c).

(*l*) For a definition see p. 66, *post*.

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 18, Sched. II., Parts I., II.

(*n*) *Webb* v. *London* (*City*) *Licensing Justices* (1910), 102 L. T. 70.

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (2) (c); *Simonds* v. *Blackheath Justices* (1886), 17 Q. B. D. 765; and see *R.* v. *Sheffield Justices* (1899), 63 J. P. 595, C. A.

(*p*) For a definition see p. 66, *post*.

SECT. 2. Justices' Licences.

the applicant, or the house in respect of which he applies, is not duly qualified as by law required (*q*).

Old beerhouse licence.

189. An old beerhouse licence is an old on-licence for the sale of beer or cider, with or without wine, which was granted in respect of premises for which a corresponding excise licence was in force on the 1st May, 1869, including licences granted by way of renewal of such a licence, whether the licence continues to be held by the same person or has been transferred to any other person (*r*). The licence must not only have been in force on the 1st May, 1869, but must have been in existence throughout the intervening period up to the date of the application, and must be in existence at the date of the application. If at any time subsequent to the 1st May, 1869, and prior to or at the date of the application, there was not a licence in existence in respect of the house, the licence is not an old beerhouse licence (*s*).

But the fact that no intoxicating liquor has been sold on the premises for several years (during which time, however, the licence has been continuously renewed) does not prevent the licence being an old beerhouse licence (*t*).

Interruption in existence of licence.

190. Any interruption in the existence of the licence is equally effective to prevent the licence being an old beerhouse licence, whether arising from the forfeiture of a licence upon conviction of a licence-holder (*a*), even if upon a first conviction for an offence (*b*), or arising from a refusal (*c*) to renew the licence (*d*), or from an omission to apply for such renewal (*e*), or from the expiration of the current licence before an application for a grant at special sessions (*f*).

Moreover, the house must be the same, and if a house in respect of which such a licence exists is taken under an Act for public purposes, an application for a special removal is not an application in respect of an old beerhouse licence (*g*).

Grounds of refusal must be specified.

191. Whenever licensing justices refuse the renewal or transfer (*h*) of an old on-licence they must specify in writing to the

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 18, Sched. II., Parts I., II. For decisions bearing upon these grounds of refusal, see p. 64, *ante*, where, *inter alia*, the same grounds occur; and see *Ex parte O'Connor* (1877), 41 J. P. 740.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. II., Part I. This appears to have altered the law, in that the continuous renewal of the justices' licence is now the essential feature, whereas formerly it was the continuous renewal of the excise licence which mattered. See *Tower Justices* v. *Chambers*, [1904] 2 K. B. 903, C. A.

(*s*) *Freer* v. *Murray*, [1894] A. C. 576, *per* Lord HERSCHELL, L.C., at p. 581.

(*t*) *Mackrell* v. *Brentford Justices*, [1900] 2 Q. B. 387.

(*a*) *R.* v. *West Riding Justices* (1888), 21 Q. B. D. 258.

(*b*) *Tower Justices* v. *Chambers*, *supra*, overruling *Ex parte Flinn & Sons* (No. 2), [1899] 2 Q. B. 607.

(*c*) On a former occasion on legal grounds.

(*d*) *Hargreaves* v. *Dawson* (1871), 24 L. T. 428.

(*e*) *R.* v. *Curzon* (1873), L. R. 8 Q. B. 400.

(*f*) *Freer* v. *Murray*, *supra*.

(*g*) *Traynor* v. *Jones*, [1894] 1 Q. B. 83; *Boodle* v. *Birmingham Justices* (1881), 45 J. P. 635.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 23 (2) (c).

applicant the grounds of their refusal (*i*), even though not asked to do so (*k*).

Reference to compensation authority.

192. If, however, the licensing justices, upon the consideration by them in accordance with the Licensing (Consolidation) Act, 1910 (*l*), of applications for the renewal or transfer of justices' licences, are of opinion that the question of the renewal of any particular old on-licences requires consideration on grounds other than those on which the justices themselves have power to refuse such renewal or transfer, they must refer the matter to the compensation authority (*m*), together with their report thereon (*l*).

The provisional renewal or transfer of licences included in reports of the justices is provided for by rules made by a Secretary of State (*n*).

SUB-SECT. 4.—*Attaching Conditions to Licence.*

Conditions unconnected with interests of public.

193. Justices cannot annex on the grant of a licence a condition unconnected with the interests of the public, such as that the applicant must pay a debt owing by him on a distinct and collateral account (*o*), or must pay rates left unpaid by a previous tenant (*p*).

Conditions which may be attached to licence.

Justices may attach to the grant of a new justices' on-licence (other than a licence for the sale of wine alone or sweets alone (*q*)) such conditions both as to the payments to be made and the tenure of the licence and as to any other matters as they think proper in the interests of the public, subject as follows :—(1) such conditions must in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear in the opinion of the justices when licensed and the value of the same premises if they were not licensed : provided that, in estimating the value as licensed premises of hotels and other premises where the profits are not wholly derived from the sale of intoxicating liquor, no increased value arising from profits not so derived can be taken into consideration; (2) the amount of any payments imposed under conditions so attached must not exceed the amount thus required to secure the monopoly value (*r*).

Conditions for securing monopoly value.

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 18 (2); *R.* v. *Sykes* (1875), 1 Q. B. D. 52; *Tranter* v. *Lancashire Justices* (1887), 3 T. L. R. 678.

(*k*) *Ex parte Smith* (1878), 3 Q. B. D. 374; *R.* v. *Ashton-under-Lyne Justices* (1873), 37 J. P. 85; but it is sufficient if a minute specifying the ground of refusal is drawn up by the clerk and read out by the chairman, although a copy is not given to the applicant, at any rate unless the applicant asks for a copy (*R.* v. *Cumberland Justices* (1881), 8 Q. B. D. 369).

(*l*) See p. 70, *post*.

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 19 (1).

(*n*) *Ibid.*, s. 47; Licensing Rules, 1910, rr. 41—45.

(*o*) *R.* v. *Athay* (1758), 2 Burr. 653.

(*p*) *Feist* v. *Tower Justices* (1904), 68 J. P. 264.

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14 (6).

(*r*) *Ibid.*, s. 14 (1).

SECT. 2. Justices' Licences.

The amount of any payments made in pursuance of any such conditions is to be collected in the same manner as the duties on local taxation licences within the meaning of the Local Government Act, 1888 (*s*), and must be paid into the Exchequer (*t*).

Ordinary removal.

194. The provisions as to attaching conditions to the grant of new licences do not apply in the case of an application for an order sanctioning the ordinary removal of a licence (*u*).

Notice to owner of undertaking required.

195. Where the justices, on an application for the renewal or transfer of an old on-licence (*a*), ask the licence-holder to give any undertaking, they must adjourn the hearing of the application and cause notice of the undertaking for which they ask to be served upon any registered owner of the premises, and give him an opportunity of being heard (*b*). But this provision does not entitle the justices to refuse to grant the renewal or the transfer if the applicant declines to give the undertaking asked for, whether the application be in respect of an old beerhouse licence (*c*), or in respect of a fully-licensed house (*d*).

Part IX.—Compensation.

SECT. 1.—*The Compensation Authority.*

Power to refuse old on-licence.

196. The power to refuse the renewal or the transfer of an old on-licence (*e*) on any ground other than the grounds upon which the licensing justices can refuse such renewals or transfers (*f*) is vested in the compensation authority and not in the licensing justices, but can only be exercised on a reference from those justices, and on payment of compensation (*g*).

Compensation authority.

The compensation authority is, (i.) as respects a licensing district being a petty sessional division of a county, quarter sessions; (ii.) in a county borough, the whole body of borough justices, and

(*s*) 51 & 52 Vict. c. 41, s. 20.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14 (3). The duties on local taxation licences are collected by the Commissioners of Inland Revenue (see title REVENUE), and are payable by them to the local taxation account. But the power to levy the duties may, by Order in Council, made on the recommendation of the Treasury, be transferred to county councils (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 20, Sched. I.).

(*u*) *R.* v. *Drinkwater*, [1905] 2 K. B. 469.

(*a*) As defined in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. II.

(*b*) *Ibid.*, ss. 16 (5), 23 (2) (c).

(*c*) *R.* v. *Grimwade, Ex parte Catchpole & Co.*, *R.* v. *Dodds, Ex parte Roberts and Walker & Son* (1905), 21 T. L. R. 366. For the definition of "old beerhouse licence," see p. 66, *ante*.

(*d*) *R.* v. *Dodds*, [1905] 2 K. B. 40, C. A.; and see *Rossi* v. *Edinburgh Corporation*, [1905] A. C. 21 (case of a licence to sell ice-cream).

(*e*) As described in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. II., Part I.

(*f*) See pp. 24 *et seq.*, *ante*.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 18 (1).

(iii.) in a borough not being a county borough, the quarter sessions for the county (*h*).

Division of area.

197. The compensation authority may divide its area into districts for the purpose of its powers and duties as such authority, and in that case those districts are deemed separate areas for the purposes of those powers and duties under the same authority (*i*).

Delegation of powers.

198. A compensation authority may delegate any of its powers and duties as such authority to a committee appointed in accordance with rules made by it, and, when the authority is the quarter sessions, must so delegate its power of determining any question as to the refusal or transfer of a justices' licence and matters consequential thereon (*k*).

Division of counties.

199. Where quarter sessions have customarily been held separately by adjournment or otherwise for any part of a county, the Secretary of State may by order, on the application of the justices sitting at each such separate sessions, constitute, for the purposes of the execution of the powers and duties of quarter sessions as confirming and compensation authority, any part of the county, for which quarter sessions are for the time being so separately held, a separate county, and the justices usually sitting at those quarter sessions a separate quarter sessions, and make all necessary provisions for the administration of those powers and duties in such a case (*l*).

Rules.

200. Any compensation authority who may or must appoint a committee may make rules, to be approved by a Secretary of State, for the mode of appointment of those committees, and, so far as not otherwise provided for, the procedure of those committees (*m*).

A Secretary of State may make rules providing for constituting, where requisite, committees of quarter sessions standing committees (*n*).

Appointment of additional member of committee.

201. The justices of any borough, not being a county borough, but having a separate commission of the peace, are entitled to appoint one of their number to act, with reference to the determination of any question as to the refusal of the renewal or transfer of a licence, and any matters consequential thereon, on the committee appointed by the quarter sessions of the county as compensation authority, and for those purposes any justice so appointed is deemed to be an additional member of the committee (*o*).

A justice of a borough so appointed is not disqualified from acting

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2.
(*i*) *Ibid.*, s. 5 (1).
(*k*) *Ibid.*, s. 6 (1).
(*l*) *Ibid.*, s. 5 (2). Such orders have been made in respect of Kent, Lancaster, Suffolk, and Sussex.
(*m*) *Ibid.*, s. 6 (3).
(*n*) *Ibid.*, s. 47 (d).
(*o*) *Ibid.*, s. 6 (5).

SECT. 1. The Compensation Authority.

on the question of the refusal to renew a licence by reason of his having acted as chairman at the meeting of the justices of the borough at which it was decided to refer the licence to quarter sessions (*p*).

SECT. 2.—*Procedure of Compensation Authority.*

Procedure.

202. The compensation authority must consider all reports made to it on the reference of the matter of the renewal or transfer of licences by the licensing justices, and, if it thinks expedient, after giving the persons interested in the licensed premises and, unless it appears to the compensation authority unnecessary, any other persons appearing to it to be interested in the question of the renewal or transfer of the licence of those premises (including the licensing justices), an opportunity of being heard, may, subject to the payment of compensation, refuse the renewal or transfer of any licence to which such report relates (*q*).

Rules for consultation with justices.

203. A Secretary of State may make rules for carrying into effect the Licensing (Consolidation) Act, 1910 (*r*), as to the renewal of old on-licences, and may by those rules, amongst other things, provide for consultation with the licensing justices as to their reports, and for the time and manner of the consideration of those reports (*s*), and may regulate the procedure of the compensation authority on the consideration of the reports of licensing justices, and on any hearing with reference to the refusal of the renewal or transfer of old on-licences (*t*).

Evidence as to particular licence essential.

204. Although the report of the justices of the licensing district must be considered by the compensation authority, it is not by itself evidence upon which the compensation authority is entitled to refuse the renewal or transfer of the licence (*u*). The compensation authority can only act upon evidence given on oath before it, and mere evidence of the number of licensed houses in the district, or of the character and population of the locality, is not sufficient, as there is no evidence relating to the particular house in question, thus differentiating it from the other licensed houses in the district (*a*).

But the compensation authority has evidence upon which it is entitled to refuse the renewal of a licence if it has evidence on oath before it as to the accommodation and takings of the particular house (*b*).

(*p*) *R.* v. *Cheshire Licensing Justices, Ex parte Kay's Atlas Brewery, Ltd.*, [1906] 1 K. B. 362.

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 19 (2), 23 (2) (c).

(*r*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*s*) *Ibid.*, s. 47 (a).

(*t*) *Ibid.*, s. 47 (e).

(*u*) *Dartford Brewery Co.* v. *London (County) Quarter Sessions*, [1906] 1 K. B. 695.

(*a*) *Ibid.*; and see *Raven* v. *Southampton Justices*, [1904] 1 K. B. 430; *R.* v. *Drinkwater, Ex parte Conway* (1905), 22 T. L. R. 12, C. A.; *R.* v. *Tolhurst, Ex parte Farrell, R.* v. *Cox, Ex parte West*, [1905] 2 K. B. 478.

(*b*) *R.* v. *Johnson (Leicester Justices), Ex parte Whitmore* (1906), 71 J. P. 59. The evidence in this case was that the house had small accommodation, that

SECT. 2. Procedure of Compensation Authority.

The compensation authority may go into any objection to the renewal which is raised on the notice of opposition, although not referred to in the report of the justices (*c*).

Evidence admissible by compensation authority.

205. The compensation authority ought not to refuse to allow questions to be asked in cross-examination of witnesses called in support of the refusal of a renewal of a licence merely on the ground that they refer to other licensed houses not included in the report of the licensing justices (*d*). But the compensation authority is not entitled, for the purpose of differentiating between two licensed houses, to take into consideration what other licences the owners of the respective licensed houses are willing to surrender, nor what contribution they are willing to make to the compensation fund, in consideration of the renewal of the respective licences (*e*).

When the renewal of a licence has been refused by the compensation authority the licence must go forward for compensation, and the compensation authority is not entitled to refuse to fix the compensation because it subsequently discovers that the house is not of the required annual value. Nor can the licensing justices refuse to renew provisionally until the compensation money is paid (*f*).

Except where special provision is made in pursuance of any Act, or under the Licensing Rules, 1910, any documents are, for the purposes of the Licensing (Consolidation) Act, 1910 (*g*), sufficiently authenticated on behalf of quarter sessions, or the justices of a licensing district, or any committee acting under the Act (*g*), if purporting to be signed by their clerk (*h*).

SECT. 3.—*The Compensation Fund.*

Compensation charges.

206. The compensation authority must in each year, unless it certifies to the Secretary of State that it is unnecessary to do so in any year, for the purposes of its powers and duties as compensation authority, impose in respect of all old on-licences renewed or transferred in respect of premises within its area charges at rates not exceeding, and graduated in the same proportion as, the rates set out in the statutory scale (*i*).

the public rooms were small, that the takings were only about £1 per day, and that there were fifteen other licensed houses within a radius of 200 yards.

(*c*) *Howe* v. *Newington Licensing Justices* (1907), 72 J. P. 12, C. A.

(*d*) *Morgan* v. *Aylesford Licensing Justices*, [1906] 1 K. B. 437.

(*e*) *R.* v. *Shann*, [1910] 2 K. B. 418, C. A.

(*f*) *R.* v. *Walsall Justices*, [1910] 2 K. B. 210.

(*g*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*h*) *Ibid.*, s. 47 (f); Licensing Rules, 1910, r. 54.

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21 (1), Sched. III., Part I. The scale is as follows:—

SCALE OF MAXIMUM CHARGES.

Annual Value of Premises to be taken as for the purpose of Publican's Licence Duty. £	Maximum Rate of Charge. £
Under 15	1
15 and under 20	2
20 ,, ,, 25	3
25 ,, ,, 30	4

SECT. 3. The Compensation Fund.

Provisional renewal.

207. A licence which has been provisionally renewed, subject to a reference to the compensation authority, and the renewal of which the compensation authority has refused, is not a licence in respect of which a charge can be imposed for the purpose of the compensation fund (*k*).

Hotels and places of entertainment.

208. The rate of charge in the case of an hotel is one-third of that charged in other cases, and in the case of any licensed premises which are certified by the licensing justices on the application of the holder of the licence to be used only as public gardens, picture galleries, exhibitions, places of public or private entertainment, railway refreshment rooms, *bonâ fide* restaurants or eating houses, or for any other purpose to which the holding of a licence is merely auxiliary, such rate, not less than one-third of that charged in other cases, as the justices think proper in the circumstances (*l*).

Meaning of "hotel."

An hotel for this purpose means premises of the value of £50 and upwards, which are proved to the satisfaction of the Commissioners of Customs and Excise (*m*) to be structurally adapted for use as an inn or hotel for the reception of guests and travellers desirous of dwelling therein, and to be mainly so used, and in the case of which either no portion of the premises is set apart and used as an ordinary public-house for the sale and consumption therein of liquors, or the annual value of any portion so set apart and used does not, in the opinion of the Commissioners, exceed £25 (*n*).

An hotel of even a large annual value, a portion of which, exceeding £25 in annual value, is set apart and used as an ordinary public-house, does not come within the exemption in favour of premises used for a purpose to which the holding of a licence is merely auxiliary (*o*).

SCALE OF MAXIMUM CHARGES—*continued.*

Annual Value of Premises to be taken as for the purpose of Publican's Licence Duty.	Maximum Rate of Charge.
£ £	£
30 and under 40	6
40 ,, ,, 50	10
50 ,, ,, 100	15
100 ,, ,, 200	20
200 ,, ,, 300	30
300 ,, ,, 400	40
400 ,, ,, 500	50
500 ,, ,, 600	60
600 ,, ,, 700	70
700 ,, ,, 800	80
800 ,, ,, 900	90
900 and over	100

(*k*) *Malkin* v. *R.*, [1906] 2 K. B. 886 (proceeding by petition of right).

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. III., Part I. As to places of entertainment generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*m*) As to these Commissioners, see title REVENUE.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. III., Part I. As to the law relating to inns generally, see title INNS AND INNKEEPERS, Vol. XVII., pp. 301 *et seq.*

(*o*) *R.* v. *Carter*, [1907] 1 K. B. 298.

Collection of compensation charge.

209. These charges must be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account must be kept by the Commissioners of Customs and Excise of the amount produced by those charges in the area of any compensation authority, and that amount must in each year be paid over to that authority in accordance with rules made by the Treasury for the purpose (*p*).

Conversion of borough into county borough.

210. If a borough in a county is constituted a county borough (*q*) between the date at which the county compensation authority imposes the charge and the date when the charge is collected, the Commissioners (*r*) must pay over to the compensation authority of the new county borough the charges collected in respect of licensed houses within the new county borough, although such charges were imposed by the county authority (*s*). But if the renewal of the licences of houses within the new county borough has already been refused by the county compensation authority, the county compensation authority must pay the compensation (*t*).

Management of compensation fund.

211. Any sums paid to a compensation authority in respect of the above charges, or received by it from any other source for the payment of compensation, must be paid by it to a separate account under its management, and the moneys standing to the credit of that account constitute the compensation fund (*u*). The compensation authority in the exercise of its powers must have regard to the funds available for the payment of compensation (*v*).

Rules have been made by the Home Secretary regulating the management and application of the compensation fund and the audit of the accounts of quarter sessions (*w*).

Borrowing powers.

212. The compensation authority may, with the consent of a Secretary of State, borrow in accordance with rules made under the Licensing (Consolidation) Act, 1910 (*a*), on the security of the compensation fund, for the purpose of paying any compensation (*b*).

A Secretary of State may make rules providing for the enforcement of any security given for money borrowed and for the time, not exceeding fifteen years, within which money borrowed must be replaced (*c*).

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21 (2). These rules were dated 10th March, 1905. The year in respect of which the charge is payable runs from 5th April to 5th April (*Horton* v. *Penn*, [1907] 1 K. B. 561).

(*q*) See title LOCAL GOVERNMENT.

(*r*) As to the Commissioners, see note (*a*), p. 17, *ante*.

(*s*) *R.* v. *Inland Revenue Commissioners*, *R.* v. *Glamorgan Justices*, *Ex parte Davies*, [1910] 1 K. B. 851.

(*t*) *Ibid.* The matter will be one for adjustment under the order creating the county boroughs.

(*u*) Licensing (Consolidation) Act (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21 (4).

(*v*) *Ibid.*, s. 21 (5).

(*w*) *I bid.*, s. 47 (c); Licensing Rules, 1910, rr. 34—36, 55—64.

(*a*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*b*) *I bid.*, s. 21 (6); Licensing Rules, 1910, rr. 65—71.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 47 (b); Licensing Rules, 1910, rr. 65—71.

SECT. 3. The Compensation Fund.

Expenses.

213. Any expenses incurred by the compensation authority in the payment of compensation or otherwise in the exercise of its powers or in the performance of its duties as compensation authority, and such expenses of the licensing justices, incurred with respect to the matter of the reference to the compensation authority of the question of the renewal or transfer of old on-licences or the grant of new on-licences, as quarter sessions may allow, must be paid out of the compensation fund (*d*).

SECT. 4.—*Deductions from Rent.*

Deductions from rent.

214. Certain deductions from rent, in no case exceeding half the rent (*e*), may, notwithstanding any agreement to the contrary (*f*), be made by any licence-holder who pays a charge levied for compensation purposes, and also by any person from whose rent a deduction is made in respect of the payment of such a charge (*g*).

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21 (5).

(*e*) *Ibid.*, Sched. III., Part II.

(*f*) *Wooler* v. *North Eastern Breweries*, [1910] 1 K. B. 247.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21 (3). The scale of deductions (*ibid.*, Sched. III., Part II.) is as follows:—

A person whose unexpired term does not exceed—

1	year	may deduct a sum equal to		100	per cent.	of the charge.	
2	years	,,	,,	88	,,	,,	
3	,,	,,	,,	82	,,	,,	
4	,,	,,	,,	76	,,	,,	
5	,,	,,	,,	70	,,	,,	
6	,,	,,	,,	65	,,	,,	
7	,,	,,	,,	60	,,	,,	
8	,,	,,	,,	55	,,	,,	
9	,,	,,	,,	50	,,	,,	
10	,,	,,	,,	45	,,	,,	
11	,,	,,	,,	41	,,	,,	
12	,,	,,	,,	37	,,	,,	
13	,,	,,	,,	33	,,	,,	
14	,,	,,	,,	29	,,	,,	
15	,,	,,	,,	25	,,	,,	
16	,,	,,	,,	23	,,	,,	
17	,,	,,	,,	21	,,	,,	
18	,,	,,	,,	19	,,	,,	
19	,,	,,	,,	17	,,	,,	
20	,,	,,	,,	15	,,	,,	
21	,,	,,	,,	14	,,	,,	
22	,,	,,	,,	13	,,	,,	
23	,,	,,	,,	12	,,	,,	
24	,,	,,	,,	11	,,	,,	
25	,,	,,	,,	10	,,	,,	

Exceeds

25	but does not exceed		30	years	7	,,	,,
30	,,	,,	35		6	,,	,,
35	,,	,,	40		5	,,	,,
40	,,	,,	45		4	,,	,,
45	,,	,,	50		3	,,	,,
50	,,	,,	55		2	,,	,,
55	,,	,,	60		1	,,	,,

"Unexpired term."

215. The unexpired term is reckoned from the date on which the charge is payable, namely, 10th October (*h*).

Where the lessor has granted to the lessee not only an existing lease, but also a reversionary lease to commence on the day next but one after the expiration of the existing lease, the unexpired term of the lessee includes not only the unexpired term of the existing lease, but also the term of the reversionary lease (*i*).

Nature and effect of deductions.

216. Such deductions are a charge upon the rent, and where the reversion is settled, a tenant for life has no right, in the absence of special directions in the will or settlement, to have any part of such deductions paid out of capital (*k*).

In arriving at the rateable value of licensed premises no deduction from the gross annual value is allowable in respect of payments to the compensation fund (*l*).

SECT. 5.—*Amount of Compensation.*

Principle of compensation.

217. The amount of compensation to be paid is a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of the Licensing Act, 1904 (*m*), and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence), and the value which those premises would bear if they were not licensed premises (*n*).

Value of licensed premises.

The value of licensed premises is the amount which they might fairly be expected to fetch if sold in the open market (*o*), and it is material to inquire into the quantity and quality of the liquors sold at the licensed premises under normal conditions and apart from any considerations of a personal or special character, such as the popularity of the licensee or the proximity of the licensed premises to the brewery; but there cannot be taken into consideration, in addition to the brewer's profit arising from the supply of liquor to the licensed premises, any profits which a tenant might be expected to make by the sale of the liquor so supplied (*p*).

Former conditions.

The conditions of renewal applicable before the passing of the Licensing Act, 1904 (*m*), were:—(1) With regard to licences other

(*h*) *London County Council* v. *Watney, Combe & Co.*, [1909] 1 K. B. 637.

(*i*) *Llangattock (Lord)* v. *Watney, Combe, Reid, & Co., Ltd.*, [1910] A. C. 394.

(*k*) *Re Smith, Smith* v. *Dodsworth*, [1906] 1 Ch. 799.

(*l*) *Waddle* v. *Sunderland Union*, [1908] 1 K. B. 642, C. A., affirming S. C., [1906] 2 K. B. 899. As to the effect of such deductions upon assessments for income-tax, see title INCOME TAX, Vol. XVI., pp. 633, 653.

(*m*) 4 Edw. 7, c. 23; and see the text, *infra*, and p. 76, *post*.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (1).

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (5).

(*p*) *Ashby's Cobham Brewery Co., Re The Crown, Cobham; Ashby's Staines Brewery Co., Re The Hand and Spear, Woking*, [1906] 2 K. B. 754. See also *Walker* v. *Brisley, Grinter* v. *Fleming*, [1900] 2 Q. B. 735; *Lassells and Sharman, Ltd., Re* "*The Freemasons Arms*," *Chester* (1908), 72 J. P. 323.

SECT. 5. Amount of Compensation.

than old beerhouse licences, they were subject to refusal by justices upon any ground in their discretion and without compensation (but subject to an appeal to quarter sessions); (2) with regard to old beerhouse licences, they were subject to refusal by justices only upon one or other of four grounds (*q*) (subject to an appeal to quarter sessions).

Determination of amount.

218. The amount of compensation to be so paid is the amount agreed upon by the persons appearing to the compensation authority to be interested in the licensed premises and approved by that authority, and in default of such agreement and approval, the amount must be determined by the Commissioners of Inland Revenue in the same manner and subject to a like appeal (*r*) to the High Court as on the valuation of an estate for the purpose of estate duty (*s*).

Costs of appeal.

Any costs incurred by the Commissioners of Inland Revenue on such an appeal must, unless the High Court orders those costs to be paid by some party to the appeal other than the Commissioners, be paid out of the amount to be paid as compensation (*t*). But the court has a discretion to order the Commissioners to pay a successful appellant's costs (*a*).

Application of compensation.

219. The compensation is to be paid to the persons interested in the licensed premises (*b*), and must, in any event, be divided amongst them (including the holder of the licence) in such shares as are determined by the compensation authority: provided that in the case of the licence-holder regard must be had not only to his legal interest in the premises or trade fixtures, but also to his conduct and to the length of time during which he has been the holder of the licence, and the holder of a licence, if a tenant, must (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises (*c*).

(*q*) Set out in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. II., Part II., A. These are the same grounds as those upon which licensing justices can themselves refuse the renewal or transfer of an old beerhouse licence (see p. 65, *ante*).

(*r*) Under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10. As to the facts to be considered, see *Lassells and Sharman, Ltd., Re* "*The Freemasons Arms*," *Chester* (1908), 72 J. P. 323.

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (2). As to such valuation, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 207 *et seq.*

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (4).

(*a*) *Re Hardy's Crown Brewery, Ltd., and St. Philip's Tavern, Manchester*, [1910] 2 K. B. 257, C. A.

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (1). As to payment to trustees for debenture-holders, see *Noakes* v. *Noakes & Co., Ltd.*, [1907] 1 Ch. 64; *Dawson* v. *Braime's Tadcaster Breweries, Ltd.*, [1907] 2 Ch. 359; *Law Guarantee and Trust Society, Ltd.* v. *Mitcham and Cheam Brewery Co., Ltd.*, [1906] 2 Ch. 98. As to payment to a tenant for life, see *Re Bladon, Dando* v. *Porter* (1911), 46 L. J. 448. As to payment to the lords of a manor in respect of a beerhouse within the same, see *Ecclesiastical Commissioners* v. *Page and Others* (1911), 131 L. T. Jo. 320. As to equitable mortgagees, see *Bent's Brewery Co., Ltd.* v. *Dykes* (1909), 100 L. T. 476.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (2).

SECT. 5. Amount of Compensation.

If a person is registered as owner of licensed premises and compensation is awarded and paid to him as such owner, although in fact he is only co-owner with other persons, an action may be brought against such registered owner by the co-owners to compel him to account for the money, and the defendant may be ordered to bring the amount paid to him into court to the credit of the action (*d*).

Co-owners.

Where the business carried on at licensed premises has been bequeathed to one person, but the licensed premises have been devised to another, who lets them to lessees and ceases to carry on the business himself, the person to whom the business has been devised is not entitled to any share in compensation awarded on non-renewal of the licence after the premises have been so let (*e*).

Bequest of business apart from premises.

220. If on the division of the amount to be paid as compensation any question arises which the compensation authority considers can be more conveniently determined by the county court, it may refer that question to the county court in accordance with rules of court to be made for that purpose (*f*).

Reference to county court.

When a question has been referred to a county court to determine in what proportions a sum of money determined to be due by way of compensation should be divided between lessees for a term of years, who are brewers, and the freeholders, and the county court judge makes the apportionment upon the basis of a particular per cent. interest table, the High Court will not interfere, the valuation of the respective interests being entirely a question of fact to be determined by the county court judge in the circumstances of each case (*g*).

SECT. 6.—*Returns to Secretary of State.*

221. The compensation authority with respect to its own action as compensation authority, and the action of the licensing justices in referring to it the question of the renewal of old on-licences, must in each year make such returns to the Secretary of State as he may require (*h*).

Returns.

(*d*) *Birkin* v. *Smith*, [1909] 2 K. B. 112, C. A.

(*e*) *Re Spurge, Culver* v. *Collett* (1911), 55 Sol. Jo. 499.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (3). Compare title COUNTY COURTS, Vol. VIII., p. 662, and for the procedure on such a reference, see *ibid.*, pp. 663, 664.

(*g*) *Liverpool Corporation* v. *Peter Walker & Son, Ltd.*, [1908] 2 K. B. 33, C. A. There is no rule nor presumption of law, either general or applicable to the particular circumstances of such a case, by which the county court judge is bound to treat the respective interests of the parties as 4 per cent. investments. *Quære*, whether there is a right of appeal from a county court judge to whom a question has been referred under the Licensing Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 46.

Part X.—Decisions of Licensing Authorities.

SECT. 1. Appeal to Quarter Sessions.

SECT. 1.—*Appeal to Quarter Sessions.*

SUB-SECT. 1.—*By Person Aggrieved.*

Who may appeal.

222. Any person who thinks himself aggrieved by the refusal of the licensing justices to grant a renewal, transfer, or special removal of a justices' licence, in cases where the power of refusal is vested in those justices, may appeal to quarter sessions (*i*).

An appeal lies from a refusal of justices to renew a beer retail justices' off-licence (*j*), as in other cases; and from a refusal to renew the provisional grant of a licence (*k*).

Where the outgoing tenant of a licensed house wilfully omits to apply for a renewal and leaves the house, and a new tenant applies for and is refused a grant at transfer sessions, there is a right of appeal (*l*).

There is no appeal to quarter sessions from a refusal to grant a new licence (*m*), or from an order sanctioning the removal of a justices' licence.

Nor is there an appeal to quarter sessions when the whole body of justices of a county borough, acting as the compensation authority, refuse, subject to compensation, to renew a licence (*n*).

No right of appeal from the refusal to grant a licence is conferred by the provision (*o*), which gives an appeal from an order or conviction of a court of summary jurisdiction (*p*); and appeals from licensing justices to quarter sessions do not take place in accordance with the Summary Jurisdiction Acts (*p*).

Appeal against order directing alterations.

223. If upon the renewal of a justices' on-licence the licensing justices make an order for alteration of the premises (*q*), such order is subject to an appeal to quarter sessions in the same manner as the refusal of licensing justices to grant the renewal of a justices' licence, provided that, in a borough having a separate court of quarter sessions, the appeal may, at the option of the appellant, be either to the borough quarter sessions or to the quarter sessions of the county in which the borough is locally situated (*r*).

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (1).

(*j*) *R.* v. *Schneider* (1883), 11 Q. B. D. 66.

(*k*) *R.* v. *London (County) Justices* (1889), 24 Q. B. D. 341.

(*l*) *Thornton* v. *Clegg* (1889), 24 Q. B. D. 132.

(*m*) See Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 27 (now repealed), which altered the law as laid down in *R.* v. *Smith* (1873), L. R. 8 Q. B. 146.

(*n*) *R.* v. *Southampton Justices*, [1906] 1 K. B. 505.

(*o*) Namely, Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 99 (2). As to the right of appeal, see the text, *supra*.

(*p*) *Boulter* v. *Kent Justices*, [1897] A. C. 556, overruling *R.* v. *Glamorganshire Justices*, *R.* v. *Pontypool Justices*, [1892] 1 Q. B. 621, C. A. For an enumeration of the Summary Jurisdiction Acts, see note (*r*), p. 87, *post*. As to appeals to quarter sessions under the Summary Jurisdiction Acts, see title MAGISTRATES.

(*q*) Under Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 72 (1).

(*r*) *Ibid.*, s. 72 (2); *R.* v. *Bath* (*Recorder*), [1904] 2 K. B. 570.

SECT. 1. Appeal to Quarter Sessions.

224. The person against whom an order has been made, or whose licence has been refused (*s*), is a person aggrieved. The person must, however, be directly aggrieved by the order (*t*); for example, a publican is not aggrieved by the grant of a licence to a rival publican (*a*).

Who is an aggrieved person.

In some cases a mortgagee may appeal to quarter sessions on behalf of the occupier, the renewal of whose licence has been refused, although the occupier personally refuses to appeal, and even says he does not wish the licence to be renewed (*b*).

In those cases in which an owner or mortgagee is expressly authorised to apply for the grant of a licence at transfer sessions, if he so applies, and his application is refused, he may appeal to quarter sessions (*c*).

SUB-SECT. 2.—*To what Court.*

Time and place of appeal.

225. The appeal must be made to the next court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated (*d*), unless that court is held within nineteen days after the refusal, and in that case to the next subsequent court (*e*). In the case of a liberty having a separate court of quarter sessions the appeal may be either to the quarter sessions for the liberty or to the quarter sessions for the county in which the liberty is locally situated (*f*).

SUB-SECT. 3.—*Notice of Appeal.*

Notice of appeal.

226. The appellant must give notice in writing of his intention to appeal and of the grounds of appeal to the clerk to the licensing justices (*g*) whose decision is appealed against within five days

(*s*) *R.* v. *Deane* (1841), 2 Q. B. 96.

(*t*) *R.* v. *Andover Justices* (1886), 16 Q. B. D. 711, *per* MATHEW, J., at p. 714; *R.* v. *Middlesex Justices* (1832), 3 B. & Ad. 938, *per* LITTLEDALE, J.

(*a*) *R.* v. *Middlesex Justices, supra;* and see *Re Nuttall, R.* v. *Sherrard* (1888), 4 T. L. R. 540.

(*b*) *Garrett* v. *Middlesex Justices* (1884), 12 Q. B. D. 620.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 87; *R.* v. *West Riding Justices* (1883), 11 Q. B. D. 417; *Garrett* v. *Middlesex Justices, supra.*

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (1); *Boulter* v. *Kent Justices*, [1897] A. C. 556. The appeal lies to the quarter sessions for the county, although the premises are situated in a borough having a separate court of quarter sessions. But the City of London is for this purpose deemed a county and not a borough (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (1)).

(*e*) *Ibid.*, s. 29 (2). See *R.* v. *Maule* (1871), 35 J. P. 596; Quarter Sessions Act, 1849 (Barnes's Act) (12 & 13 Vict. c. 45), s. 1; *R.* v. *Surrey Justices* (1880), 6 Q. B. D. 100.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (1). See *R.* v. *Deane, supra; R.* v. *Cockburn* (1854), 4 E. & B. 265.

(*g*) Formerly the notice of appeal had to be served upon all the justices who joined in the decision (*R.* v. *Bedfordshire Justices* (1839), 11 Ad. & El. 134; *R.* v. *Cheshire Justices* (1840), 11 Ad. & El. 139; *R.* v. *Glamorganshire Justices, R.* v. *Pontypool Justices*, [1892] 1 Q. B. 621, C. A., taken with *Boulter* v. *Kent Justices, supra* (see S. C. as reported 66 L. J. (Q. B.) 787, *per* Lord HERSCHELL, at p. 793); and compare *Westmore* v. *Paine*, [1891] 1 Q. B. 482); and such service was a condition precedent to the power of the sessions to hear the appeal.

SECT. 1. Appeal to Quarter Sessions.

after the decision and at least fourteen days before the holding of the quarter sessions to which the appeal is made (*h*).

If the last of the five days is a Sunday, notice served on the following Monday is too late (*i*).

Time for notice.

A notice of appeal, delivered according to the regular and ordinary course of post, on a Sunday when, if delivered on the following Monday, there would not have been the requisite fourteen clear days before the first day of the sessions, is not well served (*k*).

How reckoned.

The fourteen clear days must be reckoned exclusively both of the day of giving the notice and the first day of the sessions, and the day of bringing an appeal is the day upon which it is entered, not the day upon which it is heard (*l*).

Form of notice.

The notice must be signed by the appellant or his attorney on his behalf (*m*). A notice signed in the appellant's name by the clerk to his attorney, with the appellant's authority, is sufficient (*n*).

A mere error in the wording of a notice of appeal, if it does not mislead anyone, does not make the notice bad (*o*).

SUB-SECT. 4.—*Recognisances.*

Recognisances.

227. The appellant must, within the five days within which he can give notice of appeal, enter into a recognisance with two sufficient sureties before some justice acting in and for the county or place, conditioned to appear at quarter sessions and prosecute his appeal, and abide the judgment of the court thereon, and to pay such costs as may be awarded by the court (*p*).

Sunday is to be counted, even though it be the last of the five days (*q*).

A recognisance entered into too late is not void, but the court of quarter sessions has thereby no jurisdiction to hear the appeal (*r*).

Where a recognisance has been entered into and the appeal subsequently dismissed with costs, and after the sessions terminate,

Service upon the clerk of the justices was not sufficient (see *Ex parte Curtis* (1877), 3 Q. B. D. 13; *Westmore* v. *Paine*, [1891] 1 Q. B. 482, but the law is now altered).

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (3). It was held in *R.* v. *Bristol Licensing Justices* and *R.* v. *Gloucestershire Justices* (1893), 68 L. T. 225, that the appellant must give notice of appeal to the "other party," who might be the superintendent of police, but this decision is virtually overruled by *Boulter* v. *Kent Justices*, [1897] A. C. 556.

(*i*) *R.* v. *Middlesex Justices* (1843), 12 L. J. (M. C.) 59.

(*k*) *Re Asprell* (*Inhabitants*) v. *Lancashire Justices* (1852), 16 Jur. 1067, n.; and see *R.* v. *Middlesex Justices*, *supra*.

(*l*) *R.* v. *Middlesex Justices* (1845), 14 L. J. (M. C.) 139.

(*m*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 1.

(*n*) *R.* v. *Kent Justices* (1873), L. R. 8 Q. B. 305.

(*o*) *R.* v. *Denbighshire Justices* (*Llangollen* v. *Ruabon*) (1841), 10 L. J. (M. C.) 79; *R.* v. *Westhoughton* (*Inhabitants*) (1843), 5 Q. B. 300; *R.* v. *Buckinghamshire Justices* (1854), 24 L. J. (M. C.) 15, note (2).

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (3).

(*q*) *Ex parte Simpkin* (1859), 2 E. & E. 392; and see *Peacock* v. *R.* (1858), 4 C. B. (N. S.) 264; *Wynne* v. *Ronaldson* (1865), 12 L. T. 711.

(*r*) *R.* v. *Glamorganshire Justices* (1890), 24 Q. B. D. 675. As to costs, see pp. 83 *et seq.*, *post*.

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but before the next sessions, payment of the costs is demanded of the appellant, who does not pay, the next sessions has power, on affidavit of these facts, to estreat the recognisance, even if an adjourned sessions has been held in the meantime (*s*).

The justice before whom an appellant enters into a recognisance to prosecute his appeal may summon any person whose evidence appears to him to be material and require him to be bound in recognisance to appear at the quarter sessions to whom the appeal is made, and give evidence in the appeal (*t*). If any person so summoned neglects and refuses to obey the summons, or refuses to enter into the recognisance, the justice may issue a warrant for his arrest, and if he persists in his refusal to enter into a recognisance, may order him to be imprisoned till he enters into the recognisance or is otherwise discharged in due course of law (*a*).

SUB-SECT. 5.—*Justices disqualified on Appeals.*

Disqualification on appeals.

228. No justice can act in the hearing or determination of an appeal from any decision in which he took part (*b*).

SUB-SECT. 6.—*Procedure on Appeal.*

Procedure.

229. It seems to be intended that justices who refuse to renew or transfer a licence should, if an appeal to quarter sessions is entered, appear and support their decision (*c*).

If, however, justices do not appear in support of their decision, and no one else appears to oppose or is permitted to and does give evidence against the renewal of the licence, the court is bound to allow the appeal and grant the licence (*d*).

Objectors before the justices cannot claim as of right to be heard at quarter sessions (*e*).

The appellant cannot, upon the appeal, go into or give evidence of any ground of appeal not set out in the notice of appeal (*f*).

The court of quarter sessions cannot impose a condition to the appeal in addition to those imposed by statute (*g*).

(*s*) *R.* v. *Isle of Ely Justices* (1855), 5 E. & B. 489.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 30 (1).

(*a*) *Ibid.*, s. 30 (2).

(*b*) *Ibid.*, s. 29 (7); *R.* v. *Lancashire Justices, Ex parte Heathcote* (1906), 75 L. J. (K. B.) 198.

(*c*) Provision for the costs thus incurred by justices is made, whether the decision of the justices is upheld or reversed.

(*d*) *Evans* v. *Conway Justices*, [1900] 2 Q. B. 224, C. A.

(*e*) *Nix* v. *Nottingham Justices*, [1899] 2 Q. B. 300, n., *sub nom. Nix and Beeston Brewery* (1899), 15 T. L. R. 413.

(*f*) *Russell* v. *Blackheath Justices* (1897), 61 J. P. 696. As to defects in the statement of grounds of appeal and the amendment of grounds of appeal, see Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), ss. 1, 3; under s. 3 (*ibid.*) an entirely new ground of appeal may be added by consent of the court (*R.* v. *Llangenny* (*Inhabitants*) (1863), 4 B. & S. 311). As to the costs of frivolous and vexatious grounds of appeal, see Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 4.

(*g*) *R.* v. *Pawlett* (1873), L. R. 8 Q. B. 491. They therefore cannot make a rule that an appeal must be entered and grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions, this rule being

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If, owing to the failure of the objector to serve a seven days' notice of opposition, the justices had no jurisdiction to refuse the renewal of a licence, and an appeal is made to quarter sessions, the latter court has no jurisdiction to refuse the renewal of the licence, even though a seven days' notice of opposition has been served before the hearing of the appeal (*h*).

Notice of opposition on appeal.

230. No fresh notice of opposition is required when an appeal is made to quarter sessions (*i*), but if a notice of opposition has been given so as to give the justices jurisdiction to refuse the renewal, quarter sessions is confined to the same objections of which notice was given originally (*k*); at any rate, unless sufficient notice of new grounds of objection is given before the hearing of the appeal, or quarter sessions adjourns the case (*l*).

Hearing of appeal.

231. The court of quarter sessions cannot adjourn the hearing of the appeal from one sessions to another (*m*), but must hear and determine the matter, and make such order therein as it thinks fit, and may, if necessary, grant the renewal, transfer, or special removal of the licence in the same manner as the licensing justices (*n*), its judgment being final and conclusive for all intents and purposes (*o*).

Such an appeal amounts to a rehearing, and quarter sessions has, therefore, a right to hear fresh evidence (*p*).

Where justices ought to, but do not, state their ground of refusal, and the applicant appeals to quarter sessions, the latter court may hear the appeal on its merits, and is not bound to allow the appeal merely because the justices have not stated their ground of refusal (*q*).

Quarter sessions may dismiss the appeal on the ground that the notice of appeal is insufficient; and even if, in the opinion of the High Court, the justices at quarter sessions are not clearly right in so doing, the High Court may decline to interfere (*r*).

If the justices at quarter sessions are equally divided they cannot be compelled to adjourn, but one may retire and let the majority

more than a mere rule of practice. See also *R.* v. *Norfolk Justices* (1834), 5 B. & Ad. 950; *R.* v. *West Riding of Yorkshire Justices* (1833), 5 B. & Ad. 667.

(*h*) *Ruddick* v. *Liverpool Justices* (1876), 42 J. P. 406; *Hockings* v. *Powell* (1891), 55 J. P. 358; but see *Ex parte Gorman*, [1894] A. C. 23. As to notice of opposition, see pp. 43 *et seq.*, *post*.

(*i*) *Ex parte Gorman*, *supra*.

(*k*) *Whiffen* v. *Malling*, [1892] 1 Q. B. 362, C. A., *per* Lord ESHER, M.R., at p. 368.

(*l*) *Ex parte Gorman*, *supra*, *per* Lord HERSCHELL, L.C., at p. 29.

(*m*) *R.* v. *Belton* (1848), 11 Q. B. 379; *Ex parte Evans*, [1894] A. C. 16.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (4).

(*o*) *Ibid.*, s. 29 (5). As to the meaning of these words, see *Kydd* v. *Liverpool Watch Committee*, [1908] A. C. 327. As to costs, see p. 83, *post*.

(*p*) *R.* v. *Pilgrim* (1870), L. R. 6 Q. B. 89; *Whiffen* v. *Malling*, *supra*, *per* Lord ESHER, M.R., at p. 368.

(*q*) *Ex parte Gorman*, *supra*, *per* Lord HERSCHELL, L.C., at p. 29.

(*r*) *R.* v. *Lancashire Justices* (1877), 41 J. P. 293. Apparently on the ground that the sufficiency or insufficiency of the notice is a question of fact for quarter sessions.

of those remaining decide (*s*). If one of the justices does not withdraw, then the decision of the court below stands (*a*). If, with the assent of all the justices but one, the chairman gives a casting vote and declares a decision thus obtained, the court will not interfere (*b*). Moreover, although justices cannot, even if equally divided, adjourn to the next sessions, they may perhaps adjourn to another day before the next sessions (*s*).

SUB-SECT. 7.—*Costs.*

Costs.

232. Any court of general or quarter sessions, upon proof of notice of any appeal to the same court having been given to the party or parties entitled to receive it, though such appeal was not afterwards prosecuted or entered, may, at the same sessions for which such notice was given, award to the party or parties receiving the notice such costs or charges as the court thinks reasonable and just, and order them to be paid by the party or parties giving the notice (*c*).

Where appeal dismissed.

Where an appeal has been dismissed or abandoned, the court of quarter sessions must order the appellant to pay to the justices against whose decision he has appealed, or such person as they appoint, such sum by way of costs as is, in the opinion of the court, sufficient to indemnify those justices from all costs and charges whatsoever to which they have been put in consequence of his having served notice of his intention to appeal (*d*), and the court of quarter sessions has no discretion in the matter (*e*), even if the only application made to it be an ordinary application for costs (*f*).

(*s*) *Ex parte Evans*, [1894] A. C. 16.

(*a*) *R.* v. *Belton* (1848), 11 Q. B. 379, *per* DENMAN, C.J., at p. 389: "The judgment of the sessions would be the judgment of the justices out of sessions." And see *Ex parte Evans*, *supra*.

(*b*) *R.* v. *Fladbury* (*Inhabitants*) (1839), 10 Ad. & El. 706. In this case, on the following day, after argument as to the legality of this decision, the justices present determined to adhere to it.

(*c*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 6.

(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 31 (1). In the case of a borough which had no separate quarter sessions, whether it had or had not a separate commission of the peace, the treasurer of the county, not of the borough, was, until 1882, the person upon whom the order was to be made (*Reigate Corporation* v. *Hart* (1868), L. R. 3 Q. B. 244; *R.* v. *Dale* (1852), Dears. C. C. 37; *Winn* v. *Mossman* (1869), L. R. 4 Exch. 292). Further, the words "county or place" do not include a borough having a separate commission of the peace but no separate quarter sessions, and in the case of such a borough the order for payment should be made upon the treasurer of the county (*R.* v. *Warwickshire Justices*, [1902] 2 K. B. 101). But the attention of the judges who decided this case does not appear to have been directed either to the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 38, which did away with concurrent jurisdiction of justices for licensing purposes, or to the subsequent enactment of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 246, which runs in the following words: "Licensing.—In the Act of 9 Geo. 4, c. 61 (Alehouse Act, 1828), s. 37, 'to regulate the granting of licenses to keepers of inns, ale houses, and victualling houses in England,' the expressions 'town corporate,' 'county or place,' and 'division or place,' include every borough having a separate commission of the peace."

(*e*) *R.* v. *West Riding Justices*, [1904] 1 K. B. 545.

(*f*) *R.* v. *Worcestershire Justices*, [1900] 2 Q. B. 576, C. A.

SECT. 1. Appeal to Quarter Sessions.

The court must order any costs awarded by it to be paid, and, if necessary, issue process for enforcing the order (*g*).

If the appellant refuses or neglects forthwith to pay any sum so ordered to be paid, the court may order him to be imprisoned until the sum is paid (*h*).

Costs payable by treasurer of county or borough.

Where an appeal is allowed or where it is dismissed or abandoned, and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from some other person, the court of quarter sessions must order the treasurer of the county in which the licensing district for which the licensing justices act is situated, or, in the case of a licensing district being a borough having a separate quarter sessions, the treasurer of the borough, to pay to the justices such sum as is, in the opinion of the court, sufficient to indemnify them from all costs and charges whatsoever to which they may have been put, and such treasurer is authorised to pay the sum so ordered, which must be allowed to him in his accounts (*i*). The order upon the treasurer may be made either at the sessions where the appeal is heard or at the next ensuing sessions (*j*).

Where appeal succeeds.

Justices who appear to oppose the grant of a licence upon appeal to quarter sessions cannot be ordered to pay the appellant's costs even if the appellant succeeds (*k*).

Costs allowed to justices.

Justices are entitled to retain any solicitor whom they select to act for them, and cannot be compelled to appear by the county solicitor, even though it be one of his duties to act for justices upon the hearing of licensing appeals, and quarter sessions cannot attach to its order for costs a direction to the clerk of the peace that in ascertaining the amount of the costs he is to exclude the personal professional charges of the solicitor employed by the justices (*l*).

A person who objects to the renewal of a licence before the justices, whereupon the renewal is refused and the applicant appeals to quarter sessions, cannot, if he does not appear upon the appeal, be ordered by the court of quarter sessions to pay the costs (*m*).

When the court of quarter sessions refuses to hear an appeal on the ground that it has no jurisdiction, it has, nevertheless, jurisdiction over the costs (*n*). Even if the recognisance has been entered into too late, quarter sessions can award costs, and can estreat the recognisance for non-payment of such costs (*o*).

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (6)
(*h*) *Ibid.*, s. 31 (2).
(*i*) *Ibid.*, s. 32 (1).
(*j*) *Ibid.*, s. 32 (2).
(*k*) *R.* v. *London (Strand Division) Justices, Ex parte London County Council* (1898), 78 L. T. 559; *R.* v. *Staffordshire Justices*, [1898] 2 Q. B. 231.
(*l*) *R.* v. *West Riding Justices*, [1904] 1 K. B. 545.
(*m*) *Boulter* v. *Kent Justices*, [1897] A. C. 556.
(*n*) See *R.* v. *Glamorganshire Justices* (1890), 24 Q. B. D. 675; *Great Northern Committee* v. *Inett* (1877), 2 Q. B. D. 284; in which cases *Peacock* v. *R.* (1858), 4 C. B. (N. S.) 264, was not followed. As to the jurisdiction and recognisances see pp. 79, 80, *ante*.
(*o*) *R.* v. *Glamorganshire Justices*, *supra*; and see p. 80, *ante*.

SECT. 1. Appeal to Quarter Sessions.

The costs of a chief constable of a borough who appears on an appeal to quarter sessions to oppose a licence, even if he does so by the authority of the borough council, cannot be paid out of the borough fund, at any rate when there is no surplus fund in the hands of the corporation (*p*).

Costs of chief constable.

233. As the taxation must be by the court, the amount of costs must be specified in the order, and an order to pay costs to be taxed by the clerk of the peace cannot be sustained (*q*). But the taxation of the clerk of the peace, if adopted by the court before the termination of the sessions, is sufficient (*r*).

Taxation.

Order for costs.

An order awarding costs may direct such costs to be paid to the justices to whom notice of appeal was given, or to whomsoever they may appoint (*s*), and it seems that where an order to pay the costs is made on the treasurer of the county or place, notice to attend the taxation should be given to him (*a*).

Time for taxation.

Costs must be taxed before the end of the sessions (*b*), but may be taxed after the day of hearing the case and before an adjourned meeting (*b*), or at an adjourned meeting (*c*). The party who has to pay the costs may consent to the taxation taking place after the end of the sessions (*d*), and, if he appears at the taxation and does not raise any objection to the jurisdiction, will be held to have so consented (*e*). When costs are allowed by order of quarter sessions, and consent to a taxation out of sessions is not given, no subsequent court of quarter sessions has jurisdiction to order a taxation (*f*); but the practice of taxing out of sessions is now so common that the evidence of consent required will be slight (*g*).

Costs payable by virtue of an order for the payment of the justices' costs made upon the treasurer of the county or place may, however, be taxed either in or out of sessions (*h*).

(*p*) *Tynemouth Corporation* v. *A.-G.*, [1899] A. C. 293; and see p. 43, *post*.

(*q*) *Sellwood* v. *Mount* (1841), 1 Q. B. 726, 735; *R.* v. *Winder*, [1900] 2 Q. B. 366.

(*r*) *R.* v. *Mortlock* (1845), 7 Q. B. 459; *Freeman* v. *Read* (1860), 9 C. B. (N. S.) 301; *R.* v. *Winder*, *supra*.

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 31 (1); see p. 83, *ante*, and see *R.* v. *Binney* (1853), 1 E. & B. 810; *R.* v. *Huntley* (1854), 3 E. & B. 172; *R.* v. *Isle of Ely Justices* (1855), 5 E. & B. 489, *per* Lord CAMPBELL, C.J., at p. 493; *R.* v. *Winder*, *supra*; but see *R.* v. *Devonport Justices* (1869), 33 J. P. 614, *sub nom. R.* v. *Peek*, 20 L. T. 393.

(*a*) *R.* v. *Winder*, *supra*; and see p. 84, *ante*.

(*b*) *R.* v. *Hampshire Justices* (1864), 33 L. J. (M. C.) 104; *Re Phillips* v. *Farquhar*, *R.* v. *Phillips* (1873), 29 L. T. 100.

(*c*) *Rawnsley* v. *Hutchinson* (1871), L. R. 6 Q. B. 305.

(*d*) *R.* v. *Mortlock* (1845), 7 Q. B. 459; *Freeman* v. *Read*, *supra*; *R.* v. *Winder*, *supra*.

(*e*) *Ex parte Watkins* (1862), 5 L. T. 605.

(*f*) *Midland Rail. Co.* v. *Edmonton Union*, [1895] A. C. 485.

(*g*) *Midland Rail. Co.* v. *Edmonton Union*, *supra*, *per* Lord HERSCHELL, L.C., at p. 488; *R.* v. *Cumberland Justices* (1903), 68 J. P. 153.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 32 (2); and see p. 84, *ante*. As to the taxation of costs generally, see title SOLICITORS.

SECT. 2. **Mandamus.**

SECT. 2.—*Mandamus.*

SUB-SECT. 1.—*To Justices.*

Mandamus to justices.

234. Justices are bound to hear (*i*) and determine (*k*) every application for a licence, and if they fail to do so according to law a writ of mandamus may be obtained from the High Court directing them to hear and determine the application (*l*).

SUB-SECT. 2.—*To Quarter Sessions.*

Mandamus to quarter sessions.

235. A mandamus may be obtained to compel justices at quarter sessions to hear and determine an appeal (*m*), but such an application must be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time be allowed by the court or a judge, or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court (*n*).

SECT. 3.—*Certiorari.*

SUB-SECT. 1.—*Excise Licence.*

Excise licence.

236. An excise licence cannot be set aside by *certiorari*, as the granting of it is a ministerial and not a judicial act (*o*).

SUB-SECT. 2.—*Justices' Licence.*

Justices' licence.

237. No conviction or order made in pursuance of the Licensing (Consolidation) Act, 1910 (*p*), originally or on appeal, relative to any offence, penalty, forfeiture, or summary order, can be quashed for want of form, or, if made by a court of summary jurisdiction, be removed by *certiorari* or otherwise, at the instance of the Crown or of any private party, into any superior court (*p*); but this does not take away the *certiorari* where (1) a manifest want of jurisdiction in the tribunal that made the order, or (2) manifest fraud in the party procuring it, is shown (*q*).

(*i*) *R.* v. *Walsall Justices* (1854), 3 C. L. R. 100; *R.* v. *Farquhar* (1874), L. R. 9 Q. B. 258; *R.* v. *Redditch Justices* (1885), 2 T. L. R. 193.

(*k*) See *R.* v. *Sykes* (1875), 1 Q. B. D. 52; but see *Ex parte Gorman*, [1894] A. C. 23, 27.

(*l*) *R.* v. *Walsall Justices*, *supra*; *R.* v. *Redditch Justices*, *supra*; *R.* v. *Sykes*, *supra*. As to mandamus generally, see title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*, and in particular pp. 89—91.

(*m*) See *R.* v. *Lancaster Justices* (1891), 7 T. L. R. 428, C. A., reversing S. C. *sub nom. Re O'Brien*, *R.* v. *Lancashire Justices* (1891), 64 L. T. 562; *R.* v. *London Justices*, [1895] 1 Q. B. 616, C. A.; and as to mandamus see note (*l*), *supra*.

(*n*) Crown Office Rules, 1906, r. 68; *R.* v. *Gloucestershire Justices* (1890), 54 J. P. 519.

(*o*) See title CROWN PRACTICE, Vol X., pp. 171, 172.

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 102.

(*q*) *Colonial Bank of Australasia* v. *Willan* (1874), L. R. 5 P. C. 417; and see *R.* v. *Bolton* (1841), 1 Q. B. 66; *Re Bailey*, *Re Collier* (1854), 3 E. & B. 607; *R.* v. *St. Olave's, Southwark, District Board of Works* (1857), 8 E. & B. 529; *R.* v. *Cheltenham Commissioners* (1841), 1 Q. B. 467; *R.* v. *Cambridge* (*Recorder*) (1857), 8 E. & B. 637; *R.* v. *Arkwright* (1848), 12 Q. B. 960; *Thompson* v. *Ingham* (1850), 14 Q. B. 710; *Pease* v. *Chaytor* (1863), 3 B. & S. 620; *R.* v. *Stimpson* (1863), 4 B. & S. 301; *Bunbury* v. *Fuller* (1853), 9 Exch. 111; *R.* v. *Gillyard* (1848), 12 Q. B

SECT. 4.—*Special Case.*

SUB-SECT. 1.—*Licensing Justices.*

Licensing justices.

238. The provisions of the Summary Jurisdiction Acts (*r*) do not apply to justices acting for licensing purposes, and a special case upon a point of law cannot be asked for under the Summary Jurisdiction Acts (*r*) upon their decision (*a*). It seems also that they cannot state a case under the Quarter Sessions Act, 1849 (*b*), as there are no parties before them who can agree to the statement of a case under that Act.

But in the case of an application for a protection order, which is made to a court of summary jurisdiction, a special case may be stated by the justices under the Summary Jurisdiction Act, 1879 (*c*).

SUB-SECT. 2.—*Quarter Sessions.*

Quarter sessions.

239. Quarter sessions may grant a special case upon a point of law for the opinion of the High Court (*d*), and so may the committee of quarter sessions acting as the compensation authority (*e*).

The decisions of the High Court upon such matters other than convictions are open to appeal (*f*), but leave to appeal must be obtained (*g*).

Part XI.—Hours of Sale.

SECT. 1.—*Hours of Sale.*

SUB-SECT. 1.—*In General.*

Wholesale.

240. Intoxicating liquors may be sold by wholesale at any hour in premises in which no sale by retail can legally take place (*h*).

527; *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509; *R.* v. *Bradley* (1894), 63 L. J. (M. C.) 183. As to *certiorari* generally, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*, and see *R.* v. *Nicholson*, [1899] 2 Q. B. 455, 468, 473, C. A.

(*r*) Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43); 1879 (42 & 43 Vict. c. 49); 1884 (47 & 48 Vict. c. 43); 1899 (62 & 63 Vict. c. 22); see title MAGISTRATES.

(*a*) *Boulter* v. *Kent Justices*, [1897] A. C. 556, overruling *R.* v. *Glamorganshire Justices*, *R.* v. *Pontypool Justices*, [1892] 1 Q. B. 621, C. A.; *West* v. *Potts* (1870), L. R. 6 Q. B. 88, n., *sub nom. Garatty* v. *Potts*, 23 L. T. 410; *R.* v. *Bird*, *Ex parte Jones* (1898), 62 J. P. 309.

(*b*) 12 & 13 Vict. c. 45, s. 11.

(*c*) 42 & 43 Vict. c. 49; see *R.* v. *Bell*, *Ex parte Flinn & Sons* (1899), 15 T. L. R. 487.

(*d*) *R.* v. *Sylvester* (1862), 2 B. & S. 322, is an example.

(*e*) *R.* v. *Southampton Licensing Justices*, *Ex parte Cardy*, [1906] 1 K. B. 446.

(*f*) *Walsall Overseers* v. *London and North Western Rail. Co.* (1878), 4 App. Cas. 30.

(*g*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), ss. 1 (5), 2 (1).

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (i.); *R.* v. *Jenkins* (1891), 61 L. J. (M. C.) 57.

SECT. 1. Hours of Sale.

241. All premises in which intoxicating liquors are sold by retail must be closed as follows (*i*):—

Retail.

General closing hours in the metropolis.

(1) If situate within the metropolis (*k*),—

(i.) On Saturday night from midnight until 1 o'clock in the afternoon on the following Sunday; and

(ii.) On Sunday afternoon from 3 o'clock until 6 o'clock; and

(iii.) On Sunday night from 11 o'clock until 5 o'clock on the following morning; and

(iv.) On all other days from half an hour after midnight until 5 o'clock on the same morning (*i*).

In metropolitan police area, towns or populous places.

(2) If situate beyond the metropolis (*k*) but in the metropolitan police district (*l*), or in a town (*m*) or populous place (*n*),—

(i.) On Saturday night from 11 o'clock until half an hour after noon on the following Sunday; and

(ii.) On Sunday afternoon from 2.30 until 6 o'clock; and

(iii.) On Sunday night from 10 o'clock until 6 o'clock on the following morning; and

(iv.) On the nights of all other days from 11 o'clock until 6 o'clock on the following morning (*i*).

Elsewhere.

(3) If situate elsewhere than in the metropolis (*k*) or the metropolitan police district (*l*), or in a town (*m*) or populous place (*n*),—

(i.) On Saturday night from 10 o'clock until half an hour after noon on the following Sunday; and

(ii.) On Sunday afternoon from 2.30 until 6 o'clock; and

(iii.) On Sunday night from 10 o'clock until 6 o'clock on the following morning; and

(iv.) On the nights of all other days from 10 o'clock until 6 o'clock on the following morning (*i*).

Christmas Day and Good Friday.

242. The general closing hours on Christmas Day and Good Friday, and the days preceding Christmas Day and Good Friday

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 54, Sched. VI., 1.

(*k*) "The metropolis" means the administrative county of London, with the addition of any other area that is within the four-mile radius from Charing Cross (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. VI.—Special Provisions, 2 (a)); and compare title METROPOLIS; and see further p. 90, *post*.

(*l*) See titles METROPOLIS; POLICE.

(*m*) "Town" means a borough or urban district, and any collection of houses adjacent to a town as so defined is deemed to be part of the town after it has been declared so to be by an order of the confirming authority having jurisdiction in the place where the houses are situated; but no borough or urban district, whether including such adjacent houses or not, is to be deemed a town, unless it contains 1,000 inhabitants (*ibid.*, Sched. VI.—Special Provisions, 2 (b)); and see note (*n*), *infra*.

(*n*) "Populous place" means any area with a population (see p. 89, *post*) of not less than 1,000, which by reason of the density of its population the confirming authority of the county by order determines to be a populous place (*ibid.*).

Any order of the confirming authority of the county as to a town or populous place may be made from time to time at a meeting specially convened for that purpose, in manner provided by regulations made by that authority, or in default of those regulations by the clerk of the peace, and any such meeting may be adjourned, provided that an order restrictive of a previous order shall not be made except on a revision after the publication of a census. Any such order must specify the boundaries of the town or populous place. As soon as may be after the publication of each census the confirming authority of the county must,

respectively, are the same as the general closing hours on Sunday and Saturday, Sunday being taken to correspond to Christmas Day or Good Friday, and Saturday to the day preceding Christmas Day or Good Friday, but this provision does not alter the general closing hours on Sunday when Christmas Day immediately precedes or succeeds Sunday (*o*).

Time.

243. The time is taken as Greenwich mean time (*p*).

Population.

244. The population of any area is to be ascertained according to the last published census for the time being (*q*).

Excise licence.

245. Where any intoxicating liquors are sold by retail under an excise licence, without the necessity of a justices' licence, the provisions as to closing apply as in other cases (*r*).

Effect of local custom.

246. No local custom can abrogate the provisions as to closing hours, for example, a custom to keep open all public-houses on Mid-Lent Sunday is bad (*s*).

Power of licensing justices to vary closing hours.

247. The licensing justices may (*a*), if they think fit, as respects premises situate beyond the metropolis (*b*), for the purpose of accommodating the hours of closing on Sunday, Good Friday, and Christmas Day to the hours of public worship in that place, by order direct that such premises shall remain closed until 1 o'clock instead of half-past 12, and in that case the premises must be closed in the afternoon from 3 until 6 o'clock instead of from half-past 2 until 6 o'clock (*c*). Where such an order is made, the provisions relating to closing hours take effect as if the general closing hours were modified as respects premises affected by the order in accordance therewith (*d*).

No such order comes into operation until the expiration of one month after the date thereof, and the order must be advertised in such manner as the licensing justices direct, and is in force until revoked; the expense of such advertisement may be defrayed in like manner as the expenses of advertising the sittings of justices are defrayed (*e*).

at a meeting to be specially convened for the purpose, revise orders then in force within its jurisdiction, and may order or cancel any of those orders, or make such further orders, if any, as it deems necessary to give effect to the provisions of the Act (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. VI.—Special Provisions, 2).

(*o*) *Ibid.*, Sched. VI.—Special Provisions, 1.

(*p*) Statutes (Definition of Time) Act, 1880 (43 & 44 Vict, c. 9), s. 1; and see generally, title TIME.

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 109; and see notes (*m*) and (*n*), p. 88, *ante*. As to the meaning of "return of the last census" in the case of the extension of a borough, see *Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446, C. A., and note (*k*), p. 57, *ante*.

(*r*) *Martin* v. *Barker* (1881), 50 L. J. (M. C.) 109.

(*s*) *Stacey* v. *Milne* (1875), 39 J. P. 103; and see p. 101, *post*. For the effect of statutory enactments on customs, see title CUSTOMS AND USAGES, Vol. X., pp. 246 *et seq.*

(*a*) Notwithstanding anything contained in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), or in any local Act.

(*b*) See p. 88, *ante*.

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 56 (1).

(*d*) *Ibid.*, s. 56 (2).

(*e*) *Ibid.*, s. 56 (3). See the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 30; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. V.

SECT. 1. Hours of Sale.

SUB-SECT. 2.—*In Wales* (*f*).

Wales.

248. All premises in Wales in which intoxicating liquors are sold by retail must be closed as follows:—

If situated in a town or populous place, (i.) on Saturday night from 11 o'clock until 6 o'clock on the following Monday morning; and (ii.) on the nights of all days in the week except Saturday and Sunday from 11 o'clock until 6 o'clock on the following morning.

If not situated in a town or populous place, (i.) on Saturday night from 10 o'clock until 6 o'clock on the following Monday morning; and (ii.) on the nights of all days in the week except Saturday and Sunday from 10 o'clock until 6 o'clock on the following morning (*g*).

Christmas Day and Good Friday.

249. The closing hours in Wales for Christmas Day and Good Friday and the days preceding them are the same as the closing hours for those days in England (*h*).

SUB-SECT. 3.—*In London.*

London.

250. No licensed victualler or other person may open his house for the sale of wine, spirits, beer, or other fermented articles on a Sunday, Christmas Day, or Good Friday, before the hour of 1 p.m., except for refreshment of travellers (*i*).

No wines, spirits, or other excisable liquors may be sold by retail on board of any boat, steamboat, or other vessel which is moored or lying at anchor within the metropolitan police district during the hours and times on Sunday, Good Friday, and Christmas Day on which licensed victuallers are by law obliged to keep their houses closed (*k*).

SECT. 2.—*Six-day Licence.*

Six-day licence.

251. Where on the occasion of an application for a new justices' licence, or the transfer, removal, or renewal of a justices' on-licence, the applicant, at the time of application, applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which the licence is or is to be granted closed during the whole of Sunday, the justices must insert that condition in the licence (*l*).

(*f*) See *Richards* v. *McBride* (1881), 8 Q. B. D. 119; *Forsdike* v. *Colquhoun* (1883), 11 Q. B. D. 71.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. VI., 2; and see also p. 93, *post*. As to the meaning under the former law of "usual hours of afternoon divine service," see *R.* v. *Knapp* (1853), 2 E. & B. 447. As to the meaning of "town" and "populous place," see notes (*m*) and (*n*), p. 88, *ante*.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), Sched. VI.—Special Provisions, 1; and see pp. 88, 89, *ante*.

(*i*) City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 26 (see note (*f*), p. 123, *post*); see further as to London, p. 88, *ante*.

(*k*) Licensing Act, 1842 (5 & 6 Vict. c. 44), s. 5. See Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 42 (repealed by Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75); and compare *R.* v. *Smith* (1873), L. R. 8 Q. B. 146. As to licences to passenger vessels, see p. 105, *post*.

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 58 (1).

SECT. 2. Six-day Licence.

The holder of a justices' on-licence in which such condition is inserted, called a six-day licence, must keep his premises closed during the whole of Sunday, and the provisions with respect to the closing of licensed premises during certain hours on Sunday apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only (*m*). But Sunday does not for this purpose include Christmas Day when Christmas Day falls on a day other than a Sunday (*n*) or Good Friday (*m*).

Effect of six-day licence.

If justices have once inserted such a condition, they cannot afterwards be compelled to omit it (*o*), even if the licence has been held without the Sunday closing condition for some years before the condition was inserted (*p*).

Abatement of duty.

The holder of a six-day licence may obtain from the Commissioners of Customs and Excise any licence granted by those Commissioners which he is entitled to obtain in pursuance of the licence upon payment of six seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days (*q*).

SECT. 3.—*Early Closing Licence.*

Early closing licence.

252. Where, on the occasion of any application for a new justices' on-licence, or the ordinary removal or renewal of a justices' on-licence, the applicant applies to the licensing justices to insert in his licence a condition that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the justices must insert the condition in such licence (*r*).

The holder of a justices' on-licence in which such a condition is inserted (called an early-closing licence) must close his premises at night one hour earlier than the ordinary hour at which such premises would be closed, and the statutory provisions apply to the premises as if such earlier hour were the hour at which the premises are required to be closed (*a*).

Abatement of duty.

The holder of an early-closing licence may obtain from the Commissioners of Customs and Excise any licence granted by those Commissioners which he is entitled to obtain in pursuance of the licence upon payment of a sum representing six-sevenths of the duty which would otherwise be payable by him for a similar licence not limited to such early closing (*b*).

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 58 (2). As to a holder of a six-day licence selling intoxicating liquor on Sunday to any person not lodging in his house, see p. 94, *post*.

(*n*) *Davies* v. *Harrison*, [1909] 2 K. B. 104.

(*o*) *R.* v. *Crewkerne Licensing Justices* (1888), 21 Q. B. D. 85, C. A.; *Ellis* v. *Lincoln Licensing Justices* (1888), 52 J. P. 88.

(*p*) *R.* v. *Liverpool Licensing Justices* (1888), 52 J. P. 376.

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 60.

(*r*) *Ibid.*, s. 59 (1).

(*a*) *Ibid.*, s. 59 (2).

(*b*) *Ibid.*, s. 60.

SECT. 3. Early Closing Licence.

If the licence is both a six-day and an early-closing licence, the holder may obtain his excise licence on payment of five-sevenths of the full duty (*c*).

SECT. 4.—*Refreshment Houses not Licensed to sell Intoxicating Liquors.*

Refreshment house.

253. A refreshment house is any house, room, shop or building kept open for public refreshment, resort and entertainment at any time between 10 o'clock at night and 5 o'clock on the following morning, not being licensed for the sale of beer, cider, wine or spirits respectively; every refreshment house requires a refreshment house licence (*d*).

Closing hours.

No person may open or keep open any refreshment house in which intoxicating liquors are not sold, or sell or expose for sale or consumption in any such refreshment house any refreshments or any article whatever between (*e*) the hour of the night or morning at which premises licensed for the sale of intoxicating liquors, by retail, situated in the same place as such refreshment houses, are required to be closed (*f*) and 4 o'clock in the morning (*g*).

Any person acting in contravention of this provision is liable to a penalty not exceeding £5, recoverable in a summary manner (*h*).

Sale to persons lodging on premises.

The keeper of a refreshment house in which intoxicating liquors are not sold is not precluded from selling refreshments to, or allowing them to be consumed by, persons lodging in his house within the above-mentioned hours. But this does not authorise a person to keep open any refreshment house in which intoxicating liquors are not sold, or sell refreshments otherwise than at the times and upon the conditions prescribed by the statutes in that behalf (*i*).

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 60.

(*d*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 6, as amended by the Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 8. Certain other similar premises may, if the owner think fit, be licensed as refreshment houses (Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 6). The licence is an excise licence (*ibid.*, s. 8). The penalty for keeping a refreshment house without a licence is a sum not exceeding £20, recoverable summarily (*ibid.*, s. 9). For every licence to keep a refreshment house there are charged the following duties:—(i.) If the house and premises in respect of which such licence is granted are under the rent and value of £30 a year, the duty of 10*s.* 6*d.*; (ii.) if of the rent or value of £30 a year or upwards, the duty of £1 1*s.* (Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 9). As to what premises have been held to be within the definition of a refreshment house, see *Howes* v. *Inland Revenue Board* (1876), 1 Ex. D. 385, C. A.; *Muir* v. *Keay* (1875), L. R. 10 Q. B. 594; *Cooper* v. *Dickinson* (1877), January (unreported); *Taylor* v. *Oram* (1862), 1 H. & C. 370; *Kelleway* v. *Macdougal* (1880), 45 J. P. 207. "The question must be always one of more or less, and the facts of each particular case must be looked at as they arise" (*Muir* v. *Keay*, *supra*, *per* BLACKBURN, J., at p. 597). See also title FACTORIES AND SHOPS, Vol. XIV., p. 510.

(*e*) Public House Closing Act, 1864 (27 & 28 Vict. c. 64), s. 5.

(*f*) Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 11.

(*g*) Public House Closing Act, 1864 (27 & 28 Vict. c. 64), s. 5.

(*h*) As to summary procedure generally, see title MAGISTRATES. As to the offence of selling intoxicating liquor in an unlicensed refreshment house, see p. 93, *post*.

(*i*) Public House Closing Act, 1864 (27 & 28 Vict. c. 64), s. 5, as altered by Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 11.

SECT. 4. Refreshment Houses not Licensed to sell Intoxicating Liquors.

254. Sunday closing in Wales applies only to premises in which intoxicating liquors are sold or exposed for sale by retail, and does not apply to refreshment houses where no intoxicating liquors are sold, and where no licence is held for their sale (*k*).

An unlicensed refreshment house in Wales in which no intoxicating liquors are sold may open between 5 and 6 p.m. on Sunday (*l*).

SECT. 5.—*Refreshment Houses Licensed to Sell Foreign Wine.*

Refreshment house in Wales.

255. Whenever any person who has taken out a licence to keep a refreshment house, not being a house open after 10 p.m., applies for and obtains a licence to sell therein by retail foreign wine to be consumed in such house, he must be allowed an abatement at the following rate per annum from the duty chargeable for such licence in respect of the same period of time or portion of the year for which he takes out the said licence to retail wine,— Abatement.

	s.	d.
where the house and premises in respect of which such licence is granted are under the rent and value of £30 a year, an abatement of	7	4
where the same are of the rent and value of £30 or upwards, an abatement of	17	10

Provided that if any person to whom such an abatement has been made, on taking out a wine licence, keeps open his house as a refreshment house, or sells therein any wine or other refreshment after 10 p.m., he is deemed to keep a refreshment house without taking out and having in force a proper licence in that behalf, and also, in respect of any wine sold by him after the hour aforesaid, he is deemed to have sold the same without having a proper licence in force duly authorising him in that behalf, and forfeits the penalties imposed for such offences (*m*).

Every refreshment house in respect of which a licence is granted for the sale therein of foreign wine, upon which an abatement of duty has been so allowed, must be closed every night at 10 o'clock (*n*).

SECT. 6.—*Closing in case of Riot.*

Riot.

256. Any two justices of the peace acting for any county or place where any riot or tumult happens, or is expected to happen, may order every licensed person in or near the place where such riot or tumult happens, or is expected to happen, to close his premises during any time the justices may order; and it is lawful for any person acting by order of any justices to use such force as may be necessary for the purpose of closing such premises (*o*).

(*k*) *Berni* v. *Thorney* (1895), 64 L. J. (M. C.) 271; and see p. 90, *ante*.

(*l*) *Parker* v. *Harris* (1909), 73 J. P. 183.

(*m*) Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 9; Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), s. 4. The respective penalties are fixed by the Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), ss. 9 (see p. 92, *ante*), 19.

(*n*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 28.

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 63. As to the penalty for not closing, see p. 129, *post*.

SECT. 7. Exemptions from Closing.

SECT. 7.—*Exemptions from Closing.*

SUB-SECT. 1.—*Travellers and Lodgers.*

Travellers and lodgers.

257. Nothing in the Licensing (Consolidation) Act, 1910 (*p*), precludes the holder of a justices' on-licence from selling any intoxicating liquor to be consumed on the premises at any time to persons lodging in his house; nor, except where the licence is a six-day licence and the sale is on Sunday, to *bonâ fide* travellers (*p*).

There is no exception permitting sale to lodgers or *bonâ fide* travellers by persons licensed to sell any intoxicating liquor to be consumed off the premises (*q*).

A sale of intoxicating liquor to a person lodging in a licensed house is none the less a sale to him because his guests and not the lodger consume the liquor, provided that the latter himself pays for the liquor (*r*).

Who is a *bonâ fide* traveller.

258. *Bonâ fide* traveller in general only means traveller (*s*). But a person for this purpose is not deemed to be a *bonâ fide* traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, that distance being calculated by the nearest public thoroughfare (*t*), whether such thoroughfare is by water or by land (*u*), and a navigable arm of the sea may be a public thoroughfare for this purpose (*u*).

It is immaterial, in determining whether a person is or is not a *bonâ fide* traveller, whether the object of his travelling is business or pleasure (*v*); but a person is not a *bonâ fide* traveller, although three miles distant from his place of lodging on the previous night, if his object in making the journey was to obtain beer (*a*); and the object of his journey is a matter of fact for the determination of the justices (*b*).

A *bonâ fide* traveller does not cease to be such by reason of the fact that he has already obtained dinner and liquor in another public-house (*c*).

A friend of a publican, living more than three miles from the public-house and having slept at home the previous night, who has

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 61 (1) (b).

(*q*) *Mountifield* v. *Ward*, [1897] 1 Q. B. 326.

(*r*) *Pine* v. *Barnes* (1887), 20 Q. B. D. 221; *Cope* v. *Landles* (1896), 13 T. L. R. 18.

(*s*) *Atkinson* v. *Sellers* (1858) 28 L. J. (M. C.) 12, *per* WILLIAMS, J., at p. 13.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 61 (3).

(*u*) *Coulbert* v. *Troke* (1875), 1 Q. B. D. 1.

(*v*) *Atkinson* v. *Sellers* (1858), 5 C. B. (N. S.) 442; *Taylor* v. *Humphreys* (1861), 10 C. B. (N. S.) 429; *Taylor* v. *Humphries* (1864), 17 C. B. (N. S.) 539; *Peplow* v. *Richardson* (1869), L. R. 4 C. P. 168; *Penn* v. *Alexander*, [1893] 1 Q. B. 522, *per* COLLINS, J.

(*a*) *Atkinson* v. *Sellers*, *supra*; *Taylor* v. *Humphreys*, *supra*, *per* ERLE, C.J., at pp. 434, 435; *Taylor* v. *Humphries*, *supra*; *Peplow* v. *Richardson*, *supra*; *Penn* v. *Alexander*, *supra*; and compare note (*h*), p. 95, *post*.

(*b*) *Penn* v. *Alexander*, *supra*.

(*c*) *Oldham* v. *Sheasby* (1891), 60 L. J. (M. C.) 81.

been invited to sing at a concert at the public-house, is a *bonâ fide* traveller (*d*). SECT. 7. Exemptions from Closing.

A railway porter who walks from his house, where he slept the previous night, to a railway station, and travels thence by train to another station where he goes on duty, and who then walks to a public-house, which is more than three miles from the place where he slept, is a *bonâ fide* traveller (*e*).

SUB-SECT. 2.—*Railway Stations.*

259. Nothing in the Licensing (Consolidation) Act, 1910 (*f*), as to hours of closing, precludes the sale at any time at a railway station of intoxicating liquors to persons arriving at or departing from the station by railroad (*f*). Railway stations.

Nothing contained in the Public House Closing Act, 1864 (*g*), applies to a sale, in a refreshment house in which intoxicating liquors are not sold at a railway station between the hour of the night or morning, at which premises licensed for the sale of intoxicating liquors by retail situate in the same place as such refreshment house are required to be closed, and 4 a.m., of refreshments to persons arriving at or departing from such station by railroad (*g*).

A man who is about to depart and in fact departs by train from a railway station may legally be served at that station with intoxicating liquor, even if he takes his ticket and his journey for the purpose of obtaining the liquor (*h*).

SUB-SECT. 3.—*General Order of Exemption.*

260. The local authority of any licensing district (*i*), upon evidence that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling, may, if it thinks fit, grant to the holder of any justices' on-licence in respect of premises in the immediate neighbourhood of that market, or of the place where the persons follow that lawful trade or calling, an order (called a general order of exemption) exempting that person from the provisions of the Licensing (Consolidation) General order of exemption.

(*d*) *Dames* v. *Bond* (1891), 55 J. P. 503.

(*e*) *Cowap* v. *Atherton*, [1893] 1 Q. B. 49.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 61 (1) (c).

(*g*) Public House Closing Act, 1864 (27 & 28 Vict. c. 64), s. 10; Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 11. The former Act is repealed, except as to refreshment houses where intoxicating liquors are not sold, by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, Sched. II.; see p. 96, *post*.

(*h*) *Williams* v. *McDonald* (1899), 68 L. J. (Q. B.) 678. The meaning of "traveller departing from a railway station," under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 42 (now repealed), was discussed in *Fisher* v. *Howard* (1864), 34 L. J. (M. C.) 42.

(*i*) For the purposes of the provisions of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), relating to closing, the local authority is (a) in the metropolitan police district, the commissioner of police for the metropolis, subject to the approbation of the Secretary of State; (b) in the City of London, the commissioner of City police, subject to the approbation of the Lord Mayor; (c) in any other place, a petty sessional court (see Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 55 (4)).

SECT. 7. Exemptions from Closing.

Act, 1910 (*j*), with respect to general closing hours on such days and during such time, except between the hours of 1 a.m. and 2 a.m., as may be specified in the order (*k*).

The holder of a general order of exemption is not liable to any penalty for not closing his premises on such days and during such time as may be specified in the order; but he is not exempt from any other penalty (*k*).

Withdrawal or variation of order.

The local authority may at any time, if it thinks fit, withdraw a general order of exemption or alter the order by way of extension or restriction, as the authority deems necessary or expedient, so, however, as not to render any person liable to any penalty for anything done under the order before the holder was informed of such withdrawal or alteration (*l*).

If no evidence is given of the existence of circumstances required for granting an order of exemption the justices have no power to make such an order (*m*).

Exemption of refreshment house.

261. So far as refreshment houses where intoxicating liquors are not sold are concerned (*n*), the licensing justices may at the time of granting or renewing any licence, upon evidence that it is necessary or desirable for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling, grant to any keeper of a refreshment house whose place of business is in the immediate neighbourhood of such market, or of the place where the persons follow such lawful trade or calling, a licence exempting him from the provisions of the Public House Closing Act, 1864 (*o*), between the hours of 2 a.m. and 4 a.m., or any part of such hours, during such days, times, or hours as are specified in such licence; and no keeper of a refreshment house to whom such licence has been granted is subject to any penalty for a contravention of the Public House Closing Act, 1864 (*o*), during the days or times to which such licence extends, but he is not exempted by such licence from any penalty to which he may be subject under any other Act of Parliament; and a printed notice stating the days and special hours during which, and the class of persons for whom, the house is open under such licence must be affixed in a conspicuous position outside the house (*p*).

Withdrawal or variation of order.

The licensing justices may from time to time, as and when they think fit, either withdraw such licence altogether, or alter, vary, or amend it in such manner as they think necessary or expedient (*q*).

(*j*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 55 (1).

(*l*) *Ibid.*, s. 55 (3). An exemption from the hours of closing cannot be granted in respect of premises in the neighbourhood of a theatre for the accommodation of persons attending the same. See Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 4, repealed by and not reproduced in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*m*) *R.* v. *Johnson* [1905], 2 K. B. 59.

(*n*) As to such refreshment houses, see p. 92, *ante*.

(*o*) 27 & 28 Vict. c. 64.

(*p*) Public House Closing Act, 1865 (28 & 29 Vict. c. 77), s. 2; Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, Sched. II.

(*q*) Public House Closing Act, 1865 (28 & 29 Vict. c. 77), s. 3.

Exemptions from Closing.

Special order of exemption.

262. If the holder of a justices' on-licence applies to the local authority of a licensing district for an order (called a special order of exemption) exempting him from the provisions of the Licensing (Consolidation) Act, 1910 (*r*), relating to general closing hours on any special occasion or occasions, the local authority may grant to the applicant such a special order so exempting him during the hours, and on the occasion or occasions specified in the order; and no holder of a justices' on-licence to whom such order of exemption has been granted is subject to any penalty for the contravention of the provisions relating to general closing hours during the time to which the order extends, but he is not exempted by the order from any penalty to which he may be subject by any other provision (*s*).

It is for the authority who grants the licence for exemption to determine what is a special occasion, and the High Court will not interfere even if the authority treats Christmas Eve and New Year's Eve as special occasions (*t*).

The local authority can grant a special order of exemption to a person who holds a licence for the sale of intoxicating liquor even though it is a condition of such licence that the premises in respect of which it is held shall only be open for the sale of intoxicating liquor between certain specified and limited hours (*u*).

Refreshment house.

263. If any keeper of a refreshment house (*v*) where intoxicating liquors are not sold applies to the local authority (*x*) for a licence exempting him from the provisions of the Public House Closing Act, 1864 (*y*), on any special occasion or occasions, the local authority may grant an occasional licence exempting him from these provisions during certain hours and on an occasion or occasions to be specified in the licence; and no keeper of a refreshment house to whom an occasional licence has been granted under that Act (*y*) is subject to any penalty for its contravention during the time to which this licence extends, but he is not exempted by it from a penalty to which he may be subject under any other Act (*z*).

(*r*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*s*) *Ibid.*, s. 57.

(*t*) *Devine* v. *Keeling* (1886), 50 J. P. 551.

(*u*) *Groh* v. *Hesketh*, [1908] 1 K. B. 654, C. A.

(*v*) For refreshment houses see p. 92, *ante*.

(*x*) For the purposes of the Public House Closing Act, 1864 (27 & 28 Vict. c. 64), the following persons and bodies of persons are deemed to be the local authorities capable of granting occasional licences:—

(1) In the metropolitan police district, the commissioner of police for the metropolis, subject to the approbation of one of His Majesty's principal Secretaries of State;

(2) In the City of London and the liberties thereof, the commissioner of City police, subject to the approbation of the Lord Mayor;

(3) In any district, city or town, where petty sessions are held, except in the metropolitan police district, two justices of the peace sitting in petty sessions, and in any other district, city or town, two justices of the peace acting in the district, city or town (Public House Closing Act, 1864 (27 & 28 Vict. c. 64), s. 8; Public House Closing Act, 1865 (28 & 29 Vict. c. 77), s. 5); compare note (*i*), p. 95, *ante*.

(*y*) 27 & 28 Vict. c. 64.

(*z*) *Ibid.*, s. 7; Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, Sched. II.; Licensing Act, 1874 (37 & 38 Vict. c 49) s. 11.

SECT. 8. Right of Licensee to close Premises.

SECT. 8.—*Right of Licensee to close Premises.*

Right to close.

264. Licensed persons other than innkeepers are in the position of ordinary shopkeepers (*a*), and may close their premises whenever they choose to do so, though they are bound to close at the times before mentioned (*b*).

Part XII.—Occasional Excise Licences.

SECT. 1.—*In General.*

To innkeepers.

265. The Commissioners of Customs and Excise may, whenever they consider it conducive to public convenience, and with the consent of a petty sessional court, authorise any officer of excise to grant to any person duly authorised to keep a common inn, alehouse, or victualling house, who has taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence empowering him to sell the like articles for which he has taken out such licences at any such other place, and for and during such space of time, not exceeding three (now apparently extended to six (*c*)) consecutive days at any one time as the said Commissioners approve and as are specified in such occasional licence. A person who has taken out such occasional licence is not liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein, provided that no such licence authorises the sale of any beer, spirits, or wine, except during the hours from such hour not earlier than sunrise until such hour not later than 10 p.m. as are specified in the consent given by the justices for the granting of such occasional licence (*d*). But the occasional licence does not protect such person in the sale of any of the articles mentioned, unless he at the time of sale produces such licence when requested to do so by any officer of excise or by any constable or police officer. No such licence can be granted for the sale of any of the articles mentioned on any Sunday, Christmas Day or Good Friday, or any day appointed for a public fast or thanksgiving (*e*).

Sale at public dinner or ball.

Upon the occasion of any public dinner or ball, the person who has obtained such a licence may sell beer, spirits, or wine during such hours before and after sunrise or sunset as are allowed and specified in the consent given by the justices for the granting of the licence (*f*).

(*a*) See *R.* v. *Rymer* (1877), 2 Q. B. D. 136, C. C. R. As to innkeepers, see title INNS AND INNKEEPERS, Vol. XVII., pp. 301 *et seq.* As to shops, see title FACTORIES AND SHOPS, Vol. XIV., pp. 510 *et seq.*

(*b*) See pp. 88 *et seq.*, *ante.*

(*c*) Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 19.

(*d*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 13; Revenue Act, 1863 (26 & 27 Vict. c. 33), ss. 19, 20 (1), (2); Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 64. The power to authorise the grant of occasional licences is apparently now vested in the Commissioners of Customs and Excise (see *ibid.*, s. 64 (4)).

(*e*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 13.

(*f*) Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 20 (3).

To refreshment house keepers.

266. The Commissioners of Customs and Excise may, whenever they consider it necessary for the accommodation of the public, authorise any officer of excise to grant an occasional licence in the following cases, that is to say, to any person who has taken out an excise licence to keep a refreshment house, or to sell, by retail in a refreshment house, foreign wine to be consumed therein, or an excise on-licence to retail beer (*g*). Every such occasional licence authorises such person to carry on the same trade or business as he is authorised to carry on by virtue of the original licence, at any such place, other than the place for which his original licence was granted, and for and during such space of time, not exceeding three consecutive days at any one time, as the Commissioners approve and as are specified in such occasional licence (*h*).

But the occasional licence does not protect any such person in the carrying on of any such trade or business unless he produces such licence whenever requested to do so by any officer of excise, or by any constable or police officer, at the time of exercising such trade or business (*h*).

Consent and notice on grant of occasional licence.

267. An occasional licence cannot be granted except with the consent of a petty sessional court and unless, twenty-four hours at least before applying for that consent, the applicant has served on the superintendent of police for the district notice of his intention to apply for the consent, setting out his name and address, the place and occasion in respect of which the licence is required, the period for which the licence is to be in force, and the hours to be specified in the consent of the justices (*i*).

But where there is no sitting of a petty sessional court within three days before the time when the licence is required, the consent may be given by any two justices acting for the division and sitting together, provided such justices are satisfied that it was not practicable to make an application to a petty sessional court (*i*). Notice of a consent so given must be sent to the superintendent of police (*i*).

Effect of occasional licence.

For the purposes of certain provisions relating to public order (*j*), a person taking out an occasional licence is deemed to be the holder of a justices' licence, and the place in which any intoxicating liquor is sold in pursuance of the occasional licence is deemed to be licensed

(*g*) See pp. 14, 93, *ante*.

(*h*) Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 5. The conditions and restrictions contained in the Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 20, relating to occasional licences (see p. 98, *ante*), apply to the occasional licences to be granted under the Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18). As to the Commissioners, see note (*d*), p. 98, *ante*, and compare note (*a*), p. 17, *ante*.

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 64.

(*j*) Namely, *ibid.*, ss. 75—81, relating to the penalty for permitting drunkenness, the penalty for keeping a disorderly house, the penalty for permitting premises to be a brothel, offences in relation to constables, the penalty for permitting gaming; the power to exclude drunkards from licensed premises, the entry on premises by constables for the purpose of enforcing the Act, and for the purpose of the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12, relating to persons found drunk in a public place or on licensed premises, and any provisions for giving effect thereto.

SECT. 1. In General.

premises, and to be the premises of the person taking out such licence (*k*).

SECT. 2.—*Fairs and Races.*

Fairs and races.

268. There are or have been many statutory exemptions permitting persons holding excise licences to sell liquors without a justices' licence or excise licence in respect of a booth or tent within the limits of any lawful and accustomed fair or any races (*l*).

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 64 (3).

(*l*) The exact position of the law at the present time is difficult to state with certainty. The Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 11, provides that nothing therein contained shall extend to prohibit any person, duly licensed to sell beer, cider, or perry by retail, to be consumed in his house or premises, or any retailer of spirits, or of foreign wine, or of sweets or made wines, or of mead or metheglin, he being duly licensed respectively for such respective purpose, to carry on his business for which he is so licensed, in booths, tents, or other places, at the time and place, and within the limits of holding any lawful and accustomed fair, by virtue of any law or statute in that behalf, or any public races (as to which, see *infra*). Nothing contained in the Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), extends to prohibit any person from selling beer in booths or other places at the time and within the limits of the ground or place in or upon which is holden any lawful fair, in like manner as such person was authorised to do before the passing of that Act (*ibid.*, s. 29). The Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 13, after reciting the Excise Licences Act, 1825 (6 Geo. 4, c. 81), and the Excise Act, 1860 (23 & 24 Vict. c. 113), and stat. (1860) 23 & 24 Vict. c. 114 (since repealed), declares and enacts that nothing in either of the said two last-mentioned Acts shall be deemed to have repealed, or affected any of the provisions, exceptions, or exemptions contained in any Act in force at the time of the said two several Acts, with respect to the selling of beer or spirits at fairs or races. The Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 12, enacts that so much of any Act as permits the sale of beer, spirits, or wine at fairs or races without an excise licence is hereby repealed." But the Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 21, after reciting that by the Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 12, so much of any Act as permits the sale of beer, spirits, or wine at fairs or races without an excise licence was repealed, enacts that after the passing of the Revenue Act, 1863 (26 & 27 Vict. c. 33), nothing in the recited Act shall extend to prohibit any person duly licensed by the excise to retail beer, spirits, or wine, as is mentioned in the Excise Licences Act, 1828 (6 Geo. 4, c. 81), from carrying on his business for which he is so licensed in booths, tents, or other places at the time and place and within the limits of holding any lawful and accustomed fair by virtue of any law or statute in that behalf, or any public races, in like manner as such persons might lawfully have done under the Excise Licences Act, 1828 (6 Geo. 4, c. 81), if the Revenue Act, 1862 (25 & 26 Vict. c. 33), had not been passed. Further, by the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 20 (5), nothing in that Act contained was deemed to affect the power of any person duly authorised by the excise to sell beer, spirits, or wine at any fair or public races. By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 18, an occasional (excise) licence which was not up to that time necessary (*Haywood* v. *Holland* (1873), 28 L. T. 702, *sub nom. Hayward* v. *Holland*, 37 J. P. 376) was made necessary for sale in any booth, tent or place within the limits of any lawful and accustomed fair or any races, but this provision was repealed by the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), and no similar provision has been substituted. It seems, therefore, that the present position is the same as in 1873, when *Haywood* v. *Holland*, *supra*, was decided. Races are public races although held in a private field hired by the race committee for the occasion, and although persons entering the field are required to make a payment for admission, if anyone who chooses may go (*Boughey* v. *Rowbotham* (1866), 4 H. & C. 711). As to fairs generally, see title MARKETS AND FAIRS; and as to races, see titles GAMING AND WAGERING, Vol. XV., pp. 286, 287; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

SECT. 2. Fairs and Races.

Any right by custom, prescription or charter to sell beer, spirits, or wine at fairs without an excise licence has now been destroyed (*m*).

But exemptions already referred to (*n*) relating to excise licences do not enable any person to sell intoxicating liquor at a fair without a justices' licence enabling him to do so; unless he can bring himself within the exemptions contained in Acts relating to justices' licences (*o*).

Extent of licence.

269. The fact that a person holds a licence from justices to sell intoxicating liquor at premises in one borough does not exempt him from the necessity of having a justices' licence in order to entitle him to sell intoxicating liquor at public races in another borough (*p*). But a justices' licence in respect of premises in one licensing division of a county exempts the holder from the necessity of obtaining a justices' licence in the case of sale at a lawful and accustomed fair held in another licensing division of that county (*q*).

Part XIII.—Registers of Licences.

SECT. 1.—*Excise Licences.*

Beer and cider licences.

270. A list or register of every beer and cider retail licence, specifying the name and place of abode of every person licensed, and the name and description of the house mentioned in such licence, must be kept at the excise office with respect to all licences granted by the Commissioners (*r*), or any person authorised

(*m*) *Huxham* v. *Wheeler* (1864), 3 H. & C. 75; and see p. 89, *ante*.

(*n*) See note (*l*), p. 100, *ante*.

(*o*) *Ash* v. *Lynn* (1866), L. R. 1 Q. B. 270. The effect of these exemptions is as uncertain as in the case of exemption from excise licences. By stat. (1551) 5 & 6 Edw. 6, c. 25, s. 6, which first made a justices' licence necessary, and which was repealed by the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 35, it was provided that in such towns and places (that is, apparently, within every shire, city, borough, town corporate, franchise or liberty within this realm) where any fair or fairs were kept, for the time only of the same fair or fairs, every person might use common selling of ale or beer in booths or other places there, for the relief of the king's subjects that should repair to the same, in such like manner and sort as had been used or done in time passed, that Act or anything therein contained to the contrary notwithstanding. In the similar enactment, the Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 17 (still unrepealed), which also relates to a justices' licence (*R.* v. *Drake* (1817), 6 M. & S. 116), it was provided that nothing was to extend to prohibit any person from selling of any ale or beer in booths or other places, at the time and place of holding any lawful and accustomed fair in like manner as such person was authorised to do before the passing of that Act by virtue of any law or statute in that behalf. No similar exemption was inserted in the Licensing Act, 1872 (35 & 36 Vict. c. 94), but it was held that a person holding a justices' licence in respect of a house in the county was exempt from the necessity of obtaining any other justices' licence to enable him to sell at a lawful and accustomed fair in that county (*Haywood* v. *Holland* (1873), 28 L. T. 702), and although the Alehouse Act, 1828 (9 Geo. 4, c. 61), is now repealed, this decision appears to represent the present state of the law.

(*p*) *Ash* v. *Lynn*, *supra*.

(*q*) *Haywood* v. *Holland supra; sub nom. Hayward* v. *Holland*, 37 J. P. 376, assuming that the exemption from the necessity of obtaining a justices' licence for sale at a lawful fair still holds good.

(*r*) As to the Commissioners, see note (*a*), p. 17, *ante*.

SECT. 1. Excise Licences.

by them, and at the office or dwelling-house of every collector or supervisor in their respective collections and districts. Such register must at all times be produced to and is open to the inspection and perusal of any magistrate of the county or place where such licence is granted, and where such house is situate. A copy of such register must, once in every calendar month, be transmitted by every such collector or supervisor to the clerk of the magistrates for the district in which such licence is granted (*s*). Any copy of or extract from such register which is at any time required by the clerk to the magistrates must be given to him by such collector or supervisor (*s*).

Refreshment house licences.

271. A register of every licence granted under the authority of the Refreshment Houses Act, 1860 (*t*), specifying the name and place of abode of every person licensed, and the name and description of the house for which such licence is granted, and whether the licence be to keep a refreshment house or for the sale of wine therein, must be kept at the office or dwelling-house of every collector and supervisor of excise in their respective collections and districts. Such register must at all times be produced to and is open to the inspection and perusal of any justice of the county or place where such licence is granted and where such house is situate. A copy of such register must, once in every six months, be transmitted by every collector and supervisor of excise to the clerk of the magistrates for the district in which such licence is granted (*u*). Any copy or extract of or from such register which is at any time required by the clerk to the said justices must be given to him by such collector or supervisor (*u*).

SECT. 2.—*Justices' Licences.*

Register of licences.

272. There must be kept in every licensing district by the clerk to the licensing justices of that district a register (called the register of licences) in such form as may be prescribed by those justices, containing the particulars of all justices' licences granted in the district, the premises in respect of which they were granted, the names of the owners of those premises, and the names of the holders for the time being of the licences (*a*). There must also be entered on the register all matters directed to be so entered under any Act, all forfeitures of justices' licences, disqualifications of premises, and other matters relating to the licences on the register (*b*).

Owner's name.

Every person applying for a new justices' licence, or the renewal of a justices' licence, must state the name of the person for the time being entitled to receive, either on his own account or as mortgagee or other incumbrancer in possession, the rack-rent of the premises in respect of which the licence is granted or renewed, and that name must be indorsed on the licence, and the clerk to

(*s*) Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 2. As to collectors and supervisors, see note (*a*), p. 17, *ante*.

(*t*) 23 & 24 Vict. c. 27; and see pp. 92, 93, *ante*.

(*u*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 16.

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 50 (1). If in any licensing district the office of clerk is filled by more than one person, the justices must determine by whom the register is to be kept (*ibid.*, s. 50 (5)).

(*b*) *Ibid.*, s. 50 (3).

the justices must enter that name on the register as the name of an owner of the premises (*c*).

Other person interested.

The clerk to the licensing justices must also enter on the register, as an owner of the premises, the name of any person possessing an estate or interest in the premises, whether as owner, lessee, or mortgagee, prior or paramount to that of the immediate occupier, if that person applies to be so registered and pays a fee of 1*s*. to the clerk, provided that when such estate or interest is vested in two or more persons jointly, one only of those persons can be registered as representing such estate or interest (*d*).

Correction of register.

A court of summary jurisdiction may, on the application of any person who proves to the court that he is entitled to be entered as owner of any premises in place of the person appearing on the register as owner, make an order substituting the name of the applicant, and that order must be obeyed by the clerk to the licensing justices, and a corresponding correction may be directed to be made on the licence granted in respect of the premises of which such applicant claims to be an owner (*e*).

Convictions.

273. Where a licensed person is convicted before any court of any offence committed by him as such, the clerk to the licensing justices must enter in the register of licences, in such form as may be prescribed by the Secretary of State, notice of any conviction of the holder of a justices' licence for an offence committed by him as such (including an offence against the provisions of any Act for the time being in force relating to the adulteration of drink (*f*)), and the clerk of the court before whom the conviction takes place (if he is not the clerk to the licensing justices) must forthwith send notice thereof to the clerk to the licensing justices (*g*).

Election offences.

274. If it appears to the court by which any person holding a justices' licence is convicted of the offence of bribery or treating at an election that such offence was committed on his licensed premises, the court must direct such conviction to be entered in the proper register of licences (*h*).

Notice to owner.

275. When a conviction of a holder of a justices' licence for an offence committed by him as such is entered in the register of licences the clerk to the licensing justices must serve notice of the conviction on the owner of the premises (*i*).

In any case where the conviction of the holder of a licence involves the disqualification of the licensed premises, the court

(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 51 (1).
(*d*) *Ibid.*, s. 51 (2).
(*e*) *Ibid.*, s. 51 (3).
(*f*) As to adulteration of drink generally, see title FOOD AND DRUGS Vol. XV., pp. 5 *et seq.*, 45, 46.
(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 50 (2).
(*h*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 38 (8) (a). As to suffering bribery and treating to take place upon licensed premises, see title ELECTIONS, Vol. XII., pp. 471, 485, 525.
(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 86 (1); as to service of notices, see *ibid.*, s. 108, and p. 40, *ante*.

SECT. 2. Justices' Licences.

before whom the conviction takes place must cause notice of the disqualification to be served on any registered owner of the premises if that owner is not the occupier (*k*).

Inspection of register.

276. Any ratepayer, any owner of premises to which a justices' licence is attached, and any holder of a justices' licence within the licensing district for which the register is kept is, upon payment of a fee of 1*s.*, and any officer of police, and any officer of customs and excise in such district is, without payment, entitled at any reasonable time to inspect and take copies of or extracts from the register (*l*). If the clerk to the licensing justices or any other person prevents the inspection or taking copies of or extracts from the register of licences, or demands any unauthorised fee therefor, he is liable in respect of each offence to a penalty not exceeding £5 (*m*).

Division of register.

277. The licensing justices may, if they think fit, cause the register of licences to be divided into parts, and assign a part to any portion of the licensing district (*n*).

Where a justices' licence is granted (whether as a new licence or by way of renewal or transfer) or removed, a fee of 1*s.* must be paid by the holder of the licence to the clerk to the licensing justices in respect of the register of the transaction (*o*).

Register as evidence.

278. The register of licences is receivable in evidence of the matters required to be entered therein, and a copy of an entry made in the register, purporting to be signed by the clerk to the licensing justices and to be certified as a true copy, is evidence of such matters stated in such entry, without proof of the signature or authority of the person signing the same (*p*).

Part XIV.—Forms of Licences.

SECT. 1.—*Excise Licences.*

Form of excise licence.

279. Licences for the manufacture or sale of any intoxicating liquors are to be in such form as the Commissioners of Customs and Excise direct (*q*), and must be in accordance with the provisions of the Excise Licences Act, 1825 (*r*).

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 86 (2).
(*l*) *Ibid.*, s. 53 (1).
(*m*) *Ibid.*, s. 53 (2).
(*n*) *Ibid.*, s. 50 (6).
(*o*) *Ibid.*, s. 50 (4).
(*p*) *Ibid.*, s. 53 (3); and as to evidence generally, see title EVIDENCE, Vol. XIII., pp. 415 *et seq.*
(*q*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 49 (1), 96 (2).
(*r*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 7. As to collection of excise duties, see title REVENUE.

SECT. 2.—*Justices' Licences.*

SECT. 2. Justices' Licences.

280. A justices' licence must be in such form as may from time to time be prescribed by the Secretary of State (*s*). Form of justices' licence.

A renewal of a justices' licence may be made by an indorsement on the licence, or by the issue of a copy of the old licence (*t*).

Part XV.—Sale of Intoxicating Liquors in Passenger Ships, Railway Cars, Canteens, and Theatres.

SECT. 1.—*Passenger Ships.*

281. An excise licence may be taken out annually (*a*) or for one day only (*b*) in respect of a passenger vessel by the master or other person belonging to the vessel nominated by the owner of the vessel. Passenger ships.

Either of such licences authorises the sale by retail, while the vessel is engaged in carrying passengers, of any intoxicating liquor on the vessel to passengers for consumption on the vessel (*c*). It also authorises the sale of tobacco (*c*). No justices' licence is necessary in order to obtain the excise licence (*d*).

282. In the event of any person to whom a passenger vessels' licence has been granted ceasing to be master of or to belong to her, the licence may be transferred to any other person who is for the time being master of the vessel, or is for the time being a person belonging to her and nominated by her owner for the purpose (*e*). Transfer of licence.

In the event of the transfer of the vessel to some other owner, the licence ceases to have effect as respects that vessel, but may, in that event and in the event of the loss of the vessel, be transferred, on the application of her owner, to the master of some other vessel belonging to him or to some person belonging to such other vessel and nominated by her owner for the purpose (*f*).

283. For the purpose of giving jurisdiction, any sale of liquor on a passenger vessel is deemed to have taken place either where it actually took place or in any place in which the vessel is found (*f*). Jurisdiction and grant.

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 42 (1).
(*t*) *Ibid.*, s. 42 (2).
(*a*) Duty £10 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched I., D.
(*b*) Duty £2 (*ibid.*).
(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., D. As to tobacco, see titles REVENUE; TRADE AND TRADE UNIONS.
(*d*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (f).
(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., D.
(*f*) *Ibid.* As to the transfer of vessels, see, generally, title SHIPPING AND NAVIGATION.

SECT. 1. Passenger Ships.

All such licences may be granted by the Commissioners, or by any officer of excise authorised by them, and all licences granted by any officer so authorised are valid, anything in any Act contained to the contrary notwithstanding (*g*).

Nothing in the Licensing (Consolidation) Act, 1910 (*h*), affects or applies to the sale of intoxicating liquor in passenger vessels in pursuance of the Acts in that behalf (*h*).

SECT. 2.—*Railway Restaurant Cars.*

Restaurant cars.

284. An excise licence may be taken out annually in respect of a railway restaurant car by the railway company or other person owning the car (*i*).

Such licence may be granted without the production of a justices' licence (*j*), and is granted in respect of a car in which passengers can be supplied with meals, and authorises the sale by retail to passengers on the car of any intoxicating liquor for consumption on the car (*k*).

SECT. 3.—*Canteens.*

Canteens.

285. Nothing in the Licensing (Consolidation) Act, 1910 (*l*), affects or applies to the sale of spirits in canteens in pursuance of any Act regulating the same (*m*).

Notwithstanding any enactment to the contrary, it is not necessary for a person holding a canteen under the authority of a Secretary of State, or of the Admiralty, to obtain a justices' licence to enable him to obtain or hold any excise licence for the sale of any intoxicating liquor, and an excise licence may be granted to such person accordingly (*m*).

The holder of an authorised canteen, who holds an excise licence for the sale of beer in the canteen, is entitled to sell beer in the canteen to a civilian (*n*).

SECT. 4.—*Theatres.*

Theatres.

286. The Commissioners and Officers of Customs and Excise (*o*) may grant retail licences to any person to sell beer, spirits, and wine in any theatre established under a royal patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain or by the county council or other authority for the public performance of stage plays, without the production by the person

(*g*) Excise Act, 1834 (4 & 5 Will. 4, c. 75), s. 10. As to the Commissioners, see note (*a*), p. 17, *ante*.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (f). As to vessels within the metropolitan police district, see p. 90, *ante*.

(*i*) Duty £1 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., E).

(*j*) *Ibid.*, Sched. I., E, 1. Nothing in the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), affects or applies to the sale of intoxicating liquor for consumption on a restaurant car, in pursuance of the Acts in that behalf (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (m)).

(*k*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I., E, 2. As to railways generally, see title RAILWAYS AND CANALS.

(*l*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*m*) *Ibid.*, s. 111 (2) (l).

(*n*) *Dickeson & Co.* v. *Mayes*, [1910] 1 K. B. 452. As to canteens, see title ROYAL FORCES.

(*o*) As to the Commissioners and Officers, see note (*a*), p. 17, *ante*.

SECT. 4. Theatres.

applying for such licence or licences of any certificate or authority for such person to keep a common inn, alehouse, or victualling house, anything in any Act to the contrary notwithstanding (*p*).

Only theatres licensed in the manner before described, and not music-halls, even if called theatres, can obtain this licence for the sale of intoxicating liquor (*q*).

Nothing in the Licensing (Consolidation) Act, 1910 (*r*), affects or applies to the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf (*r*). But the hours of closing licensed premises apply nevertheless to the sale of intoxicating liquor by proprietors of theatres (*s*).

SECT. 5.—*Clubs.*

Clubs.

287. The law relating to the sale of intoxicating liquor in clubs is dealt with elsewhere (*t*).

Part XVI.—Offences.

SECT. 1.—*Relating to Sale of Intoxicating Liquors.*

SUB-SECT. 1.—*Sale without Licence.*

(i.) *Without Justices' Licence.*

Sale without justices' licence.

288. Any person selling or exposing for sale by retail any intoxicating liquor, unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor, or at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor, is liable for the first offence to a fine not exceeding £50, or to imprisonment, with or without hard labour, for a term not exceeding one month; for the second offence to a fine not exceeding £100, or to imprisonment, with or without hard labour, for a term not exceeding three months, and he may, by order of the court before whom he is convicted, be disqualified for any term not exceeding five years from holding any justices' licence (*u*); and for any

(*p*) Excise Act, 1835 (5 & 6 Will. 4, c. 39), s. 7; Theatres Act, 1843 (6 & 7 Vict. c. 68), ss. 2, 5; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 7. As to what is public entertainment, see *Taylor* v. *Oram* (1862), 1 H. & C. 370; and as to theatres and music-halls generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*q*) *R.* v. *Inland Revenue Commissioners* (1888), 21 Q. B. D. 569.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111 (2) (e).

(*s*) *Gallagher* v. *Rudd*, [1898] 1 Q. B. 114; but see *R.* v. *Jenkins* (1891), 61 L. J. (M. C.). 57. The exemption only means that the holders of theatre licences need not obtain a justices' licence. As to closing hours, see pp. 88, *et seq.*, *ante*, and as to theatres and music-halls generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*t*) See title CLUBS, Vol. IV., pp. 429 *et seq.*, and Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 91—98.

(*u*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65 (1), (2), (4). A second offence means a second offence of the same description and under the same statute, and must be an offence committed after the

SECT. 1. Relating to Sale of Intoxicating Liquors.

subsequent offence to a penalty not exceeding £100, or to imprisonment, with or without hard labour, for any term not exceeding six months, and may, by order of the court by which he is tried, be disqualified for any term of years or for life from holding any justices' licence (*v*). Any person so convicted for a second or any subsequent offence, if he be the holder of a licence, forfeits such licence (*a*). On a conviction for any of the above offences, the court may, if it thinks fit, declare all intoxicating liquor found in the possession of the convicted person, if he is the holder of a justices' licence, and the vessels containing the liquor (if the liquor and vessels are not otherwise forfeited under the Licensing (Consolidation) Act, 1910 (*b*)), to be forfeited (*c*).

Fine or imprisonment.

Although the punishment may be either a fine or imprisonment, it may perhaps not be a fine and, in default of payment, imprisonment, except after default of distress (*d*).

Occupier privy to sale.

289. Every occupier of premises on which any intoxicating liquor is so sold is subject, if proved to be privy or consenting to the sale, to the penalties imposed upon persons for the sale of intoxicating liquors without a justices' licence (*e*).

Unlicensed person selling on licensed premises.

290. If a person who is neither the licensee, nor the agent nor servant of the licensee, sells in licensed premises liquor which is his own and which he is selling for his own benefit, he sells it without a licence, notwithstanding the fact that there is an existing licensee living on the licensed premises, and in such circumstances the licensee may be convicted of aiding and abetting such sale (*f*).

Proof of sale or consumption.

291. In proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under the Licensing (Consolidation) Act, 1910 (*b*), it is not necessary to show that any money actually passed or that any intoxicating liquor was actually consumed, if the court hearing the case is satisfied that a transaction in the nature of a sale actually took place, or that any consumption of intoxicating liquor was about to take place (*g*).

Proof of consumption, or intended consumption, of intoxicating liquor on premises to which a justices' licence is attached, by some person other than the occupier of or a servant employed on the premises, is evidence that the liquor was sold by or on behalf

conviction for the first offence (*Re Authers* (1889), 22 Q. B. D. 345; compare *Ex parte Short* (1870), L. R. 5 Q. B. 174; *R.* v. *South Shields Justices*, [1911] 2 K. B. 1).

(*v*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65 (1), (2), (4).

(*a*) *Ibid.*, s. 65 (3).

(*b*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*c*) *Ibid.*, s. 65 (5).

(*d*) *Re Brown* (1878), 3 Q. B. D. 545; *Re Clew* (1881), 8 Q. B. D. 511; but see now the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 5.

(*e*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65 (6).

(*f*) *Peckover* v. *Defries* (1906), 95 L. T. 883.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 85 (1). A "transaction in the nature of a sale" seems to mean a case of barter, or of equivalent other than money being given in exchange for the liquor; see the repealed Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 18.

of the holder of the licence to the person consuming, or being about to consume, or carrying away the same (*h*).

Proceedings.

292. An indictment will not lie for selling ale without a licence, the offence being a statutory one, and the remedy being prescribed before a court of summary jurisdiction (*i*).

It is no defence to a prosecution for selling without a justices' licence that the person charged holds an excise licence for the sale of the liquors in question (*k*).

Burden of proof.

The burden of proving the existence of a licence appears to be on the defendant (*l*).

Place of sale.

In some cases very careful attention has to be paid to the circumstances in order to decide whether or not the sale takes place on the licensed premises (*m*).

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 85 (2).

(*i*) *Anon.* (undated), 3 Salk. 25; *Stephen Watson's Case* (1701), 3 Salk. 26; *R.* v. *Edwards* (undated), 3 Salk. 27 (HOLT, C.J., dissenting). For courts of summary jurisdiction, see title MAGISTRATES.

(*k*) *R.* v. *Downs* (1790), 3 Term Rep. 560.

(*l*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39. See *Turner* v. *Johnson* (1886), 51 J. P. 22; *R.* v. *Neville* (1830), 1 B. & Ad. 489; *R.* v. *Turner* (1816), 5 M. & S. 206; *Apothecaries Co.* v. *Bentley* (1824), Ry. & M. 159; *Huggins* v. *Ward* (1873), L. R. 8 Q. B. 521.

(*m*) *Pletts* v. *Campbell*, [1895] 2 Q. B. 229. In this case the holder of a beer off-licence sent out his cart in the charge of a driver, who solicited orders for jars of beer, the driver taking down notes of the orders, and, on returning to the licensee's house, telling him the orders. Subsequently the jars ordered were put into a cart and delivered at the respective purchasers' premises, and the respective purchasers paid on delivery. The jars were not distinguished by any label or mark, although the driver placed them in the cart in the order in which he would arrive at the houses of the customers, so that he could tell which jar was intended for each customer. It was held that the licensee was properly convicted of selling at a place not authorised by his licence. In *Pletts* v. *Beattie*, [1896] 1 Q. B. 519, the holder of a beer off-licence sent his traveller round to customers for orders, and the traveller carried postcards addressed to the licensed premises, stating the amount and kind of liquor to be ordered, and that the customer assented to the appropriation by the licensee to the order at the licensed premises, of goods of the amount and kind described, and in a deliverable state, and the customer signed the postcard which the traveller then posted, and after receipt of the postcard at the licensed premises the traveller, in execution of the order at the licensed premises, placed the requisite number of bottles of beer for the customer in a box on a lorry for delivery, one of these bottles being labelled with the customer's name and address and the others being near it. The sale in this case was held to have taken place on the licensed premises, where the goods were ordered by receipt of the postcard, and were, with the consent of the owner, sufficiently appropriated to the order. In *Cocker* v. *McMullen* (1900), 81 L. T. 784, a traveller for the holder of a beer off-licence called at the house of a customer and obtained an order for beer, which order the traveller entered in a book, and subsequently the beer was delivered by the carter of the licence-holder, who, at the time of delivery, took the bottles from a box containing only the requisite number, although constructed to contain more, but the bottles were not marked in any way indicating appropriation, and there was no address or label on the box. The beer was paid for on delivery. The place of sale in this case was held to be the customer's house and not the licensed premises. In *Walker* v. *Walker* (1903), 90 L. T. 88; *Hewitt* v. *Jarvis* (1903), 68 J. P. 54; and *Strickland* v. *Whittaker* (1904), 20 T. L. R. 224, a traveller for a licensed person took an order for beer at a customer's house and handed the order to the licensee at the licensed premises. The licensee appropriated beer at the licensed premises by placing it in a box together with a piece of paper on which was the

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Completed sale wholesale.

293. If a completed sale of a wholesale quantity of beer takes place and the liquor is duly appropriated to such sale, the fact that delivery of the beer takes place in retail quantities at various times does not make the sale a sale by retail, even though such delivery is one of the terms of the sale (*n*).

Unauthorised sale by servant.

294. Sales without a justices' licence by a servant against the orders, given *bonâ fide*, of the master, if effected without the knowledge or consent, direct or indirect, of the master, do not render the master liable (*o*).

If the servant of a licensed person makes a sale of intoxicating liquor away from the licensed premises, such sale being outside the scope of his authority and against the express instructions of the licensee, the latter cannot be convicted of selling without a licence (*p*).

If the servant of a holder of a justices' licence, when off the licensed premises, sells for cash some intoxicating liquor for which no order has been received at the licensed premises, the money so received being accounted for to the licensee, and if the servant is acting outside the scope of his authority in making the sale, the servant has sold without a licence, and if the facts are such that the licensee must be taken to have known that the servant took with him, on a round of sales, intoxicating liquor which was not required for the execution of orders received, the licensee may be convicted of aiding and abetting the servant (*q*).

Sale by agent of unlicensed principal.

295. A servant who sells intoxicating liquor, the property of his master, upon instructions of his master, where the master does not hold a justices' licence, and the place where the sale takes place is not licensed for the sale of intoxicating liquor, cannot be convicted of selling without a licence (*r*).

Where intoxicating liquor is sold by retail by an agent on behalf of the owner, there is a sale by the owner and not by the agent; and if the owner is not licensed, the fact that the agent holds a licence for the sale of intoxicating liquor is no defence to the owner (*s*).

If a wife sells intoxicating liquor at her husband's shop, neither

customer's name. The sale was held to have taken place at the licensed premises. In the last of these cases the justices convicted, holding that an executory contract of sale had been entered into at the customer's house. The court quashed the conviction on the ground that there was no evidence of an executory contract of sale, but left open the question whether an executory contract is sufficient to bring a vendor within the terms of the Licensing Acts. Compare *Dunning* v. *Owen*, [1907] 2 K. B. 237.

(*n*) *Hales* v. *Buckley* (1911), 104 L. T. 34. But as to the sale of spirits in such circumstances, see Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 102 (1).

(*o*) *Newman* v. *Jones* (1886), 17 Q. B. D. 132, *sub nom. Newman* v. *Leach*, 2 T. L. R. 600 (a steward of club selling to non-members against orders of trustees and managing committee).

(*p*) *Boyle* v. *Smith*, [1906] 1 K. B. 432.

(*q*) *Stansfield & Co.* v. *Andrews* (1909), 25 T. L. R. 259.

(*r*) *Williamson* v. *Norris*, [1899] 1 Q. B. 7 (a servant of the House of Commons selling within the precincts of that House).

(*s*) *Dunning* v. *Owen*, *supra*; compare cases cited in note (*m*), p. 109, *ante*; see also title AGENCY, Vol. I., p. 218.

she nor her husband having a licence and there being no evidence that the husband knew of or consented to the sale, the husband cannot be convicted of selling without a licence (*t*).

Facts may appear from which it can be concluded that liquor is sold by an agent away from licensed premises with the consent and for the benefit of the licence-holder. If so, the licence-holder may be convicted of selling intoxicating liquor at the place where the agent sold it (*a*).

Sunday sale with six-day licence.

296. If the holder of a six-day licence sells any intoxicating liquor on Sunday to any person not lodging in his house, he is deemed to be selling intoxicating liquor without a justices' licence (*b*).

Effect of temporary authority, or attempted transfer to another.

297. A licensee, who allows a temporary authority to sell intoxicating liquor at his premises to be granted by justices at petty sessions to another person, cannot be convicted of selling without a licence for selling at his licensed premises after the grant but before the transfer of the licence at transfer sessions, at any rate if the person holding the temporary authority has not entered the premises and sold intoxicating liquor under such authority (*c*).

Nor does a licensee by leaving the premises for some months during the currency of his licence, not intending to return, and by seeking to transfer the licence to another person, cease to be a licensed person (*d*).

Incoming tenant unlicensed.

298. For an incoming tenant of a public-house to carry on the business of the house for a period of nine days without a licence is a serious offence; and the facts that the outgoing tenant had been duly licensed, and that, for the period in question, no sessions sat at which a temporary authority to sell could have been applied for, do not warrant a court of summary jurisdiction in treating the offence as one of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment (*e*).

Void licence.

299. A void licence is of no effect, so that a licence granted after the statutory provision giving power to grant it had been repealed, although the applicant, the justices, and the excise authorities were unaware of the fact, would be no defence to a charge of selling without a licence (*f*).

Licence good on face of it.

But if a licence is good on the face of it, evidence of fraud in the way in which justices' signatures were obtained is not admissible, unless it is evidence to charge the licence-holder personally with having fraudulently obtained the licence, and if the licence-holder acts *bonâ fide* under it he cannot be convicted (*g*).

A licence granted privately by two justices, and not at the general

(*t*) *Allen* v. *Lumb* (1893), 57 J. P. 377; see also titles AGENCY, Vol. I., pp. 217 *et seq.*; HUSBAND AND WIFE, Vol. XVI., p. 435.
(*a*) *Seager* v. *White* (1884), 51 L. T. 261 (case of husband and wife).
(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24) s. 58 (3), (4); see p. 107, *ante*.
(*c*) *Andrews* v. *Denton*, [1897], 2 Q. B. 37.
(*d*) *Lawrence* v. *O'Hara* (1903), 67 J. P. 369.
(*e*) *Barnard* v. *Barton*, [1906] 1 K. B. 357.
(*f*) *Pearson* v. *Broadbent* (1871), 36 J. P. 485; and see also p. 113, *post*.
(*g*) *R.* v. *Minshull* (1833), 1 Nev. & M. (K. B.) 277.

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annual licensing meeting, would be no defence to a charge of selling without a licence (*h*).

Sale of excisable liquors without licence.

300. If any person sells ale or beer or any other excisable liquors by retail, or permits or suffers any such liquors to be sold by retail in his house, outhouse or yard, garden, orchard or other place, without being duly licensed by the magistrates (*i*) so to do, and is duly convicted, for every such offence he forfeits the sum of £20, and also the costs and expenses attending the conviction, to be levied and recovered as directed, and, on and after a second conviction for the like offence, is also rendered incapable of being thereafter licensed to keep an alehouse or to sell ale or beer or other excisable liquors by retail (*k*).

Sale of beer or ale without licence.

301. Every person who makes any entry at any office of excise of any house, outhouse, cellar, vault, storehouse, or other place for laying or keeping of any beer or ale, or for selling the same therein, as an alehouse-keeper, victualler, or retailer, is deemed to be a seller by retail of such liquors to all intents and purposes. Any justice of the peace may from time to time summon before him or before any other justice any entry-keeper, gauger, or other excise officer having the custody of entries made by innkeepers, victuallers, and retailers of beer or ale within his division, who must, when required, produce before such justice every entry made at the office of excise by any person within the division of such officer, and also the stock books or other accounts of survey of such person. Such justice must examine on oath such officer respecting any such entry of any such places as aforesaid for keeping beer or ale, or respecting any stock of any person making such entries. If it appears that any person has made entry at the office of excise of any such place for laying or keeping any ale or beer therein, or for selling the same as an alehouse-keeper, victualler or retailer, or if it appears that any such person is surveyed as an alehouse-keeper, victualler or retailer, and has not received or is not entitled to receive the abatement of duty allowed to common brewers, then such justice may summon before him such person to produce to the justice his licence to sell beer and ale. If such person does not at the return of such summons appear before the justice, or, appearing, does not produce to him a licence duly obtained and in force, the justice may (proof being made of due service of the summons, in case the party does not appear) adjudge the party guilty of selling beer or ale by retail

(*h*) *R.* v. *Downs* (1790), 3 Term Rep. 560.
(*i*) *R.* v. *Drake* (1817), 6 M. & S. 116; *Ash* v. *Lynn* (1866), L. R. 1 Q. B. 270.
(*k*) Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 1; which is a police law and not a revenue law (*R.* v. *Hanson* (1821), 4 B. & Ald. 519, *per* ABBOTT, C.J., at p. 521). Provision is made for the determination of complaints under this enactment by justices and the levying of unpaid penalties, with costs, by distress (Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 2), and for the sale of goods distrained (*ibid.*, s. 3), allowance to officers executing the distress warrants (*ibid.*, s. 4), application of penalties, and imprisonment in default of sufficient distress (*ibid.*, s. 5), and what shall be deemed legal notice to persons summoned to answer as to information for selling liquors by retail without licence (*ibid.*, s. 6).

without licence, and the party so adjudged is liable to the penalties imposed on persons retailing beer or ale without licence (*l*).

(ii.) *Without Excise Licence.*

Sale by retail without excise licence.

302. If any spirits are sold or delivered in any quantity less than two gallons, or if any beer, wine, cider, perry, sweets, mead or metheglin, or vinegar, or any other goods for the retail of which a licence is required by the Excise Licences Act, 1825 (*m*), are sold by retail in any premises, or in any part of any premises, by any person unknown, or who is not licensed for that purpose according to that Act, every occupier of such premises, or part of such premises, being privy or consenting thereto, is deemed to be the retailer of such liquors or goods, and, as such, is liable to the penalties imposed upon persons for the sale of such liquors or goods, by retail, without licence (*n*).

Provision is made for the reward of informers (*o*).

Informers.

Place of sale.

303. In order that a person may be convicted of selling at a place without having a licence to sell at that place, the contract to supply must be at that place; and if the contract is not made at that place, the fact that unlicensed premises are kept for the purpose of taking orders merely for transmission to the premises does not justify a conviction for selling (*p*).

Restaurant without licence.

Intoxicating liquor brought for a customer to a restaurant without a licence from licensed premises elsewhere may, in certain circumstances, justify a finding that the sale took place at the restaurant and not at the licensed premises (*q*).

Manufacture without licence.

304. Any person who makes or manufactures any intoxicating liquor, for the making or manufacture of which he is required to take out a licence under the Finance (1909–10) Act, 1910 (*r*), without taking out such a licence, is liable in respect of each offence to an excise penalty of £500 (*s*).

Wholesale dealing without licence.

Any person who deals (*t*) wholesale in any intoxicating liquor, for the wholesale dealing in which he is required to take out a licence under that Act (*r*), without taking out such a licence, is liable in respect of each offence to an excise penalty of £100 (*u*).

Sale by retail without licence.

Any person who sells by retail any intoxicating liquor, for the retail sale of which he is required to take out a licence under that Act (*r*), without taking out such a licence, is liable in respect of each offence, at the election of the Commissioners of Customs and Excise, either to an excise penalty of £50, or to an excise penalty equal to treble the amount of the full duty (*v*).

(*l*) Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 9; see p. 112, *ante*.
(*m*) 6 Geo. 4, c. 81.
(*n*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 27.
(*o*) *Ibid.*, s. 29.
(*p*) *Stephenson* v. *Rogers* (*W. J.*), *Ltd.* (1899), 80 L. T. 193; and compare note (*m*), p. 109, *ante*.
(*q*) *Pasquier* v. *Neale*, [1902] 2 K. B. 287. In this case the restaurant proprietor was in partnership with the licensee of the licensed premises.
(*r*) 10 Edw. 7, c. 8.
(*s*) *Ibid.*, s. 50 (1).
(*t*) See *R.* v. *Excise Commissioners* (1788), 2 Term Rep. 381.
(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 50 (2).
(*v*) *Ibid.*, s. 50 (3).

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If any person holding any of the excise licences in respect of intoxicating liquor (*a*) contravenes the terms of the licence, or sells otherwise than as he is authorised by the licence, or contravenes any of the provisions applicable to the licence, he is liable in respect of each offence, if the offence is not an offence for which any specific penalty is imposed by any Act relating to excise duties or licences, to an excise penalty of £50 (*b*).

Effect of retail licence becoming void.

305. Where an excise licence for the sale of beer, cider, or perry by retail, to be consumed on the premises, becomes void, and the person to whom the licence was granted thereupon disabled from selling beer, cider, and perry, the excise licence for the sale of any spirits or foreign wine, or sweets or made wines, or mead or metheglin, by retail to be consumed on the premises thereupon granted, becomes null and void also. In such case, if the licensee sells any spirits or foreign wine, or any sweets or made wines, or any mead or metheglin respectively by retail, to be consumed on the premises after such conviction has taken place, and every excise licence has thereby become void, such person incurs the penalty for selling spirits or foreign wine, or sweets or made wines, or mead or metheglin, to be consumed on the premises, by retail without licence.

In all such cases, in the prosecution for the recovery of the penalty, the conviction may be proved by a certificate just as in the case of a prosecution for selling beer, cider, or perry without licence under similar circumstances (*c*).

Selling after conviction.

Every person who, after being convicted of felony or of selling spirits without licence (*d*), sells any beer or cider by retail, in any manner whatsoever, incurs the penalty for so doing without licence, and in all such cases in the prosecution for the recovery of such penalty a certificate from the clerk of the peace (*e*) of such conviction is, on the trial in such prosecution, legal evidence thereof (*f*).

Every person who, after being convicted as aforesaid (*g*), sells any wine by retail in any manner whatsoever, incurs the penalty for so doing without licence; and in all such cases, in the prosecution for the recovery of such penalty, a certificate from the clerk of assize or the clerk of the peace (*h*) of any such conviction is on the trial legal evidence thereof (*i*).

(*a*) The licences specified in the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. I.

(*b*) *Ibid.*, s. 50 (4); see *R.* v. *Smith* (1859), 7 W. R. 162.

(*c*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 23. As to proof of conviction, see p. 55, *ante*.

(*d*) That is, apparently, without excise licence; see Excise Licences Act, 1825 (6 Geo. 4, c. 81), ss. 26, 27.

(*e*) Or person acting as such.

(*f*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 7; and as to disqualification generally, see p. 54, *ante*.

(*g*) That is, apparently, without excise licence; see Excise Licences Act, 1825 (6 Geo. 4, c. 81), ss. 26, 27.

(*h*) Or person acting as such.

(*i*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 22; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), Sched. VI.

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Taking orders without licence.

306. Any person who solicits, takes, or receives any order for spirits, wine, or other article for the dealing in, retailing, or selling whereof an excise licence is required, without having in force a proper excise licence authorising him to do so, forfeits the statutory penalty for so doing (*k*); and in any case in which the place of business or residence of the offender is not known to the officer of excise who exhibits an information for the recovery of such penalty, or, if known, is out of the United Kingdom, the notice and summons required to be given to a defendant by any law of excise are sufficiently served if they are left, at the house or place where the offender has solicited, taken, or received any such order as aforesaid, addressed to such offender (*l*).

The above provision, however, does not apply to the sale of any spirits or foreign wine while they remain in the warehouse in which they have been deposited, according to law, before payment of duty upon the importation thereof, where such spirits or foreign wine are sold in a quantity not less than 100 gallons at one time; nor does it impose a penalty upon a *bonâ fide* traveller taking orders for goods which his employer is duly licensed to deal in or sell (*l*).

Several shops.

307. If a person, having several shops, in respect of one of which he holds an excise licence for the sale of beer, takes an order for beer at another of his shops in respect of which he has no such licence, he is liable to conviction (*m*).

Agencies.

In the case of agencies in other towns or places the rule seems to be that if the principal keeps premises elsewhere, and his agent there enters into a contract to supply the liquor, an excise licence is required for those premises (*n*); but if the agent, whether he has premises or not, takes orders only as a traveller, then orders taken by the agent are covered by the licence for the principal's premises (*o*).

Traveller for licensee.

Whether a person is acting as a *bonâ fide* traveller for a person licensed to sell wine and spirits appears to be a question of fact (*o*).

Offences under Spirits Act, 1880.

308. If any person hawks, sells, or exposes for sale any spirits otherwise than in premises for which he is licensed to sell spirits he incurs a fine of £100, and the spirits are forfeited (*p*).

In default of payment of the fine on summary conviction, the offender must be imprisoned with or without hard labour (*q*).

Any person may arrest a person found committing an offence against this provision (*r*).

(*k*) This prohibits the purchase of wine wholesale with the intention of subsequently reselling it, unless a wine dealer's licence has been taken out before such purchase, as buying is an act of dealing (*R.* v. *Excise Commissioners* (1788), 2 Term Rep. 381).

(*l*) Revenue Act, 1867 (30 & 31 Vict. c. 90), s. 17. As to who is a *bonâ fide* traveller within the terms of this section, see *Killick* v. *Graham*, *Lintern* v. *Burchell*, [1896] 2 Q. B. 196; and see note (*o*), *infra*.

(*m*) *Elias* v. *Dunlop*, [1906] 1 K. B. 266.

(*n*) *Stallard* v. *Marks* (1878), 3 Q. B. D. 412.

(*o*) *Stuchbery* v. *Spencer* (1886), 55 L. J. (M. C.) 141.

(*p*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 146 (1).

(*q*) *Ibid.*, s. 146 (3).

(*r*) *Ibid.*, s. 146 (4

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If any person knowingly sells or delivers, or causes to be sold or delivered, any spirits to the end that they may be unlawfully retailed or consumed or carried into consumption, he incurs, in addition to any other penalty, a fine of £100 (*s*).

If any person receives, buys, or procures any spirits from a person not having authority to sell or deliver the same, he incurs a fine of £100 (*t*).

Peninsular War.

309. Certain relatives of persons who were engaged in the Peninsular War may carry on trades in any city, town, or place, notwithstanding any statute, law, ordinance, custom, or provision to the contrary (*a*), but this only gets rid, so far as they are concerned, of the difficulties imposed by charter, custom, or local Act of Parliament, and does not enable them to sell intoxicating liquors without an excise licence (*b*).

Justices' licence condition precedent to excise licence.

310. Where a justices' licence is required, an excise licence under which intoxicating liquor may be sold by retail cannot be granted except to a person who holds a justices' licence duly granted authorising the grant of the excise licence to that person, and any excise licence granted in contravention of this provision is void (*c*).

Where persons disqualified by certain convictions from holding certain excise licences nevertheless take out such excise licences, these licences are void (*d*).

Where a justices' licence is forfeited in pursuance of the Licensing (Consolidation) Act, 1910 (*e*), or becomes void under any of the provisions of that Act, any licence for the sale of intoxicating liquors granted by the Commissioners of Customs and Excise to the holder of the justices' licence in pursuance of that licence is void (*f*).

SUB-SECT. 2.—*Drinking on Premises contrary to Terms of Licence.*

(i.) *Justices' Licence.*

Drinking on or near premises with off-licence.

311. If any person purchases any intoxicating liquor from the holder of a justices' licence whose licence does not cover the sale of that liquor for consumption on the premises, and drinks the same on the premises where it is sold, or on any premises adjoining or near to those premises, if belonging to the seller of the liquor or under his control or used by his permission, or on any highway adjoining or near to such premises, and it appears to the court that the drinking was with the privity or consent of the holder of the licence, the latter is liable in respect of each offence to a fine not

(*s*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 147.
(*t*) *Ibid.*, s. 148.
(*a*) Stat. (1816) 56 Geo. 3, c. 67, repealed with savings by the Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91).
(*b*) *Killin* v. *Swatton* (1896), 76 L. T. 55.
(*c*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 13; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1.
(*d*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), ss. 22, 23; Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 7; Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 22; and see also p. 114, *ante*.
(*e*) 10 Edw. 7 & 1 Geo. 5, c. 24.
(*f*) *Ibid.*, s. 106.

exceeding in the case of the first offence £10; and in the case of any subsequent offence £20 (*g*).

But if intoxicating liquor consumed on a highway near to licensed premises to which an off-licence is attached has been purchased at, and taken by the purchaser from, the licensed premises, and there is nothing to show that the licence-holder knows where the liquor is to be consumed, there is no evidence on which to convict the licence-holder (*h*).

Drinking on highway.

312. If the holder of a justices' licence, whose licence does not cover the sale of liquor to be consumed on the premises, himself takes or carries, or employs or suffers any other person to take or carry, any intoxicating liquor out of or from his premises for the purpose of being sold on his account, or for his benefit or profit, and of being consumed in any place whatsoever (whether inclosed or not, and whether or not a public thoroughfare) other than the licensed premises, with intent to evade the conditions of the licence, he is liable in respect of each offence to a fine not exceeding £10, and in the case of any subsequent offence £20, and if the place is any house, tent, shed, or other building of any kind whatever belonging to him, or hired, used, or occupied by him, he is deemed, unless the contrary is proved, to have intended to evade the conditions of the licence (*i*).

Carrying to unlicensed place.

(ii.) *Excise Licence.*

313. If any person holding any of the excise licences specified in the First Schedule to the Finance (1909-10) Act, 1910 (*j*), contravenes the terms of the licence or sells otherwise than as he is authorised by the licence, or contravenes any of the provisions applicable to the licence under that schedule, he is liable in respect of each offence, if the offence is not one for which any specific penalty is imposed by any Act relating to excise duties or licences, to an excise penalty of £50 (*k*).

314. The holder of an excise retail off-licence may be convicted if the liquor sold is consumed by the customer whilst sitting on a bench outside the door of the house but touching the walls of the house, the bench having been there for some time for the purpose of being used by the customers to sit upon and drink their liquor (*l*).

But if the licence-holder hands liquor through a window to a customer who drinks it on the highway he cannot be so convicted (*m*).

SUB-SECT. 3.—*Permitting Drunkenness.*

315. If the holder of a justices' licence permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his

Offence and penalty.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 66 (1).
(*h*) *Bath* v. *White* (1878), 3 C. P. D. 175.
(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 66 (2).
(*j*) 10 Edw. 7, c. 8.
(*k*) *Ibid.*, s. 50 (4).
(*l*) *Cross* v. *Watts* (1862), 13 C. B. (N. S.) 239 (conviction under Beerhouse Act, 1834 (4 & 5 Will. 4, c. 84), s. 17, now repealed).
(*m*) *Deal* v. *Schofield* (1867), L. R. 3 Q. B. 8.

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premises, or sells any intoxicating liquor to any drunken person (*n*), he is liable in respect of each offence to a penalty not exceeding for the first offence £10, and for any subsequent offence £20 (*o*).

The holder of a justices' licence includes for this purpose an heir, executor, administrator or assign of a licensed person dying before the expiration of his licence, or the trustee of a licensed person who has been adjudged bankrupt, or whose affairs have been liquidated by arrangement, while carrying on the business of the licensed premises (*p*), until the next special licensing sessions held after fourteen days from such death or bankruptcy (*q*).

What constitutes permitting drunkenness.

316. A licensed person may be convicted of permitting drunkenness on his premises upon evidence that a person who had been drinking on such premises was found drunk some time afterwards at a little distance therefrom (*r*).

But a licensed person cannot be convicted of permitting drunkenness to take place on his premises where a person on such premises is in fact drunk, but the licensed person does not know that such person is drunk (*s*), provided that the licensed person and the persons employed by him took all reasonable steps for preventing drunkenness on the premises (*t*). It lies on the holder of the licence to prove that he and the persons employed by him took such steps (*a*).

A licensed person who sells intoxicating liquor to a drunken person may be convicted of permitting drunkenness on his premises (*b*), but serving the drunken person with drink is not essential to the offence (*c*).

If the manager of an hotel-keeper accepts a person who is drunk as a lodger and allows him to remain in a public room, the hotel-keeper may be convicted of permitting drunkenness (*d*).

If the private guests of a licence-holder are, even after closing hours, drunk on the premises to the knowledge of the licensee or of the person in charge on his behalf, the licensee may be convicted of permitting drunkenness (*e*).

But a licensed person cannot be convicted of permitting drunkenness by reason of being drunk on his own premises (*f*).

Selling to a drunken person.

317. Upon a charge of selling to a drunken person the fact that the licence-holder did not know, and had no means of knowing,

(*n*) See the text, *infra*; and p. 119, *post*.
(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 75 (1), (2).
(*p*) Under *ibid.*, s. 65 (7).
(*q*) *M'Donald* v. *Hughes*, [1902] 1 K. B. 94.
(*r*) *Ethelstane* v. *Oswestry Justices* (1875), 33 L. T. 339 (three-quarters of an hour in this case, and 100 yards from the licensed premises).
(*s*) *Somerset* v. *Wade*, [1894] 1 Q. B. 574.
(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 75 (3).
(*a*) *Ibid.*
(*b*) *Edmunds* v. *James*, [1892] 1 Q. B. 18; and as to the offence of selling to a drunken person, see notes (*g*)—(*i*), p. 119, *post*.
(*c*) *Hope* v. *Warburton*, [1892] 2 Q. B. 134.
(*d*) *Thompson* v. *McKenzie*, [1908] 1 K. B. 905.
(*e*) *Lawson* v. *Edminson*, [1908] 2 K. B. 952 (where the wife of the licensee supplied the liquor).
(*f*) *Warden* v. *Tye* (1877), 2 C. P. D. 74.

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that the person served was drunk, is immaterial, except as a matter for mitigation of penalties (*g*).

When the sober companion of a drunken person orders and pays for intoxicating liquor, which is supplied to the drunken person, the licence-holder may be convicted of selling to the drunken person (*h*).

Nor is it a defence that the sale was the act of a servant done in the absence of the licensee and against his express instructions given *bonâ fide*, so long as the sale was an act within the general scope of the servant's authority or employment (*i*).

Procedure.

318. A charge of permitting "drunkenness and other disorderly conduct," not naming the parties permitted to misbehave, is apparently not too vague; nor is the conviction following on such charge bad for duplicity (*a*).

In such a conviction the words "this being adjudged to be his second offence against the provisions of the aforesaid statutes" are a sufficient adjudication upon the point of the second offence (*a*).

When two different charges are preferred against a person upon the same facts, the justices must give their decision upon one charge before hearing the other charge, the defendant having a right to be put in a position to set up, as a defence to the second charge, the fact that he has already been either convicted or acquitted, as the case may be, on the same facts (*b*). The test is to take the evidence on the second charge and see whether it would be sufficient to convict if brought forward on the first (*c*).

SUB-SECT. 4.—*Procuring Drink for Drunken Person.*

Procuring drink for drunken person.

319. Any person who, being on premises licensed for the sale of any intoxicating liquor, whether for consumption on or off the premises, procures, or attempts to procure, any intoxicating liquor for consumption by any drunken person, or who aids and abets any drunken person in obtaining or consuming any intoxicating liquor on premises so licensed, is liable on summary conviction to a fine not exceeding 40*s*., or to imprisonment, with or without hard labour, for any period not exceeding one month (*d*).

SUB-SECT. 5.—*Liquor Unlawfully on Premises.*

(i.) *Without Authority from Justices.*

Unauthorised liquor on premises.

320. If the holder of a justices' licence has in his possession, on the premises in respect of which his licence is granted, any

(*g*) *Cundy* v. *Le Cocq* (1884), 13 Q. B. D. 207; and see p. 118, *ante*.
(*h*) *Scatchard* v. *Johnson* (1888), 57 L. J. (M. C.) 41; and as to the offence of procuring drink for a drunken person, see the text, *infra*.
(*i*) *Police Commissioners* v. *Cartman*, [1896] 1 Q. B. 655; *Worth* v. *Brown* (1896), 62 J. P. 658; and compare pp. 108 *et seq.*, *ante*.
(*a*) *Wray* v. *Toke* (1848), 12 Q. B. 492 (decided under the Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), s. 13, now repealed). As to what constitutes a second offence, see p. 159, *post*.
(*b*) *Hamilton* v. *Walker*, [1892] 2 Q. B. 25.
(*c*) *I bid.*, *per* VAUGHAN WILLIAMS, J., at pp. 28, 29.
(*d*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 7; and see note (*h*), *supra*.

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description of intoxicating liquor which he is not authorised to sell, unless he accounts for the possession of the same to the satisfaction of the court by which he is tried, he forfeits such liquor and the vessels containing the same, and is liable to a penalty not exceeding for the first offence £10, and for any subsequent offence £20 (*e*).

Power of search.

Any justice of the peace, if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail, or exposed or kept for sale by retail, at any place within his jurisdiction, whether a building or not, in which that liquor is not authorised to be sold by retail, may in his discretion grant a warrant under his hand, by virtue whereof any constable named in such warrant may, at any time or times within one month from the date thereof, enter, and if need be by force, the place named in the warrant, and every part thereof, and examine the same and search for intoxicating liquor therein, and seize and remove any intoxicating liquor found therein which there is reasonable ground to suppose is in such place for the purpose of unlawful sale at that or any other place, and the vessels containing such liquor (*f*).

Seizure.

Forfeiture.

In the event of the owner or occupier of the premises being convicted of selling by retail, or exposing or keeping for sale by retail, any liquor which he is not authorised to sell by retail, the liquor so seized and the vessels containing such liquor are forfeited (*g*).

Persons found on premises.

321. When a constable has entered any premises in pursuance of any such warrant and has seized and removed liquor as aforesaid, any person found at the time on the premises, is, until the contrary is proved, deemed to have been on them for the purpose of illegally dealing in intoxicating liquor, and is liable to a penalty not exceeding 40*s*. (*h*).

Power to take name and address.

The constable may demand the name and address of any person found on any premises on which he seizes or from which he removes liquor as aforesaid, and, if he has reasonable ground to suppose that the name or address given is false, may examine the person further as to the correctness of such name and address, and may, if the person fail upon that demand to give his name or address, or to answer satisfactorily the questions so put to him, apprehend him without warrant and take him as soon as practicable before a justice of the peace (*i*).

Any person so required by a constable to give his name and

(*e*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 73. It was held under the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 15 (now repealed), that the licensed person must have an opportunity of explaining the fact of having the liquor on his premises before liquor seized could be sold (*Gill* v. *Bright* (1871), 41 L. J. (M. C.) 22).

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 82 (1). As to search warrants, generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310.

(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 82 (2).

(*h*) *Ibid.*, s. 82 (3). "Dealing in" includes buying as well as selling (*McKenzie* v. *Day*, [1893] 1 Q. B. 289; and see *R.* v. *Excise Commissioners* (1788), 2 Term Rep. 381).

(*i*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 82 (4).

address, who fails to give the same, or gives a false name or address, or false information with respect to his name and address, is liable to a penalty not exceeding £5 (*k*).

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(ii.) *Without Authority from Excise.*

Consumption of liquors not covered by licence.

322. If any person licensed to sell beer or cider permits or suffers any wine or spirits, sweets or made wines, mead or metheglin, to be brought into his house or premises to be consumed there, or suffers any wine, spirits, sweets, mead, or metheglin to be consumed in his house or premises by any person, he forfeits, over and above any excise penalties to which he may be subject, £20 (*l*).

Keeping spirits in an unlicensed place.

323. If any person licensed to retail wine receives into, or keeps, or has in his possession, in any cellar, room, or place entered for storing, keeping, or retailing wine, any spirits, he forfeits, in addition to all other penalties, the sum of £50, which is denominated an excise penalty; and all spirits found in any such entered cellar, room, or place are forfeited (*m*). On conviction of any such licensed person in any penalty for having spirits in his possession, or for selling or retailing spirits, his licence for retailing wine becomes null and void, and must be so adjudged (*m*).

If any person knowingly buys or receives, or has in his possession, any spirits after they have been removed from the place where they ought to have been charged with duty and before the duty payable thereon has been charged and paid or secured to be paid, or the spirits have been condemned as forfeited, he forfeits the spirits and incurs a fine equal to treble their value (*n*).

SUB-SECT. 6.—*Sale or Delivery to Children.*

Sale to children.

324. Every holder of a justices' on-licence who sells or allows any person to sell, to be consumed on the premises, any description of spirits to any person apparently under the age of sixteen years, is liable in respect of each offence to a fine not exceeding 20*s.* for the first offence, and 40*s.* for any subsequent offence (*o*).

Delivery to children.

Every holder of a justices' licence who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities of not less than one reputed pint for consumption off the premises

(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 82 (5).

(*l*) Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 16; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 51 (1). The penalty is to be recovered, levied, mitigated, and applied in the same manner as other penalties (not being excise penalties) are by the Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), to be recovered, levied, mitigated, and applied.

(*m*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 25; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 28), Sched. VI.

(*n*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 149.

(*o*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 67. See as to other offences in connection with children, Children Act, 1908 (8 Edw. 7, c. 67), s. 119, and title INFANTS AND CHILDREN, Vol. XVII., p. 172.

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only, is liable in respect of each offence to a fine not exceeding 40*s.* for the first offence, and £5 for any subsequent offence (*p*).

Knowledge.

But a licence-holder cannot be convicted if he has no knowledge of the sale, and the servant who sells the liquor honestly believes that the child is above the age of fourteen years (*q*), or if he has not delegated his authority to the servant and does not know of or connive at the sale (*r*).

Sending child to licensed premises.

Every person who knowingly sends any person under the age of fourteen years to any place where intoxicating liquors are sold, or delivered, or distributed, for the purpose of obtaining any description of intoxicating liquors, except such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint (*s*), for consumption by any person on or off the premises, is liable to like fines (*t*).

If a person knowingly sends a child under the age of fourteen years to a public-house for intoxicating liquor, it is not sufficient, to bring him within the exception, that the vessel is capable of being corked and sealed by the vendor, unless there is evidence that the sender intended the vessel to be corked and sealed before the delivery of the liquor to the child (*u*).

Liquors covered by exception.

325. The exception giving a right to sell in properly corked and sealed vessels is not confined to the sale of such liquors as are ordinarily sold in corked and sealed vessels, but includes the sale of any intoxicating liquor which is in fact in a corked and sealed vessel (*a*).

What is "properly corked and sealed."

If a properly-corked bottle is not in fact properly sealed, it is no defence that the licence-holder honestly believed it to be properly sealed (*b*).

If a bottle is so sealed with a label that the label can be removed without being torn, there is evidence on which justices are entitled to find that the bottle is not sealed (*c*). But, in order to convict, the justices must have some evidence before them that the particular label in question can be removed without being destroyed, unless at least it is a matter of common knowledge (*d*).

Messenger under fourteen.

326. The holder of a justices' licence may employ a member of his family or his servant or apprentice, even if under the age of fourteen years, as a messenger to deliver intoxicating liquor (*e*).

(*p*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 68 (1), (4). The expression "corked" means closed with a plug or stopper, whether it is made of wood, or glass, or some other material. The expression "sealed" means secured with any substance without the destruction of which the cork, plug, or stopper cannot be withdrawn (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 68 (5)).

(*q*) *Groom* v. *Grimes* (1903), 89 L. T. 129.

(*r*) *Emary* v. *Nolloth*, [1903] 2 K. B. 264; *McKenna* v. *Harding* (1905), 69 J. P. 354.

(*s*) See p. 121, *ante*.

(*t*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 68 (2), (4).

(*u*) *Farndale* v. *Dillon*, [1907] 2 K. B. 513.

(*a*) *Jones* v. *Shervington*, [1908] 2 K. B. 539.

(*b*) *Brooks* v. *Mason*, [1902] 2 K. B. 743.

(*c*) *Mitchell* v. *Crawshaw*, [1903] 1 K. B. 701.

(*d*) *Macey* v. *McKenzie* (1903), 88 L. T. 631.

(*e*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 68 (3).

City of London.

327. In the City of London, every person licensed to deal in excisable liquors who knowingly supplies any sort of distilled excisable liquor to any boy or girl apparently under the age of sixteen years to be drunk on the premises, is liable to a penalty not exceeding, for the first offence, 20*s.*, for a second offence, 40*s.*, for a third offence, £5 (*f*).

Allowing child to be on licensed premises.

328. The holder of the licence of any licensed premises must not allow a child under the age of fourteen years to be at any time in the bar of the licensed premises, except during the hours of closing (*g*), and if a child is found in the bar as aforesaid, the licence-holder is deemed to have committed an offence under this provision unless he shows that he has used due diligence to prevent the child being admitted to the bar or that the child was apparently a person over the age of fourteen (*h*).

If the licence-holder acts in contravention of this provision, or if any person causes or procures, or attempts to cause or procure, any child to go to or to be in the bar of any licensed premises except during the hours of closing, he is liable, on summary conviction, to a fine not exceeding, in respect of the first offence, 40*s.*, and in respect of any subsequent offence, £5 (*i*).

But a licensee is not in all circumstances liable if without his knowledge his wife allows a child to be in the bar of licensed premises (*k*)

No offence is, however, committed in the case of a child of the licence-holder or in the case of a child who is resident but not employed in the licensed premises, or who is in the bar of licensed premises solely for the purpose of passing through in order to obtain access to, or egress from, some other part of the premises, not being a bar, where there is no other convenient means of access to, or egress from, that part of the premises, or in case of railway refreshment rooms or other premises constructed, fitted, and intended to be used in good faith for any purpose to which the holding of a licence is merely auxiliary (*l*).

SUB-SECT. 7.—*Sale not by Standard Measure.*

Sale not by standard measure.

329. All intoxicating liquor which is sold by retail and not in cask (*m*) or bottle, and is not sold in a quantity less than half a

(*f*) City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 27. The greater part of this statute (including s. 27) is unrepealed. (For short title see 52 & 53 Vict. c. cxxvii., Preamble.) Compare title INFANTS AND CHILDREN, Vol. XVII., p. 172.

(*g*) Children Act, 1908 (8 Edw. 7, c. 67), s. 120 (1). For closing hours, see pp. 88 *et seq.*, *ante*.

(*h*) Children Act, 1908 (8 Edw. 7, c. 67), s. 120 (2).

(*i*) *Ibid.*, s. 120 (3).

(*k*) *Russon* v. *Dutton* (No. 1) (1911), 104 L. T. 599.

(*l*) Children Act, 1908 (8 Edw. 7, c. 67), s. 120 (4). The bar of licensed premises means any open drinking bar or any part of the premises exclusively or mainly used for the sale and consumption of intoxicating liquor, and the expressions "licence" and "licensed premises" have the same meaning as in the Licensing Acts, 1828 to 1906 (Children Act, 1908 (8 Edw. 7, c. 67), s. 120 (5)). For the definitions of "licence" and "licensed premises," see pp. 7, 8, *ante*.

(*m*) As to the use of an unstamped cask, see *Hayley* v. *Taylor* (1900), 82 L. T. 803.

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pint, must be sold in measures marked according to the imperial standards (*n*).

Every person who sells, or suffers any person under his control or in his employment to sell, any intoxicating liquor so as to contravene this provision is liable, in respect of each offence, to a fine not exceeding for the first offence £10, and not exceeding for any subsequent offence £20, and is also liable to forfeit the illegal measure in which the liquor is sold (*n*).

Penalty.

A notice that the vessel in which the liquor is sold is not represented either as containing any amount of imperial measure, or as being a measure of imperial standard, or secondary imperial measure of capacity, is not a defence (*o*).

Transfer of liquor from marked to unmarked measure.

330. If a licensee draws beer into a marked measure and pours it thence into an unmarked vessel, which he then brings to the customer, who, however, cannot see the beer drawn and never sees it in the measure, the licensee may be convicted (*p*).

But no offence is committed if the quantity purchased is measured into a measure marked according to the imperial standard in the sight of the purchaser and is thence poured into an unmarked vessel and a further quantity is then added without being measured, if the further quantity is not charged for (*q*).

SUB-SECT. 8.—*Offences relating to Closing.*

(i.) *Infringing Closing Hours.*

Infringing closing hours.

331. Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed (*r*), sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open those premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed on those premises, is for the first offence liable to a penalty not exceeding £10, and for any subsequent offence to a penalty not exceeding £20 (*s*).

Three offences.

There are three distinct offences under this section—(1) sale or exposure for sale; (2) opening or keeping open for sale; (3) allowing consumption on premises (*t*); and a conviction must

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 69. As to the imperial standards and measures generally, see title WEIGHTS AND MEASURES.

(*o*) *Payne* v. *Thomas* (1890), 60 L. J. (M. C.) 3.

(*p*) *Addy* v. *Blake* (1887), 19 Q. B. D. 478; see also *R.* v. *Aulton* (1861), 3 E. & E. 568.

(*q*) *Pennington* v. *Pincock*, [1908] 2 K. B. 244.

(*r*) By or in pursuance of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*s*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 61 (1). The closing hours prescribed in the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 24 (now repealed), were held to apply to a licensee whose licence was granted in 1871 and was still current after that Act came into force (*Jones* v. *Cooper* (1873), 28 L. T. 496). As to a plea of a local custom to be open during statutory closing hours, see p. 89, *ante*.

(*t*) *Tennant* v. *Cumberland* (1859), 1 E. & E. 401; *Newman* v. *Bendyshe* (1839), 10 Ad. & El. 11; *Police Commissioner* v. *Roberts*, [1904] 1 K. B. 369, 372; and see the argument in *Peache* v. *Colman* (1866), L. R. 1 C. P. 324, 326.

state for which offence the conviction takes place, and if it includes all these offences it is bad for uncertainty (*a*).

Sale during closing hours.

332. A licensee whose servant is paid for intoxicating liquor during permitted hours upon promising to have it delivered at the purchaser's house may be convicted of selling during prohibited hours if, the promise not being kept, he subsequently hands the liquor to the purchaser at the licensed premises during closing hours (*b*).

Keeping open for sale.

333. If a person purchases and pays for intoxicating liquor at licensed premises during permitted hours of sale, and the liquor is set aside for him on his promise to return for it during permitted hours, and he subsequently takes it away during closing hours, there is no evidence to support a conviction for keeping open during prohibited hours for the sale of intoxicating liquor (*c*).

But a licence-holder keeps open for sale during prohibited hours if he accepts payment for intoxicating liquor during permitted hours, but promises to deliver it subsequently during closing hours at a place other than the licensed premises, even though the intoxicating liquor is at once set aside, if it is kept until after closing time in a building within the curtilage of the licensed premises, and is subsequently taken therefrom by the servant of the licence-holder during prohibited hours and delivered to the purchaser as promised (*d*).

Entertainment of friends.

334. An innkeeper does not keep open for the sale of beer by entertaining his friends at his own expense, and supplying them with beer, during closing hours (*e*).

The holder of a justices' licence is not liable to any penalty for

(*a*) *Newman* v. *Bendyshe* (1839), 10 Ad. & El. 11. As to the form of conviction under the former law, see *Newman* v. *Hardwicke* (*Earl*) (1838), 8 Ad. & El. 124.

(*b*) *Saunders* v. *Thorney* (1898), 78 L. T. 627 (where sale was by wife, and delivery was to purchaser's servant).

(*c*) *Mackenzie* v. *Spear* (1902), unreported, but noted at 74 L. J. (K. B.) 546, and referred to [1905] 2 K. B. 220.

(*d*) *Noblett* v. *Hopkinson*, [1905] 2 K. B. 214. All three judges held that there had been no sufficient appropriation of the beer to the purchasers on the licensed premises on the Saturday, but Lord ALVERSTONE, C.J., and KENNEDY, J. (RIDLEY, J., dissenting), further held that assuming there had been a complete appropriation of the beer on the Saturday, the licensee was nevertheless liable to be convicted, on the ground that delivery of the beer on Sunday was an essential condition of the purchase, and that by opening his premises on that day for the carrying out of a material part of the contract of sale he had opened them during prohibited hours within the meaning of the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 9.

(*e*) *Overton* v. *Hunter* (1859), 1 L. T. 366. Under a provision (now repealed) a beerseller was convicted of opening her house and selling beer after closing hours, on evidence that she refused to sell the beer, but gave it, declining the money offered, adding, however, that the recipient of the beer might send her some greens. The recipient did send some greens, which she would not have sent if she had not received the beer. The court quashed the conviction, WIGHTMAN, J., saying: "The evidence here did not justify the conviction. Whether or not it was a gift, no fraud was intended, and there was nothing which amounted to a selling" (*Petherick* v. *Sargent* (1862), 6 L. T. 48).

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supplying intoxicating liquors, after the hours of closing, to private friends *bonâ fide* entertained by him at his own expense (*f*).

Premises open for short time after hours.

335. Where licensed premises are kept open for a short time after the legal closing hour, but the justices do not find as a fact that they are kept open for the sale of intoxicating liquor, and the judges do not think they can draw that inference from the evidence, a conviction for keeping open for the sale of intoxicating liquors will be quashed (*g*).

Evidence of keeping open for sale.

336. There is, however, evidence to support a conviction for keeping open during closing hours for the sale of beer where a licence-holder lets a room in his licensed premises for a meeting and, three-quarters of an hour after the house should have been closed, a side door is found unfastened and several persons are sitting in the room transacting their business, with glasses, some of which contain beer, before them (*h*).

So, too, there is evidence to support a conviction for keeping open if, after closing time, the door of licensed premises is partially open and several men are inside, with glasses containing intoxicating liquor before them, though they are not seen to consume anything (*i*).

A licence-holder may be convicted of keeping open for sale during prohibited hours upon evidence that a man, during prohibited hours, went to the house and came out with a bottle of intoxicating liquor (*k*).

A conviction for keeping open can be supported on evidence of a witness that, during prohibited hours, the front door was closed, but that he knocked and was admitted, that he saw the licensee in the house, and that he found persons on the premises and indications that liquor had just been supplied to them (*l*).

So, too, a licence-holder may be convicted of keeping open during prohibited hours if the outer door of licensed premises is, during prohibited hours, open and entrance is free to anyone from the street, the public rooms being open, and persons in them with intoxicating liquor before them (*m*).

But in order to constitute the offence of keeping open, there must be a keeping open of the premises in the sense that people can get in from the outside to have intoxicating liquor, or can get it supplied to them when outside (*n*).

Evidence insufficient to convict for keeping open.

337. A conviction for keeping open cannot be supported by evidence that during closing hours several persons came out of a side door of licensed premises, which was opened to let them out, the front door being shut, and that shortly afterwards another person

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 61 (1) (a).
(*g*) *Cates* v. *South* (1859), 1 L. T. 365.
(*h*) *Pearse* v. *Gill* (1877), 41 J. P. 742.
(*i*) *Thompson* v. *Greig* (1869), 34 J. P. 214.
(*k*) *Brewer* v. *Shepherd* (1872), 36 J. P. 373.
(*l*) *Finch* v. *Blundell* (1862), 5 L. T. 672.
(*m*) *Smith* v. *Vaux* (1862), 6 L. T. 46; and compare p. 127, *post*.
(*n*) *Police Commissioner* v. *Roberts*, [1904] 1 K. B. 369.

came out drunk; but this evidence might perhaps support a conviction for selling intoxicating liquor during closing hours (*o*).

Nor can a conviction for keeping open be supported upon evidence that after the closing hour the front door of the licensed premises is open, and there are men drinking intoxicating liquor on the licensed premises, if none of the men entered the premises after closing time, and the liquor was sold before closing time, and if no one would have been supplied had he entered after closing time (*p*).

There is no evidence of keeping open for the sale of intoxicating liquor where, during prohibited hours, a man is drinking intoxicating liquor on the licensed premises with the licence-holder and is afterwards let out (*q*).

Nor is evidence that, the outer doors being kept closed, customers who were on the premises before closing time remained after closing time and were served with liquor, sufficient to support a conviction for keeping open for sale during prohibited hours, though it would justify a conviction for selling during prohibited hours (*r*).

Open for sale of other articles.

338. If the holder of a justices' licence has two shops which are under the same roof, in respect of one of which he holds the justices' licence, there being internal communication from one shop to the other, but at closing time partitions are put up and all means of communication with the shop in respect of which the licence is held are stopped, the licensee cannot be convicted of keeping open his shop for the sale of intoxicating liquors, even though the other shop is kept open after the closing hour for licensed premises (*s*).

If a shopkeeper who holds a justices' licence keeps open his shop during closing hours, but locks up and keeps out of sight all intoxicating liquor, and refuses to sell any intoxicating liquor during closing hours, he cannot be convicted of keeping open his shop for the sale of intoxicating liquor (*a*).

But if a shopkeeper who holds a justices' licence keeps intoxicating liquors during prohibited hours within sight of customers as though for sale, even though they are under lock and key, there is evidence from which justices may infer that the shop is open for the sale of intoxicating liquor (*b*).

Belief that customer is *bonâ fide* traveller.

339. If in the course of any proceedings taken against the holder of a justices' licence for contravening the provisions as to closing hours the licence-holder fails to prove that the person to whom the intoxicating liquor was sold is a *bonâ fide* traveller, but the court is satisfied that the licence-holder truly believed that

(*o*) *Jefferson* v. *Richardson* (1871), 35 J. P. 470.
(*p*) *Lloyd* v. *Barnett* (1900), 82 L. T. 804.
(*q*) *Tennant* v. *Cumberland* (1859), 1 E. & E. 401.
(*r*) *Jeffrey* v. *Weaver*, [1899] 2 Q. B. 449.
(*s*) *Brigden* v. *Heighes* (1876), 1 Q. B. D. 330; and as to internal communication, see also p. 131, *post*.
(*a*) *Tassell* v. *Ovenden* (1877), 2 Q. B. D. 383.
(*b*) *Ex parte Joynt* (1874), 38 J. P. 390.

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such person was a *bonâ fide* traveller, and further that the licence-holder took all reasonable precaution to ascertain whether or not such person was a *bonâ fide* traveller, the court must dismiss the case as against the licence-holder, and if it thinks that such person falsely represented himself to be a *bonâ fide* traveller, the court may direct proceedings (*c*) to be instituted against such person for so representing himself (*d*).

Burden of proof.

The burden of proof that a person supplied with liquor is a traveller or lodger lies on the licensed person (*e*).

Presence of *bonâ fide* travellers and others together.

340. If a very large number of people is supplied with intoxicating liquor on licensed premises during closing hours, the great majority being *bonâ fide* travellers, the licence-holder may nevertheless be convicted for keeping open for the sale of intoxicating liquor, if the court concludes from the evidence that all the people were not *bonâ fide* travellers (*f*). Evidence that some *bonâ fide* travellers and some persons not travellers or lodgers are on licensed premises is sufficient to support a finding by justices that the premises were kept open for the sale of intoxicating liquor to persons other than travellers and lodgers (*g*).

But it seems that where an innkeeper has opened his house during prohibited hours for the *bonâ fide* supply of refreshment to travellers arriving at an adjacent railway station, the mere fact that intoxicating liquor is supplied to one or two persons not travellers will not justify a conviction for keeping open for the sale of intoxicating liquor, if the innkeeper does not intend to supply liquor to non-travellers, and does not know that it is supplied to them (*h*).

(ii.) *Consumption of Intoxicating Liquor in Refreshment House.*

Consumption in refreshment house.

341. If any person, licensed to keep premises licensed as a refreshment house but not for the sale of intoxicating liquor, allows any intoxicating liquor to be consumed on the premises during the hours during which the same premises would, if licensed victualler's premises, be closed by law for the sale and consumption of intoxicating liquor, he is liable to a penalty not exceeding for the first offence £10, and for any subsequent offence, £20 (*i*).

(*c*) Under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*d*) *Ibid.*, s. 61 (2). As to who is a traveller, see p. 94, *ante*.

(*e*) *Roberts* v. *Humphreys* (1873), L. R. 8 Q. B. 483; *Stacey* v. *Milne* (1875), 39 J. P. 103; *Gallimore* v. *Goodall* (1874), 38 J. P. 597; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39; and see *Taylor* v. *Humphries* (1864), 17 C. B. (N. S.) 539; *Davis* v. *Scrace* (1869), L. R. 4 C. P. 172; the law as laid down in *Copley* v. *Burton* (1870), L. R. 5 C. P. 489, under stat. (1848) 11 & 12 Vict. c. 49, s. 1 (now repealed), being now altered.

(*f*) *Gallimore* v. *Goodall*, *supra*.

(*g*) *Watt* v. *Glenister* (1875), 32 L. T. 856.

(*h*) *Peache* v. *Colman* (1866), L. R. 1 C. P. 324 (decided under the repealed stat. (1848) 11 & 12 Vict. c. 49, s. 1).

(*i*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 27. As to refreshment houses, see p. 92, *ante*.

(iii.) *Consumption of Intoxicating Liquor in Refreshment House Licensed for Sale of Wine.*

Refreshment house licensed for sale of wine.

342. If any person, keeping a refreshment house licensed for the sale by retail of foreign wine, and bound to close at 10 p.m., sells or exposes for sale in such refreshment house, or opens or keeps open any such refreshment house, for the sale of intoxicating liquors during the time that such house is directed to be closed, or during such time as aforesaid allows any intoxicating liquors to be consumed on such premises, he is liable for the first offence to a penalty not exceeding £10, and for any subsequent offence to a penalty not exceeding £20 (*k*).

(iv.) *In cases of Riot.*

Keeping open during riot.

343. Any person who keeps open his premises for the sale of intoxicating liquors during any time at which the justices have ordered them to be closed in cases of riot (*l*) is liable to a penalty not exceeding £50 (*m*).

SUB-SECT. 9.—*Offences relating to Production of Licence.*

(i.) *Excise Licence.*

Production of excise licence.

344. If any person licensed to carry on any trade or business, or make or sell any goods for which an excise licence is required, does not produce and deliver such licence to be read and examined by any officer of Customs and Excise, within a reasonable time after such officer has demanded the production thereof, such person for each such offence forfeits the sum of £20 (*n*).

(ii.) *Justices' Licence.*

Production of justices' licence.

345. Every holder of a justices' licence, or of a general or special order of exemption made by a local authority (*o*) in relation to closing hours, must, by himself, his agent, or servant, produce the licence within a reasonable time after the production thereof is demanded by a justice of the peace, constable, or officer of customs and excise, and deliver the same to be read and examined by him. Any person who fails to comply with this enactment is liable in respect of each offence to a penalty not exceeding £10 (*p*).

SUB-SECT. 10.—*Forgery of Justices' Licence.*

Forgery of licence.

346. If any person forges or tenders, knowing the same to have been forged, any justices' licence, he is liable in respect of each offence to a fine not exceeding £20, or, in the discretion

(*k*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 28.
(*l*) See p. 93, *ante*.
(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 63.
(*n*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 28. As to such officers, see note (*a*), p. 17, *ante*.
(*o*) Under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).
(*p*) *Ibid.*, s. 84.

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of the court, to imprisonment for any period not exceeding six months with or without hard labour (*q*).

If any unauthorised person imitates or affixes an impression of any official seal or stamp on any justices' licence or imitation of a justices' licence, or knowingly uses a justices' licence or imitation of a justices' licence falsely purporting to be sealed, he is guilty of forgery, and is on conviction on indictment punishable accordingly (*r*).

SECT. 2.—*Relating to the Regulation of Licensed Premises.*

SUB-SECT. 1.—*Affixing Name etc.*

(i.) *By Holder of Excise Licence.*

Name to be affixed by holder of excise licence.

347. Every person required by any law of excise to make entry of his premises, in order to carry on therein any trade or business for which an excise licence is required, and who has taken out such licence, must paint or cause to be painted, or place and fix in letters publicly visible and legible, and at least one inch long, in and upon his entered premises, his name at full length (or where there are partners or more than one person engaged in carrying on jointly the same trade or business, the name or style of the firm or partnership), and after such name the word "licensed," adding thereto the words necessary to express the purpose for which such licence has been granted; and must cause such letters to be painted or placed, and fixed in such conspicuous place on the outside of the front of the premises, over the principal outward door or gate, or entrance door thereto, and not more than three feet from the top of such outward door or gate, or entrance door (*s*).

No person who is not licensed to carry on any trade or business for which a licence is required (*t*) may put or have any such letters as aforesaid upon his premises, or any letters importing that he carries on any such trade or business, or is licensed so to do (*s*).

Penalty.

Every person who fails to paint or place and fix such letters or to keep them so painted, placed or fixed, or to renew the same when necessary during the continuance of his licence, or acts in contravention of the above provisions, for every such offence forfeits the sum of £20 (*s*).

(ii.) *By Holder of Justices' Licence.*

Name to be affixed by holder of justices' licence.

348. The holder of a justices' licence must cause to be painted or fixed, and must keep painted or fixed on the premises in respect of which his licence is granted, in a conspicuous place and in such form and manner as the licensing justices direct, his name, with the addition after the name of the word "licensed," and of words sufficient, in the opinion of the justices, to express the business for which his licence has been granted, and in particular (1) of words

(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 44 (2).
(*r*) *Ibid.*, s. 44 (1). And see as to forgery generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 711 *et seq.*
(*s*) Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 25.
(*t*) That is, by the Excise Licences Act, 1825 (6 Geo. 4, c. 81).

expressing whether the licence authorises the sale of intoxicating liquor to be consumed on or off the premises only, as the case may be; and (2), in the case of a six-day licence, of words indicating that the licence is for six days only; and (3) in the case of an early-closing licence, of such words as the licensing justices may order for giving notice to the public that the licence is an early-closing licence.

No person may have on his premises any words or letters importing that he is authorised, as the holder of a justices' licence, to sell any intoxicating liquor which he is not in fact duly authorised to sell.

Every person who fails to comply with or acts in contravention of the above provisions is liable to a penalty not exceeding, for the first offence, £10, and for any subsequent offence, £20 (*u*). Penalty.

SUB-SECT. 2.—*Notice of Exemption Order.*

349. A notice in such form as may be prescribed by the local authority (*v*), stating the days and hours during which the premises are permitted to be open under a general order of exemption, must be affixed and kept affixed in a conspicuous position outside the premises; and if the holder of the order of exemption makes default in affixing or in keeping affixed the notice in manner above mentioned, during any part of the time for which his exemption is granted, he is liable, in respect of each offence, to a fine not exceeding £5. Notice of exemption order.

Every person who keeps affixed to his premises any such notice when he does not hold a general order of exemption is liable to a penalty not exceeding £10 (*a*).

SUB-SECT. 3.—*Internal Communication with Place of Public Resort.*

350. Every person who makes or uses, or allows to be made or used, any internal communication between any licensed premises and any unlicensed premises which are used for public entertainment or resort, or as a refreshment house, is liable to a fine not exceeding £10 for every day during which such communication remains open; and in addition, if he is the holder of a justices' licence, forfeits that licence (*b*). Internal communication.

In the metropolitan police district, every person who makes or uses, or allows to be made or used, any internal communication between any house, shop, room, or place of public resort not licensed for the sale of wine, spirits, beer, or other excisable articles, and any house, shop, room, or place licensed for the sale

(*u*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 74.

(*v*) As to the local authority, see note (*i*), p. 95, *ante*.

(*a*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 55 (2). As to general exemption orders, see p. 95, *ante*.

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 70. As to the meaning of "place of public resort" under the statutes, see *Sewell* v. *Taylor* (1859), 7 C. B. (N. S.) 160; *Davys* v. *Douglas* (1859), 4 H. & N. 180; *Ex parte Davis* (1857), 2 H. & N. 149; *Kitson* v. *Ashe*, [1899] 1 Q. B. 425. See also definition of "place of public resort" in the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 36 (6); and as to a place to which the public have access, see also *Turnbull* v. *Appleton* (1881), 45 J. P. 469. Compare also, as to internal communication, p. 127, *ante*.

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of wine, spirits, beer, or other excisable articles, or in which wine is sold by a free vintner, is liable to a penalty of not more than £10 for every day that such communication is open (*c*).

There is an almost exactly similar provision relating to the City of London (*d*).

SUB-SECT. 4.—*Refusing Admission to Constable.*

Refusing to admit constable.

351. Any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the Licensing (Consolidation) Act, 1910 (*e*), which it is his duty to enforce, at all times enter on any licensed premises.

Every person who himself, or by any person in his employ or acting by his direction or with his consent, refuses or fails to admit any constable in the execution of his duty demanding to enter in pursuance of this provision, is liable to a penalty, not exceeding for the first offence £5, and for any subsequent offence, £10 (*f*).

What is refusing admission.

352. If on demanding admission a constable gives as his only reason for demanding entry that he wishes to visit the house, and he does not, before demanding entry, suspect the commission of an actual offence against the Licensing Acts, and the licence-holder refuses the constable admission for a short time, the licence-holder may be convicted (*g*).

Acts of servant.

If the servant of a licensed person refuses admission to a constable when the licensed person himself is at the time managing the business of the house and is unaware of his servant's action, and has never given any directions to his servant to refuse a constable admission, the licensed person cannot be convicted (*h*). But if the act of the servant is within the general scope of his employment, or if he has been expressly or impliedly authorised by the master to do such an act, the master is liable, but not otherwise (*i*).

To what premises right of entry extends.

353. An outhouse in the yard of an alehouse, though only used as a cellar, is, if part of the licensed premises, a place to which a constable has a right of entry (*k*).

But a constable is not entitled to enter a room in an inn, which room has been let by the innkeeper for specified times under an agreement of tenancy, upon one of the times during which it is in occupation of the tenant, at any rate unless the constable has

(*c*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 45. The words "house, shop, room, or place" are all qualified by the words "public resort"; see *ibid.*, s. 44, and preceding recital; City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 28, and preceding recital; *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, *per* Lord BRAMWELL, at p. 808.

(*d*) City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 29.

(*e*) 10 Edw. 7 & 1 Geo. 5, c. 24.

(*f*) *Ibid.*, s. 81.

(*g*) *R.* v. *Dobbins* (1883), 48 J. P. 182.

(*h*) *Caswell* v. *Hundred House Justices* (1889), 54 J. P. 87.

(*i*) *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516, C. A.; *Stedman* v. *Baker & Co.* (1896), 12 T. L. R. 451, C. A.; see *Hanson* v. *Waller*, [1901] 1 K. B. 390; and compare *Massey* v. *Morriss*, [1894] 2 Q. B. 412, 414. See, generally, title AGENCY, Vol. I., p. 166.

(*k*) *R.* v. *Tott* (1861), 30 L. J. (M. C.) 177.

reason to suppose that some offence against the Licensing Acts is being committed (*l*).

A constable has no right of entry upon the premises of the holder of an excise retail licence if the holder has not and does not require a justices' licence (*m*).

Right of entry by excise officer

354. Any officer of excise may, at all times during the hours in which any house licensed for the retail of beer or cider is kept open, enter into every house, cellar, room, or place entered for the storing, keeping or retailing of beer or cider, and make search for and seize all wine, spirits and sweets which may be found in any such place, and examine all beer or cider kept therein (*n*).

Any officer of excise may, during the hours which any house is kept open for the sale of beer after the rate of 1½*d.* or after a less rate the quart, enter into every such house, cellar, room, or place for the keeping or retailing such beer, and make search for and seize all wines, spirits, sweets, and all beer which may not lawfully be sold there (*o*).

Entry into refreshment houses.

355. All constables and officers of police may, when and so often as they think proper, enter into all houses licensed as refreshment houses and into and upon the premises belonging thereto; and if any person licensed to keep a refreshment house, or any servant or other person in his employ or by his direction, refuses to admit or does not admit any constable or officer of police demanding admittance into such refreshment house or upon such premises, the person so licensed must, for the first offence, forfeit and pay any sum not exceeding £5, together with the costs of conviction, to be recovered before one or more justices of the peace, on information or complaint made within seven days next after the day on which such offence was committed. Any two or more justices before whom any such person is convicted for the second time of any such offence may adjudge (if they so think fit) the licence or licences of such offender in respect of such refreshment house to be forfeited, and that he be disqualified from having any licence granted to him under the Refreshment Houses Act, 1860 (*p*), in respect of such house for the space of two years, or for such shorter space of time as they may think proper to adjudge (*q*).

Premises used for brewing.

356. An officer of customs and excise may at all reasonable times enter and inspect any premises used for the purposes of brewing by a brewer other than a brewer for sale, and examine the vessels and utensils used by him for the purposes of brewing (*r*).

(*l*) *Duncan* v. *Dowding*, [1897] 1 Q. B. 575.
(*m*) *Harrison* v. *McL'Meel* (1884), 50 L. T. 210.
(*n*) Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 11.
(*o*) *Ibid.*, s. 12.
(*p*) 23 & 24 Vict. c. 27.
(*q*) *Ibid.*, s. 18, which is repealed, so far as it relates to the sale of intoxicating liquors or any offences connected therewith, by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75 and Sched. II.
(*r*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 35. "Officer" is defined as "officer of Inland Revenue" (*ibid.*, s. 2), but by the effect of the Finance Act, 1908 (8 Edw. 7, c. 16), s. 4, and the Excise Transfer Order, 1909 (London Gazette, 1909, 16th February, 1212), the duties referred to in the text are now carried out by the Commissioners of Customs and Excise. See also note (*a*), p. 17, *ante*.

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An officer of Inland Revenue (*s*) may at any time enter the premises of a dealer in or retailer of spirits and inspect and examine the spirits in his stock or possession, and take samples of any such spirits, paying the usual price thereof for any sample so taken (*t*).

SUB-SECT. 5.—*Holding Seditious Meetings.*

Seditious meetings.

357. Any two or more justices of the peace acting for any place may, upon evidence on oath that any meeting of any society (*u*) or club (*v*) declared to be an unlawful combination and confederacy, or any meeting for any seditious purpose, has been held at any house, room, or place licensed for the sale of ale, beer, wine, or spirituous liquors, with the knowledge and consent of the person keeping such house, room, or place (*a*), adjudge and declare the licence or licences for selling such liquors granted to the person keeping such place to be forfeited, and the person so keeping such place is, from and after the day of the date of such adjudication and declaration, and notice thereof given to him (*a*), liable to all the penalties and forfeitures for any act done after that day to which such person would be liable, if such licence or licences had expired or otherwise determined on that day (*b*).

SUB-SECT. 6.—*Offences in relation to Constables.*

Harbouring, supplying liquor to; or bribing, constable.

358. Any holder of a justices' licence (1) who knowingly harbours or knowingly suffers to remain on his premises any constable during any part of the time appointed for his being on duty, unless for the purpose of keeping or restoring order or in execution of his duty; or (2) supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty unless by authority of some superior officer of the constable; or (3) bribes, or attempts to bribe, any constable, is liable to a penalty not exceeding for the first offence £10, and not exceeding for the second or any subsequent offence £20 (*c*).

If a police constable is served with liquor while on duty, but the licensed person is not aware that he is on duty, and is naturally led to suppose he is not on duty by his dress, the licensed person cannot be convicted (*d*).

Act of servant.

If the servant of a licensed person knowingly supplies liquor to a constable on duty, the licensed person may be convicted, although he did not know of his servant's act (*e*).

Harbouring by victualler.

359. Any victualler, or keeper of any house, shop, room, or other place for the sale of any liquors, whether spirituous or

(*s*) See note (*a*), p. 17, *ante*.
(*t*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 141.
(*u*) By the Unlawful Societies Act, 1799 (39 Geo. 3, c. 79), s. 14.
(*v*) By the Seditious Meetings Act, 1817 (57 Geo. 3, c. 19). The word "club" does not appear in the Unlawful Societies Act, 1799 (39 Geo. 3, c. 79), s. 14.
(*a*) The provisions as to "knowledge and consent" and "notice" do not appear in the Unlawful Societies Act, 1799 (39 Geo. 3, c. 79), s. 14.
(*b*) *Ibid.*; Seditious Meetings Act, 1817 (57 Geo. 3, c. 19). As to unlawful societies, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 466, 467.
(*c*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 78. As to constables generally, see title POLICE.
(*d*) *Sherras* v. *De Rutzen*, [1895] 1 Q. B. 918.
(*e*) *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292.

otherwise, who knowingly harbours or entertains any constable, or permits the constable to abide or remain in such house, shop, room, or other place during any part of the time appointed for his being on duty, is liable for every such offence, upon conviction before two justices, to a penalty not exceeding £5 (*f*).

Towns Police Clauses Act, 1347.

360. In places where the Towns Police Clauses Act, 1847 (*g*), applies, every victualler or keeper of any public-house, or any person licensed to sell wine, beer, cider, or other fermented or distilled liquors by retail to be consumed on the premises, who knowingly harbours, or entertains, or suffers to remain in his public-house or place wherein he carries on his business, any constable during any part of the time appointed for his being on duty, unless for the purpose of quelling any disturbance or restoring order, is liable for every such offence to a penalty not exceeding £20 (*h*).

SUB-SECT. 7.—*Harbouring Thieves.*

At common law.

361. It seems that at common law innkeepers may be indicted and fined as being guilty of a public nuisance if they usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in their houses (*i*).

Prevention of Crimes Act, 1871.

362. Every person who occupies or keeps any house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, and knowingly lodges or knowingly harbours thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein having reasonable cause for believing them to be stolen, is liable to a penalty not exceeding £10, and in default of payment to be imprisoned for a period not exceeding four months with or without hard labour, and the court before which he is brought may, in addition to or in lieu of any penalty, require him to enter into recognisances, with or without sureties, for keeping the peace or being of good behaviour during twelve months, provided that (1) no person must be imprisoned for not finding sureties in pursuance of this enactment for a longer period than three months; and (2) the security required from a surety must not exceed £20 (*j*).

Any licence for the sale of intoxicating liquors which has been granted to the occupier or keeper of any such place may, in the discretion of the court, be forfeited on his first conviction, and on his second conviction his licence must be forfeited, and he is disqualified for a period of two years from receiving any such licence.

Where two such convictions have taken place within a period of three years in respect of the same premises, whether the

(*f*) County Police Act, 1839 (2 & 3 Vict. c. 93), s. 16.
(*g*) 10 & 11 Vict. c. 89.
(*h*) *Ibid.*, s. 34.
(*i*) 3 Bac. Abr., tit. Inns and Innkeepers (A.), 6th ed. (1807), by Gwillim, p. 660. As to the liabilities of innkeepers, see title INNS AND INNKEEPERS, Vol. XVII., pp. 306 *et seq.*
(*j*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10. As to places of public entertainment generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT; as to racecourses, see also title GAMING AND WAGERING, Vol. XV., pp. 286, 287.

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persons convicted were or were not the same, the court must direct that for a term not exceeding one year from the date of the last of such convictions no such licence shall be granted to any person whatever in respect of such premises (*k*). Any licence granted in contravention of this provision is void (*k*).

Production of licence.

363. Any licensed person brought before a court in pursuance of the provisions referred to in the preceding paragraph must produce his licence for examination, or if it is forfeited must deliver it up altogether, and if he wilfully neglects or refuses to produce his licence he is, in addition to any other penalty under these provisions, liable on summary conviction to a penalty not exceeding £5 (*k*).

Any person convicted under these provisions has a right of appeal (*l*).

Meeting on behalf of criminal.

364. If the occupant of a place where intoxicating liquors are sold allows a meeting to be held there for the purpose of getting up a subscription in aid of the family of a man charged with an offence, and of procuring means for his defence, and several thieves or reputed thieves, known by the occupant to be such, are present, the occupant appears to be guilty of an offence under the provisions referred to above (*m*).

SUB-SECT. 8.—*Disorderly Houses.*

(i.) *Keeping Disorderly House.*

Keeping disorderly house.

365. Any holder of a justices' licence who knowingly permits his premises to be the habitual resort of or place of meeting of reputed prostitutes, whether the object of their so resorting or meeting is or is not prostitution, is liable, if he allows them to remain thereon longer than is necessary for the purpose of obtaining reasonable refreshment, to a penalty not exceeding for the first offence £10, and for any subsequent offence £20 (*n*).

There is sufficient evidence to support a conviction if a large number of prostitutes are on licensed premises, many of them taking refreshments and talking with men, and the licence-holder is told what they are, and a short time afterwards some of the women are there with other prostitutes, only a few of them taking refreshments, and they are going out and coming in with men (*o*).

When it has been proved that a number of prostitutes assembled at the house of a licensed person, it is admissible evidence against him, for the purpose of proving that he knew they were prostitutes, that on a previous occasion several of the same women met together at his house (*p*).

(*k*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10.

(*l*) Statute Law Revision (Substituted Enactments) Act, 1876 (39 & 40 Vict. c. 20), s. 5. As to procedure on appeal from courts of summary jurisdiction, see title MAGISTRATES.

(*m*) *Marshall* v. *Fox* (1871), L. R. 6 Q. B. 370, decided under the repealed Habitual Criminals Act, 1869 (32 & 33 Vict. c. 99), s. 10.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 76. As to disorderly houses, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 541 *et seq.*

(*o*) *Whitfield* v. *Bainbridge* (1866), 30 J. P. 644, decided under a somewhat similar local statute.

(*p*) *Parker* v. *Green* (1862), 2 B. & S. 299.

But a conviction cannot be supported if all that is proved is that a known prostitute is seen on the premises and the licensee speaks to her when a policeman enters, and that the prostitute, who has then no refreshment in front of her, leaves immediately (*q*).

The point that there is no evidence of knowledge on the part of the licensed person, if not taken at the hearing, cannot be taken on appeal by special case (*r*).

Refreshment houses.

366. Every person licensed to keep a refreshment house who knowingly suffers any unlawful games or gaming therein, or knowingly suffers prostitutes, thieves, or drunken and disorderly persons to assemble at or to continue in or upon his premises, or does, suffers, or permits any act in contravention of his licence, must, upon conviction thereof before two justices, pay for the first offence a fine not exceeding 40*s*., for the second offence a fine not exceeding £5, and for every subsequent offence a fine not exceeding £20, or be subject to a forfeiture of his licence, at the discretion of the justices before whom he is convicted; and in case of such forfeiture of his licence such person is disqualified for the space of one year then next ensuing from obtaining a fresh licence; such fresh licence, if obtained within the said year, being absolutely null and void to all intents and purposes (*s*).

It appears to be necessary to support a conviction that the prostitutes should assemble on the premises in their capacity of prostitutes, though not necessary that they should be there for the purpose of prostitution, and the question of the capacity in which the prostitutes are on the premises is one of fact for the justices (*t*).

Towns Police Clauses Act.

367. In places where the Towns Police Clauses Act, 1847 (*u*), applies, every person keeping any house, room, shop, or other place of public resort for the sale or consumption of refreshments of any kind, who knowingly suffers common prostitutes or reputed thieves to assemble at and continue on his premises, is for every such offence liable to a penalty not exceeding £5 (*a*); the keeper of a licensed alehouse is within this provision (*b*).

If the Towns Police Clauses Act, 1847 (*u*), is incorporated in a local Improvement Act which gives the penalty to the Improvement Commissioners, their authority is not necessary to the laying of the information (*b*).

In London.

368. Every person who has, or keeps, any house, shop, room, or place of public resort in the metropolitan police district (*c*), or in

(*q*) *Miller* v. *Dudley Justices* (1898), 46 W. R. 606.
(*r*) *Purkis* v. *Huxtable* (1859), 1 E. & E. 780.
(*s*) Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 32 (repealed so far as regards intoxicating liquors; see p. 133, *ante*). As to permitting gaming, see also p. 138, *post*; as to refreshment houses generally, see p. 92, *ante*.
(*t*) *Belasco* v. *Hannant*, *Barton* v. *Hannant* (1862), 3 B. & S. 13; *Greig* v. *Bendeno* (1858), E. B. & E. 133, decided under a local statute (1842), 5 & 6 Vict. c. cvi., containing similar words.
(*u*) 10 & 11 Vict. c. 89.
(*a*) *Ibid.*, s. 35.
(*b*) *Cole* v. *Coulton* (1860), 2 E. & E. 695.
(*c*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 44.

SECT. 2. Relating to the Regulation of Licensed Premises.

the City of London and the liberties thereof (*d*), wherein provisions, liquors, or refreshments of any kind are sold or consumed (whether the same are kept or retailed therein or procured elsewhere), and who wilfully or knowingly permits drunkenness or other disorderly conduct in such house, shop, room, or place, or knowingly suffers any unlawful games, or any gaming whatsoever, therein, or knowingly permits or suffers prostitutes or persons of notoriously bad character to meet together and remain therein, is liable to a penalty of £5 for every such offence (*e*).

Licensed victualler.

If the offender be a licensed victualler, or licensed to sell beer by retail to be drunk on the premises in the City of London or the liberties thereof, he is not exempted from the penalties or penal consequences to which he may be liable for committing an offence against the tenor of his licence (*f*).

Conviction of master and servant.

If the keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of the above-mentioned provisions, and the servant does so, the master may be convicted, and the servant may be convicted of aiding and abetting him (*g*).

(ii.) *Permitting Premises to be a Brothel.*

Brothel.

369. Any holder of a justices' licence who is convicted of permitting his premises to be a brothel is liable to a penalty not exceeding £20, and forfeits his licence (*h*).

Evidence of user.

If during the absence of a licensed victualler two prostitutes and two men enter his premises, where they a little later occupy a double-bedded room, and the police after some time enter the house and find the two women concealed with the licensee's wife, and the men elsewhere on the premises, there is evidence, in the absence of explanation, upon which the licensee may be convicted of permitting the premises to be a brothel, and the justices are not bound to state a case, there being no point of law raised before them (*i*).

SUB-SECT. 9.—*Permitting Gaming.*

Permitting gaming.

370. The holder of a justices' licence who (1) suffers any gaming (*k*) or any unlawful game to be carried on on his premises; or (2) opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the Betting Act, 1853 (*l*), is liable in respect of each offence to a penalty not exceeding for the first offence £10, and for any subsequent offence £20 (*m*).

(*d*) City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 28.

(*e*) See note (*c*), p. 137, *ante*, and note (*d*), *supra*. As to permitting gaming, see further the text, *infra*, and p. 139, *post*.

(*f*) *Wilson* v. *Stewart* (1863), 3 B. & S. 913.

(*g*) City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 28.

(*h*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 77. He forfeits his licence whether the conviction for permitting his premises to be a brothel takes place under this provision or otherwise. As to brothels generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 542 *et seq.*

(*i*) *R.* v. *Parts of Holland, Lincolnshire, Justices* (1882), 46 J. P. 312.

(*k*) As to what constitutes gaming, see title GAMING AND WAGERING, Vol. XV., p. 278, note (*t*); and as to unlawful games see *ibid.*, pp. 284 *et seq.*

(*l*) 16 & 17 Vict. c. 119; see title GAMING AND WAGERING, Vol. XV., pp. 291 *et seq.*

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79; and see also title GAMING AND WAGERING, Vol. XV., pp. 291, 295, note (*n*).

The offence of permitting gaming on licensed premises may in some circumstances be of such a trifling nature as to justify justices in refusing to convict (*n*).

A licensed person suffers gaming on his premises if he plays cards for money with his private friends in his own private room (*o*), or if his private friends, *bonâ fide* entertained at his own expense, play cards for money in his company after closing hours (*p*). Cards.

So, too, a licensed person suffers gaming if he and others play skittles on the licensed premises for liquor, paid for by the loser (*q*), and it makes no difference that the liquor is not consumed on the skittle-ground (*r*). Skittles.

The game of dominoes is not in itself unlawful (*s*), and an information charging a licensed person with knowingly suffering a certain unlawful game, to wit the game of dominoes, to be played in his licensed house discloses no offence (*t*). Dominoes.

371. If gaming takes place on licensed premises suddenly and without premeditation, when the licensed person is out of the way, and there is no evidence that the person left in charge knew of the game, the licensed person cannot be convicted (*u*); for though it is not necessary to prove actual knowledge on the part of a licensed person or his servants, some circumstances must be proved from which it can be inferred that they connived at what was going on (*a*). Such an inference may be drawn from the fact that a servant left in charge by the licensed person late at night removes as far as possible from the room where the gaming takes place (*b*). Gaming unknown to licensee.

If a servant is left to attend to the house, his knowledge of the gaming is sufficient to convict the licensed person (*c*). So, too, is the knowledge of a servant in charge of a skittle-alley attached to licensed premises, when the gaming takes place in the skittle-alley (*d*). But the knowledge of a servant who does not appear to be in charge of the room where the gaming takes place is not sufficient ground for convicting the licensed person (*e*). Knowledge of servant of licensee.

372. A licensed victualler is still liable to be convicted under the Betting Act, 1853 (*f*). Betting Act, 1853

(*n*) *Ex parte Marshall* (1907), 71 J. P. 501; see *Phillips* v. *Evans* (1896), 60 J. P. 120; and compare title GAMING AND WAGERING, Vol. XV., p. 289.
(*o*) *Patten* v. *Rhymer* (1860), 3 E. & E. 1.
(*p*) *Hare* v. *Osborne* (1876), 34 L. T. 294. As to games where prizes are given by third parties, see title GAMING AND WAGERING, Vol. XV., p. 288, note (*a*).
(*q*) *Danford* v. *Taylor* (1869), 20 L. T. 483. See title GAMING AND WAGERING, Vol. XV., p. 287.
(*r*) *Luff* v. *Leaper* (1872), 36 J. P. 773.
(*s*) *R.* v. *Ashton* (1852), 1 E. & B. 286.
(*t*) *Ibid.*
(*u*) *Avards* v. *Dance* (1862), 26 J. P. 437.
(*a*) *Bosley* v. *Davies* (1875), 1 Q. B. D. 84.
(*b*) *Redgate* v. *Haynes* (1876), 1 Q. B. D. 89.
(*c*) *Redgate* v. *Haynes*, *supra*; *Crabtree* v. *Hole* (1879), 43 J. P. 799.
(*d*) *Bond* v. *Evans* (1888), 21 Q. B. D. 249.
(*e*) *Somerset* v. *Hart* (1884), 12 Q. B. D. 360.
(*f*) *Sims* v. *Pay* (1889), 58 L. J. (M. C.) 39; the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79 (see note (*m*), p. 138, *ante*), not implying any repeal of the earlier statute. For the Betting Act, 1853 (16 & 17

SECT. 2. Relating to the Regulation of Licensed Premises.

SUB-SECT. 10.—*Using for Parliamentary or Municipal Election.*

Using premises for elections.

373. Licensed premises may not be used as a committee room in connection with a parliamentary election (*g*), or as a committee room or for holding a meeting in connection with a municipal election (*h*). The offence of illegal hiring may be committed either by the person hiring the premises or by the person letting them for hire (*i*).

SUB-SECT. 11.—*Possession of Sugar by Dealer in or Retailer of Beer.*

Possession of sugar by beer dealer or retailer.

374. No dealer in nor retailer of beer may receive or have in his custody or possession any sugar, saccharine substance, extract, or syrup (except for domestic use, the proof whereof lies on him), or any preparation for increasing the gravity of beer (*k*). If he contravenes this provision the article is forfeited, and he incurs a fine of £20 (*l*).

This provision does not apply to sugar and other preparations deposited (*a*) in the entered sugar store of a brewer of beer for sale, nor to sugar or syrup kept for sale in the ordinary course of trade of a grocer, where the brewer or grocer carries on upon the same premises the trade or business of a dealer in or retailer of beer (*b*).

SECT. 3.—*Offences by the Public.*

SUB-SECT. 1.—*Persons found Drunk.*

Found drunk.

375. Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, is liable to a penalty not exceeding 10*s*., and, on a second conviction within a period of twelve months, to a penalty not exceeding 20*s*., and, on a third or subsequent conviction within such period of twelve months, to a penalty not exceeding 40*s*. (*c*).

For this purpose "licensed premises" means licensed premises while they are open to the public for the purposes of the licence, so that a licensed person who is found drunk on his own licensed premises during closing hours and when the premises are closed to the public cannot be convicted, although a licensee is not less amenable to the enactment than any other person (*d*).

Vict. c. 119), and decisions as to what facts constitute contraventions thereof, see title GAMING AND WAGERING, Vol. XV., pp. 289, note (*g*), 291 *et seq.*, 296, 297, and *Bradford* v. *Dawson*, [1897] 1 Q. B. 307; *Belton* v. *Busby*, [1899] 2 Q. B. 380.

(*g*) See title ELECTIONS, Vol. XII., p. 304.

(*h*) See *ibid.*, pp. 348, 349.

(*i*) Corrupt and Illegal Practices Act, 1883 (46 & 47 Vict. c. 51), s. 20; Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 16 (1). As to the penalties for these offences, see title ELECTIONS, Vol. XII., p. 534, notes (*c*), (*d*).

(*k*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 11 (1).

(*l*) *Ibid.*, s. 11 (2).

(*a*) In conformity with the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 7.

(*b*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 11 (3)

(*c*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300, note (*d*). As to habitual drunkards, see *ibid.*, pp. 553, 554; and title INFANTS AND CHILDREN, Vol. XVII., pp. 169, 170. As to being drunk in charge of a child, see *ibid.*

(*d*) *Lester* v. *Torrens* (1877), 2 Q. B. D. 403. As to permitting drunkenness on licensed premises, see p. 118, *ante*.

But if a person enters licensed premises for the purpose of using them as such, and remains upon the premises until after closing time, and is then found drunk upon them, he may be convicted (*e*).

Imprisonment.

Any person committed to prison for non-payment of a penalty under this provision may be imprisoned with hard labour (*f*).

SUB-SECT. 2.—*Drunk and Disorderly or in Charge of Carriage etc.*

Drunk and disorderly.

376. Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge, on any highway or other public place, of any carriage (*g*), horse, cattle (*h*), or steam engine, or who is drunk while in possession of any loaded firearms, may be apprehended, and is liable to a penalty not exceeding 40*s*., or in the discretion of the court to imprisonment, with or without hard labour, for any term not exceeding one month (*i*).

Charge of different offence.

A person charged with being drunk and disorderly cannot be found guilty upon the same summons of a different offence, such as that of being drunk on licensed premises or in a public place (*k*).

SUB-SECT. 3.—*Refusing to Quit.*

Power to refuse admittance and to eject.

377. The holder of a justices' licence may refuse to admit to, and may turn out of, the premises in respect of which his licence is granted, any person who is drunken, violent, quarrelsome, or disorderly, and any person whose presence on his premises would subject him to a penalty under the Licensing (Consolidation) Act, 1910 (*l*).

(*e*) *R.* v. *Pelly*, [1897] 2 Q. B. 33.

(*f*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12.

(*g*) "Carriage" appears to include a bicycle (see *Taylor* v. *Goodwin* (1879), 4 Q. B. D. 228 (case of furious driving); *R.* v. *Parker* (1895), 59 J. P. 793. But see *Simpson* v. *Teignmouth and Shaldon Bridge Co.*, [1903] 1 K. B. 405, C. A.; *Williams* v. *Ellis* (1880), 5 Q. B. D. 175; *Cannan* v. *Abingdon (Earl)*, [1900] 2 Q. B. 66; *Hatton* v. *Treeby*, [1897] 2 Q. B. 452; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85; *Plymouth, Stonehouse and Devonport Tramways Co.* v. *General Tolls Co.* (1898), 14 T. L. R. 531, H. L.; *Smith* v. *Kynnersley*, [1903] 1 K. B. 788, C. A.; *O'Donoghue* v. *Moon* (1904), 68 J. P. 349 (motor bicycle)).

(*h*) "Cattle" appears to include pigs (see *Child* v. *Hearn* (1874), L. R. 9 Exch. 176).

(*i*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12, and see note (*f*), *supra*. There are similar enactments with regard to being drunk while driving a hackney carriage etc., in the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 61, and in the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 28; and similar enactments with regard to disorderly conduct while drunk, under the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 29; and in the metropolitan police district (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 58), and in the City of London (City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 37). As to similar offences under the Inebriates Act, 1898 (61 & 62 Vict. c. 60), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 532.

(*k*) See *Martin* v. *Pridgeon* (1859), 1 E. & E. 778; *Soden* v. *Cray* (1862), 7 L. T. 324, *sub nom. Loadman* v. *Cragg*, 26 J. P. 743. As to persons found drunk on licensed premises or in public places, see p. 140, *ante*.

(*l*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 54), s. 80 (1); and see *Howell* v. *Jackson* (1834), 6 C. & P. 723.

SECT. 3.
Offences by the Public.

Penalty.

Any such person who, upon being requested by such licensed person, or his agent or servant, or any constable, to quit the premises, refuses or fails to do so, is liable to a penalty not exceeding £5, and all constables are required, on the demand of the licensed person, or his agent or servant, to expel or assist in expelling every such person from the premises, and may use such force as may be required for that purpose (*m*).

Imprisonment.

The court committing any person to prison for non-payment of any such fine may order him to be imprisoned with hard labour (*n*).

Person not drunk or disorderly.

But a person who is not drunk or disorderly at the time when he is requested to leave does not come within the above penal provision (*o*).

General power.

Even apart from the above penal provision, it seems that, where a person is in an unfit condition to be on the premises, the licensed person is justified in insisting upon his leaving (*p*); and if the licensee calls in a police officer, the licensee is not liable for any excess of violence that may be used by such officer in removing the objectionable person (*p*).

Licensed premises not being an inn.

378. The licensee of licensed premises which are not at common law an inn may request a person who is not a traveller to leave the premises, and may eject him if he refuses to go (*q*).

Person drunk in refreshment house.

379. Any person who is drunk, riotous, quarrelsome, or disorderly in any premises licensed as a refreshment house (*r*), and refuses or neglects to quit the same upon being requested to do so by the manager or occupier, or his agent or servant, or by any constable, is liable, on conviction before one justice, to pay a fine not exceeding 40*s*. All constables must, on the demand of such manager, occupier, agent, or servant, assist in expelling such drunken, riotous, quarrelsome, and disorderly persons from the premises (*s*).

If several persons are charged in one information, and the objection that each case ought to be taken separately is waived, a separate conviction against each is good (*t*).

SUB-SECT. 4.—*Being on Licensed Premises during Closing Hours.*

Being on premises during closing hours.

380. If, during any period during which any premises are required under the provisions of the Licensing (Consolidation) Act, 1910 (*a*), to be closed, any person is found on such premises, he

(*m*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 80 (2).

(*n*) *Ibid.*, s. 80 (3).

(*o*) *Dallimore* v. *Tutton* (1898), 78 L. T. 469.

(*p*) *Pidgeon* v. *Legge* (1857), 21 J. P. 743 (a chimney sweep in his working clothes); and see title INNS AND INNKEEPERS, Vol. XVII., pp. 310, 311.

(*q*) *Sealey* v. *Tandy*, [1902] 1 K. B. 296; and see title INNS AND INNKEEPERS, Vol. XVII., pp. 308, 309.

(*r*) Under the provisions of the Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27).

(*s*) *Ibid.*, s. 41 (repealed, so far as it relates to the sale of intoxicating liquors or any offences connected therewith, by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, Sched. II.; see p. 133, *ante*, and note (*s*), p. 137, *ante*).

(*t*) *Wells* v. *Cheyney* (1871), 36 J. P. 198.

(*a*) 10 Edw. 7 & 1 Geo. 5, c. 24. As to closing hours, see pp. 88 *et seq.*, *ante*.

is, unless he satisnes the court that he was an inmate, servant, or lodger on such premises, or a *bonâ fide* traveller, or that otherwise his presence on such premises was not in contravention of such provisions, liable to a penalty not exceeding 40*s.* (*b*).

Penalty.

Any constable may demand the name and address of any person found on any premises during such period, and, if he has reasonable ground to suppose that the name or address given is false, may require evidence of the correctness of the name and address, and may, if the person fail upon his demand to give his name or address, or the required evidence, apprehend him without warrant, and take him, as soon as practicable, before a justice of the peace. Any such person failing to give his name and address, or giving a false name or address, or giving false evidence with respect to them, is liable to a fine not exceeding £5 for each offence (*c*).

Powers of constable.

Any person who, by falsely representing himself to be a traveller, or a lodger, buys or obtains, or attempts to buy or obtain, at any premises, any intoxicating liquor, during closing hours, is liable to a fine not exceeding £5 for each offence (*d*).

False representation.

381. A private friend of a licensed person, *bonâ fide* entertained by the licensed person during closing hours at his own expense, cannot be convicted under the provisions referred to in the preceding paragraph, even though he play cards for money during that time (*e*).

But where a person entertains some friends to dinner on licensed premises until closing hour, and after that time the licensee invites that person and his guests to remain and have some intoxicating liquor at the licensee's expense, and they do so, they may be convicted, as they are not really the private friends of the licensee, although he pays for the liquor consumed after the closing hour (*f*).

If a person goes into licensed premises during closing hours and comes out again with intoxicating liquor, there is evidence on which to convict him of being found on licensed premises (*g*).

If certain persons hire a room in licensed premises to transact business, and some time after the hour of closing they are sitting in the room with glasses before them, some of which contain intoxicating liquor, even though they are transacting their business, they can be convicted of being found on licensed premises during closing hours (*h*).

A person, who goes on to licensed premises during closing hours in order to obtain, as guest of a *bonâ fide* traveller, intoxicating liquor to be paid for by such *bonâ fide* traveller, may be convicted of being unlawfully upon the licensed premises (*i*).

(*b*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 62 (1).
(*c*) *Ibid.*, s. 62 (2), (3).
(*d*) *Ibid.*, s. 62 (4).
(*e*) *Cooper* v. *Osborne* (1876), 35 L. T. 347; and compare p. 139, *ante*.
(*f*) *Corbet* v. *Haigh* (1879), 5 C. P. D. 50.
(*g*) *Thomas* v. *Powell* (1893), 57 J. P. 329; and compare p. 126, *ante*.
(*h*) *Harbottle* v. *Gill* (1877), 41 J. P. 742; and compare p. 126, *ante*.
(*i*) *Jones* v. *Jones*, [1910] 2 K. B. 262; and compare pp. 125, 128, *ante*.

SECT. 3. Offences by the Public.

SUB-SECT. 5.—*Sale of Pistol to Intoxicated Person.*

Sale of pistol.

382. Any person who knowingly sells a pistol to any person who is intoxicated is liable to a penalty not exceeding £25, or to be imprisoned, with or without hard labour, for a period not exceeding three months (*j*).

SECT. 4.—*Offences by Brewers for Sale.*

Keeping and entering up brewing book.

383. Every brewer for sale must keep a book, which is delivered to him by an officer (*k*), and enter in it full particulars of all brewing, with times and dates, and particulars must be sent to the proper officer (*k*) before the next brewing if so required. For contravention of these regulations a fine of £100 is imposed upon the brewer (*l*).

Marking of vessels, rooms, and position of vessels.

384. Every brewer of beer for sale must mark in manner provided all vessels used in his business and every room and place wherein any part of his business is carried on, and for contravention of these provisions he incurs a fine of £100 (*m*). An entry must be made of the vessels, marks, and rooms before beginning to brew, and signed and delivered to the proper officer (*n*).

Operations in course of brewing.

385. Provisions are made with respect to grains in a mash tun, the removal of worts in the customary order of brewing, and the conduct of the operations in brewing, and on contravention of any of these provisions the brewer incurs a fine of £50 (*o*).

Separation and mixing of brewings.

386. Every brewer of beer incurs a fine of £100 if he contravenes certain provisions as to keeping the produce of each brewing separate from the produce of any other brewing for a certain time and not mixing them except under certain specified conditions (*p*).

Concealing worts etc.

387. Any brewer for sale, who conceals any worts or beer so as to prevent any officer (*q*) from taking an account thereof, or mixes any sugar with any worts or beer so as to increase the quantity or gravity thereof after an account of such worts or beer has been taken by an officer (*q*) and the duty has been charged thereon, for every such offence incurs a fine of £100, and the worts or beer in respect of which the offence is committed, together with the vessels containing the same, must be forfeited (*r*).

Provision of scales, weights, and appliances.

388. Every brewer for sale must provide and maintain sufficient and just scales and weights and other necessary and reasonable appliances to enable the officers (*q*) to take account of, or check by weight, gauge, or measure, all materials and liquids used or produced in brewing (*s*).

(*j*) Pistols Act, 1903 (3 Edw. 7, c. 18), s. 5. There is a special definition of "pistol" for the purposes of this Act (see *ibid.*, ss. 2, 8). As to the sale of pistols, see title TRADE AND TRADE UNIONS.

(*k*) See note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*; and as to the definition of "proper officer," see also Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 2.

(*l*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 20; Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 6.

(*m*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 21.

(*n*) *Ibid.*, s. 22; and see note (*k*), *supra*.

(*o*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 23.

(*p*) *Ibid.* s. 25.

(*q*) See note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.

(*r*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 27.

(*s*) *Ibid.*, s. 28 (1).

Every brewer must also render all necessary assistance to the officers (*t*) in the taking of such accounts (*u*), and, if required by the officer, provide sufficient lights, ladders, and other conveniences (*w*).

For every contravention of these provisions the brewer incurs a fine of £100 (*x*).

Entry and examination by officer.

389. An officer (*a*) may at any time, either by day or night, enter any part of the entered premises of a brewer for sale to take an account of the materials used or to be used in brewing, and of the worts and beer produced (*b*).

If an officer (*a*), after having demanded admission into the entered premises of a brewer for sale, and declared his name and business at any entrance or window thereof, is not immediately admitted, the officer, and any person acting in his aid, may at any time, either by day or night (but at night only in the presence of an officer of the peace), break open any door or window of the premises or break through any wall thereof, for the purpose of obtaining admission, and the brewer incurs a fine of £100 (*c*).

Search for concealed pipes etc.

390. If any officer (*a*) has reason to suspect that any private or concealed pipe, or conveyance, or vessel is kept or made use of by a brewer for sale, he may, either by day or night (but at night only in the presence of an officer of the peace) break open any part of the premises of such brewer or forcibly enter therein, and may break up the ground in or adjoining such premises, or any wall thereof, to search for such private or concealed pipe, or conveyance, or vessel (*d*).

If such officer (*a*) finds any such pipe or conveyance, he may enter any house in the possession of any other person into which such pipe or conveyance may lead, and may break up any part of such house or premises to search for the vessel communicating with such pipe (*e*). Every such pipe, conveyance, or vessel, and all beer, worts, or materials for brewing found therein must be absolutely forfeited, and the brewer incurs a fine of £100 (*f*).

Any damage done in the search, if unsuccessful, must be made good (*g*).

Use of sugar.

391. Detailed regulations exist as to the use of sugar of any description, whether cane sugar, saccharine, glucose, or other saccharine substance, or extract or syrup, by a brewer of beer for sale, and a penalty of £50 is imposed for breach thereof (*h*).

(*t*) See note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*u*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 28 (2).
(*w*) *Ibid.*, s. 28 (3).
(*x*) *Ibid.*, s, 28 (4).
(*a*) See note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*b*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 29 (1).
(*c*) *Ibid.*, s. 29 (2).
(*d*) *Ibid.*, s. 30 (1).
(*e*) *Ibid.*, s. 30 (2),
(*f*) *Ibid.*, s. 30 (3).
(*g*) *Ibid.*, s. 30 (4).
(*h*) As to adding sugar to beer and adulteration of beer generally, see title FOOD AND DRUGS, Vol. XV., p. 45 ; Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), ss. 7, 8.

SECT. 5.

Offences by Brewers other than Brewers for Sale.

SECT. 5.—*Offences by Brewers other than Brewers for Sale.*

Brewing paper.

392. A paper in the prescribed form must be delivered by an officer (*i*) to every brewer, other than a brewer for sale, if chargeable to the duty on beer, and the brewer must, before commencing to brew, enter in the paper the quantity of malt, corn, and sugar which he intends to use in the brewing (*j*).

The brewer must, on demand (*i*) by an officer, produce the paper for his inspection, and must not cancel, obliterate, or alter any entry in the paper, or make any entry which is untrue in any particular (*j*).

For any contravention of these provisions the brewer incurs a fine of £10 (*j*).

Domestic brewing and use.

393. A brewer, other than a brewer for sale, must only brew beer for his own domestic use, or for consumption by farm labourers employed by him in the actual course of their labour or employment (*k*).

He may only brew on premises occupied by him, or, in case he occupies a house of an annual value not exceeding £10, on premises gratuitously lent to him by a brewer other than a brewer for sale (*l*).

Any brewer who contravenes either of the foregoing provisions or sells, or offers for sale, any beer brewed by him, incurs a penalty of £10 (*m*).

SECT. 6.—*Offences against Excise Regulations as to Spirits.*

Using still without licence.

394. No person may, without being licensed to do so, or on any premises to which his licence does not extend, have or use a still for distilling, rectifying, or compounding spirits, or brew or make wort or wash, or distil low wines, feints, or spirits, or rectify or compound spirits (*n*).

Any person who contravenes these provisions incurs for each offence a fine of £500, and all spirits and vessels, utensils, and materials for distilling or preparing spirits in his possession must be forfeited (*o*).

Capacity of still.

395. A distiller who keeps or uses a still of which the body without the head is of less capacity than 3,000 gallons must not keep or use in his distillery at the same time more than two wash stills and two low wine stills (*p*).

For every still kept or used in contravention of this provision the distiller incurs a fine of £100, and a further fine of £100 for

(*i*) See note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*j*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 32. "Prescribed" and "approved" mean respectively prescribed or approved by the Commissioners (*ibid.*, s. 2); see also note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*k*) Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 34 (1).
(*l*) *Ibid.* s. 34 (2).
(*m*) *Ibid.*, s. 34 (3).
(*n*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 5 (1).
(*o*) *Ibid.*, s. 5 (2); and see p. 158, *post*.
(*p*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 7 (1).

every time that any such still is used; and every still kept or used in contravention of this provision must be forfeited (*q*).

396. There are general provisions, subject to certain exceptions, prohibiting proximity within a quarter of a mile between any premises used for distilling and a rectifier's premises (*r*).

Position of premises.

397. No distiller (*s*) or rectifier keeping a still (*t*) may carry on upon his premises the business of a brewer of beer, or of a maker of sweets, vinegar, cider, or perry, or of a refiner of sugar, or of a dealer or retailer of wine (*s*).

Connection between distillery and premises of brewer.

No person may carry on the business of a distiller (*u*), or rectifier keeping a still (*x*) upon premises communicating otherwise than by an open public street or carriage road with any premises used by a brewer of beer, or a maker of sweets, vinegar, cider, or perry, or a refiner of sugar, or a dealer in or retailer of spirits (*y*), or a dealer in or retailer of wine.

Any person who contravenes any of these provisions incurs a fine of £200 (*a*).

Contravention of statutory rules.

398. A large number of detailed technical rules exist, for breaches of which distillers, rectifiers, and dealers and retailers are subject to specified penalties (*b*).

Alteration of vessels etc.

399. A distiller (*c*) or rectifier (*d*) may, on giving to the proper officer (*e*) two days' previous notice in writing of his intention, specifying the vessel, utensil or pipe intended to be altered, moved or added, alter or move any entered vessel, utensil or pipe, or add a new vessel, utensil or pipe (*c*).

Every such new vessel, utensil or pipe must be duly entered (*f*).

A distiller who, without giving such notice, alters, moves or adds to the vessels, utensils or pipes on his premises after entry has been made thereof, or the capacity thereof has been ascertained by the proper officer, for each offence incurs a fine of £200 (*g*).

The Commissioners (*h*) may permit any distiller (*i*) or rectifier (*j*) to fix and use, subject to such regulations as they prescribe, any

(*q*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 7 (2).
(*r*) *Ibid.*, ss. 10, 87, 162.
(*s*) *Ibid.*, s. 11 (1).
(*t*) *Ibid.*, s. 88 (1).
(*u*) *Ibid.*, s. 11 (2).
(*x*) *Ibid.*, s. 88 (2).
(*y*) A similar less extensive provision applies to dealers and retailers of spirits (*ibid.*, s. 101 (1)).
(*a*) *Ibid.*, ss. 11 (3), 88 (3).
(*b*) See *ibid.*, ss. 14, 86, 96, and Sched. I.
(*c*) *Ibid.*, s. 15 (1).
(*d*) *Ibid.*, s. 86 (a).
(*e*) "Proper officer" means the officer of the division or ride in which the business of an excise trader is carried on, or in which anything is by the Spirits Act, 1880 (43 & 44 Vict. c. 24), required to be done by, or any notice to be given to, such officer, and includes a person acting as such officer, and also any officer superior in matters of excise to such officer (*ibid.*, s. 3; and see note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*).
(*f*) *Ibid.*, s. 15 (2).
(*g*) *Ibid.*, s. 15 (3).
(*h*) See *ibid.*, s. 3, and note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*i*) Spirits Acts, 1880 (43 & 44 Vict. c. 24), s. 16.
(*j*) *Ibid.*, s. 86 (b).

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vessel, utensil or fitting, in addition to or instead of any of those required by statute, and may from time to time withdraw any such permission. The statutory provisions apply to any such additional or substituted vessel, utensil or fitting as if its use were permitted or required (*k*).

Penalty for attempt to defeat gauging.

400. A fine of £200 is provided in wide terms for any attempt on the premises of a distiller, rectifier or dealer and retailer to defeat gauging (*l*).

Offences relating to fittings.

401. A distiller (*m*), rectifier (*n*), or dealer and retailer (*o*), who places, affixes or makes any cock, plug, pipe or opening in, on, to, into or from any vessel or utensil in contravention of the Spirits Acts, 1880 (*p*); or causes or procures any cover, fastening, cock, plug, pump or pipe to be so made or used that any vessel or utensil may be employed, opened, removed, filled or emptied in the absence of an officer, or as in any manner to avoid or defeat the security intended to be provided by that Act (*p*), for each offence incurs a fine of £500 (*m*).

Making entry of rooms, utensils etc.

402. There are provisions for entry, with full specified details of houses, rooms, utensils, and vessels, both by a distiller and by a rectifier, and penalties are imposed for breaches of these provisions (*q*).

Distiller to use his own wort.

403. A distiller must not distil spirits except from wort or wash brewed or made in his distillery (*r*).

If a distiller has in his possession any wort, wash, low wines, feints or fermented liquor not brewed, made or distilled in his distillery he forfeits them, and also incurs a fine of £200 (*s*).

Use of sugar.

404. A distiller must not, without the consent of the Commissioners (*t*), remove any sugar from the place entered as a sugar store, except for use in the manufacture of spirits (*u*).

Not less than four hours before removing any sugar for this purpose he must give the officer in charge of the distillery written notice, specifying the time of the intended removal and the quantity to be removed (*v*). At the time so specified the distiller must convey the specified sugar immediately from the sugar store to the mash tun or other entered vessel, to be there immediately used in the manufacture of spirits (*w*). He must forthwith deposit again in the sugar store all sugar so removed and not so used (*x*). A distiller

(*k*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 16.
(*l*) *Ibid.*, ss. 17, 86 (c), 96 (a).
(*m*) *Ibid.*, s. 18.
(*n*) *Ibid.*, s. 86 (d).
(*o*) *Ibid.*, s. 96 (b).
(*p*) 43 & 44 Vict. c. 24.
(*q*) *Ibid.*, ss. 19, 86 (e); as to the application of these provisions to a dealer and retailer, see *ibid.*, s. 96 (a).
(*r*) *Ibid.*, s. 22 (1).
(*s*) *Ibid.*, s. 22 (2); and see p. 158, *post*.
(*t*) See Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3, and note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*u*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 23 (1).
(*v*) *Ibid.*, s. 23 (2).
(*w*) *Ibid.*, s. 23 (3).
(*x*) *Ibid.*, s. 23 (4).

who contravenes these provisions for each offence incurs a fine of £50 (*y*).

Unlawful hours.

405. A distiller (*a*) or rectifier (*b*) must not mash any materials, or brew, or make wort or wash, or use a still, between 11 p.m. on Saturday and 1 a.m. on Monday. A distiller who contravenes this provision incurs a fine of £50 (*a*).

Regulation of brewing and distilling.

406. The periods of brewing and distilling (*c*), and mode of distilling (*d*), are provided for in detail, and contravention of the statutory provisions relating thereto entails a fine of £500 (*c*), or £200 (*d*) respectively.

Notice of commencing or recommencing business.

407. Every distiller must, at least six days before beginning to brew wort, or, if he has discontinued brewing wort for more than one month, before recommencing to brew wort, give the proper officer (*e*) a written notice specifying the day on which he intends so to brew or recommence brewing (*f*).

If a distiller contravenes this provision, or if any wort or wash is found in the distillery or possession of a distiller before the required notice, or before the day specified in the notice given by him, or if there is found in his possession any wort or wash which he may not lawfully have in his possession, he for each offence incurs a fine of £200, and forfeits all wort or wash so found (*g*).

Notice of brewing.

408. A distiller must at least four hours before he mashes any materials or brews for making wort give the officer in charge of the distillery written notice specifying the day and hour when the mashing or brewing is to be commenced. If a distiller mashes or brews without giving such notice he incurs a fine of £50 (*h*).

Declaration as to wort.

409. All wort must be collected into the fermenting back within eight hours after it has begun to run into the back (*i*). Immediately after the wort is so collected the distiller must deliver to the officer in charge of the distillery a written declaration specifying the number of the back in which the wort is contained, the gravity or (if yeast has been added) the original gravity of the wort, and the quantity thereof as measured by the number of dry inches, that is to say, by the number of inches between the dipping place of the back and the surface of the wort contained therein (*j*).

If a distiller makes default in complying with these provisions, or if

(*y*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 23 (5).
(*a*) *Ibid.*, s. 24.
(*b*) *Ibid.*, s. 86 (f).
(*c*) *Ibid.*, s. 25.
(*d*) *Ibid.*, s. 38.
(*e*) See note (*a*), p. 17, *ante*, note (*r*), p. 133, *ante*, and note (*e*), p. 147, *ante*.
(*f*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 26 (1).
(*g*) *Ibid.*, s. 26 (2); and see p. 158, *post*.
(*h*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 27.
(*i*) *Ibid.*, s. 28 (1).
(*j*) *Ibid.*, s. 28 (2).

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the declaration delivered by him contains any untrue statement, he for each offence incurs a fine of £200 (*k*).

If after the declaration has been delivered, or after an officer has taken account of the gravity or quantity of the wort or wash in a fermenting back, the gravity of the wort be found to exceed the gravity therein specified, or the quantity of the wort or wash be found to exceed by 5 per cent. the quantity of wort therein specified, the distiller incurs a fine of £200, and, if an account has been taken, there are special provisions as to charging duty (*l*).

Excess of wort or gravity of wort.

Original gravity exceeding declared gravity.

If the original gravity of any wort or wash exceeds by more than two degrees the declared gravity thereof, the distiller incurs a fine of £200, and a further fine of 6*d.* for every gallon of wash contained in the vessel from which the sample was taken (*m*).

Yeast in backs only.

410. A distiller must not add yeast or other matter capable of causing fermentation to wort or wash in any vessel except a fermenting back. A distiller who contravenes this provision incurs a fine of £200 (*n*).

Use of yeast, making bub etc.

411. It is an offence to deal with the yeast except in specified ways (*o*), or to make or use bub or any other composition for promoting the fermentation of wort or wash except in stated ways and after giving a specified notice (*p*), and provision is made as to refilling backs during the brewing period (*q*).

Declaration at end of brewing period.

412. When the whole of the wort or wash made in a distillery during one brewing period is collected into the fermenting backs or into the fermenting backs and wash charger, the distiller must give the officer in charge of the distillery a written declaration to that effect (*r*).

If the declaration is untrue in any particular, or any still in the distillery is used before the expiration of two hours after the delivery thereof, the distiller incurs a fine of £200 (*s*).

Return at end of distilling period.

413. At the end of every distilling period the distiller, or the principal manager of the distillery, must sign and deliver to the proper officer (*a*) a return in the prescribed form, specifying the quantity of each description of material used in making wort or wash during the brewing and distilling period, the quantity of wort or wash decreased or distilled during the period, the quantity of spirits computed at proof produced during the period, and the quantity of feints remaining at the end of the period.

If the distiller fails to make the return, or if the return is untrue in any particular, he incurs a fine of £200 (*b*).

(*k*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 28 (3).
(*l*) *Ibid*, ss. 29, 30.
(*m*) *Ibid.*, s. 36.
(*n*) *Ibid.*, s. 31.
(*o*) *Ibid.*, s. 32; Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 14 (5).
(*p*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 33.
(*q*) *Ibid.*, s. 34.
(*r*) *Ibid.*, s. 35 (1).
(*s*) *Ibid.*, s. 35 (2).
(*a*) See note (*a*), p. 17, *ante*, note (*r*), p. 133, *ante*, and note (*e*), p. 147, *ante*.
(*b*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 39.

Power to test by distillation.

414. For the purpose of testing the quantity of spirits at proof in any wash by distillation, the proper officer may require any charger or receiver in a distillery to be emptied and cleaned, and any quantity of the wash to be distilled, and the produce to be conveyed into the charger or receiver. For this purpose all persons in the employ of the distiller must, on request and on reasonable notice, provide the officer with assistance and fuel (*c*). All low wines, feints, and spirits so distilled and conveyed into a charger or receiver must be kept therein unmixed with any other thing until the officer has taken an account of the quantity and strength thereof (*d*).

If a distiller contravenes any of these provisions he incurs a fine of £200 (*e*).

If the quantity of proof spirits produced from the wash exceeds a certain standard the distiller incurs a fine of £200, and, in addition, of 6*d*. for every gallon of wash from which the wash so distilled was taken (*f*).

Low wines or spirits mixed to increase gravity.

415. There must not be mixed with or added to any low wines, feints, or spirits in a distillery any substance which either increases the gravity thereof, or prevents the true strength thereof from being ascertained by Sykes's hydrometer (*g*).

If this provision is contravened, the distiller for each offence incurs a fine of £200, and all low wines, feints, spirits and mixtures with respect to which the offence is committed are forfeited (*h*).

Spirits in store.

416. Detailed regulations are made in respect of bringing spirits into a distiller's store, the attendance of the officer in charge of the store, filling spirits in the store into casks, removing spirits from the store at particular strengths, and in particular quantities, casks being full or on ullage, the time for removal of spirits from the store, and the striking of a balance of account by the proper officer (*i*); and penalties are provided for the contravention of these regulations (*i*).

Account.

417. An account of the quantity of spirits in the store must be taken from time to time, and penalties are imposed in case of excess or deficiency (*j*).

Accommodation for officer.

418. In the case of a distiller's warehouse or of an excise warehouse, the distiller or the proprietor or occupier must, to the satisfaction of the Commissioners (*k*), provide accommodation at the warehouse for the officer in charge thereof, subject on default to a fine of £50 (*l*).

(*c*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 40 (1).
(*d*) *Ibid.*, s. 40 (2).
(*e*) *Ibid.*, s. 40 (3).
(*f*) *Ibid.*, s. 40 (4).
(*g*) *Ibid.*, s. 41 (1).
(*h*) *Ibid.*, s. 41 (2); and see p. 158, *post.*
(*i*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 43. As to the definition of "proper officer," see note (*e*), p. 147, *ante;* see also note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante.*
(*j*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 44.
(*k*) As to the Commissioners, see note (*a*), p. 17, *ante.*
(*l*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 51. "Warehouse" means any warehouse approved or provided for the deposit of spirits. "Distiller's ware-

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Customs warehouse receipt.

419. A receipt in a prescribed form must be given by the authorised officer of customs for spirit warehoused in a customs warehouse, and for the deduction, from the quantity of spirits for which the distiller is chargeable with duty, of the quantity of spirits warehoused. If a distiller or any other person produces a receipt purporting to express that spirits have been warehoused in a customs warehouse, which receipt is untrue in any particular, he incurs a fine of £200 (*m*).

Stowage of casks in warehouse.

420. All casks warehoused must be arranged and stowed in such manner that access can be easily had to each cask. If a distiller or the proprietor or occupier of a warehouse fails to comply with this provision he incurs a fine of £5 (*n*).

Vatting, blending, racking, and marking casks.

421. The proprietor of spirits warehoused in a distiller's or excise warehouse may, in accordance with the prescribed regulations, vat, blend, or rack them in the warehouse, either on payment of duty or otherwise. Every cask containing racked or blended spirits must be marked and kept marked in the prescribed manner by the proprietor, subject on default to a fine of £50 (*o*).

Racking duty-paid spirits.

422. Special provisions are made as to racking spirits on which duty has been paid, and a penalty is imposed upon any excess (*p*).

Restrictions on business of rectifier.

423. A rectifier keeping a still must not have in his possession any wort, wash, fermented liquor, or materials capable of being distilled into low wines or spirits (*q*).

No rectifier whatever may distil or extract low wines or spirits from any material except spirits, or have in his possession any spirits for which he has not received and delivered to the proper officer (*a*) a permit or certificate, or have in his possession any foreign spirits, except for the purpose of being rectified or compounded by him as spirits of wine or as British compounds (*q*).

If a rectifier contravenes these provisions he for each offence, in addition to any other penalty, incurs a fine of £500, or, at the election of the Commissioners (*r*), of 20*s*. for every gallon of wort, wash, fermented liquor, or other materials or of the low wines or spirits in respect of which the offence is committed (*q*).

If a rectifier is convicted more than once of any such offence his licence becomes void, and he is, during three years from the date of the conviction, incapable of holding a licence as a rectifier (*q*).

Receipt of spirits by rectifier.

424. Strict regulations are made as to what a rectifier is to do on receipt of any spirits, and penalties are imposed on their contravention (*b*).

house" means an approved warehouse on the premises of a distiller. "Excise warehouse" means a warehouse approved or provided by the Commissioners (see note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*) as a general warehouse for the deposit of spirits (Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 3).

(*m*) *Ibid.*, s. 58 (7), (8), (9).

(*n*) *Ibid.*, s. 60.

(*o*) *Ibid.*, s. 64.

(*p*) *Ibid.*, s. 65.

(*q*) *Ibid.*, s. 89.

(*r*) As to the Commissioners, see note (*a*), p. 17, *ante*.

(*a*) For the definition of "proper officer," see note (*e*), p. 147, *ante*; see also note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.

(*b*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 90.

Rules as to rectifiers. Mixing wine.

425. There are detailed rules as to pipes, cocks, charging the still, and many other similar matters, and penalties are provided for contravention thereof (*c*).

426. An officer may take a sample of the contents of a still of a rectifier at any time before it has begun to work, or after it has ceased working, and if there is found in the still any wine or wash put into or mixed with low wines, feints, or spirits, the rectifier, in addition to any other penalty, incurs a fine of £500 (*d*).

Quantity of spirits sent out by rectifier.

427. A rectifier must not send out any spirits except British compounds or spirits of wine, and must not send out any British compounds or spirits of wine in less quantity than two gallons, under a penalty of £50; and all spirits sent out in contravention of this provision, together with all horses, cattle, carriages, and boats made use of in conveying the same, must be forfeited (*e*).

Excess or deficiency of stock.

428. Provision is made for taking from time to time an account of the spirits in the stock of a rectifier, dealer or retainer, and penalties are imposed for any excess or deficiency discovered (*f*).

Marking casks.

429. There must be legibly cut, branded, or painted with oil colour on some conspicuous part of every fixed cask or other vessel used by a dealer or retailer for holding spirits in stock, and on the outside of both the ends of every movable cask used by him for keeping or delivering spirits, the number of gallons which the cask or vessel is capable of containing (*g*).

Every cask or vessel which does not bear the capacity thereof so cut, branded, or painted must be forfeited with the contents, and the dealer or retailer incurs a fine of £50 (*h*).

Marking strength of contents.

430. Where the strength of any spirits forming part of the stock of a dealer or retailer cannot be ascertained by Sykes's hydrometer, the dealer or retailer must, on being so required by an officer (*i*), cause the quantity and strength of the spirits to be legibly marked and kept marked on the outside of the cask or vessel containing them (*j*).

Every cask or vessel not complying with this provision or found to be untruly marked, must be forfeited with the contents, and the dealer or retailer for each offence incurs a fine of £50 (*j*).

But a cask or vessel is not deemed to be untruly marked if the strength denoted by the mark corresponds with that expressed in the permit or certificate with which the spirits were received into stock, and no alteration has since been made in the spirits (*j*).

Distiller holding dealer's licence.

431. A distiller must not be licensed to carry on the business of a dealer upon any premises within two miles from his distillery unless those premises are first approved by the Commissioners (*k*).

(*c*) Spirits Acts, 1880 (43 & 44 Vict. c. 24), s. 91, and Sched. III.
(*d*) *Ibid.*, s. 92.
(*e*) *Ibid.*, s. 93; and see p. 158, *post*.
(*f*) Spirits Act, 1880 (43 & 44 Vict. c. 24), ss. 94, 103 (2). As to distillers, see pp. 146 *et seq.*, *ante*.
(*g*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 98 (1).
(*h*) *Ibid.*, s. 98 (2).
(*i*) See note (*r*), p. 133, *ante*.
(*j*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 99.
(*k*) *Ibid.*, s. 100. For the definition of "Commissioners," see *ibid.*, s. 3; see also note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.

SECT. 6. Offences against Excise Regulations as to Spirits.

If a distiller carries on the business of a dealer on any approved premises within two miles from his distillery, no spirits must be removed from such premises unless accompanied by a permit, and if any spirits are removed without a permit he incurs the same fine and forfeiture as if the removal had been from his spirit store (*l*).

Communication with distiller's premises.

432. A retailer must not be concerned or interested in the business of a distiller, or of a rectifier keeping a still, carried on upon any premises within two miles from the premises on which he is licensed to carry on the business of a retailer (*m*).

If a dealer or retailer contravenes this provision, he, for each offence, incurs a fine of £200 (*n*).

Restriction on sale by retailer.

433. A retailer must not, unless he is also licensed as a dealer, sell, send out, or deliver spirits to a rectifier, dealer or retailer, or buy or receive spirits from another retailer, not being also licensed as a dealer (*o*).

A dealer or retailer must not receive, send out, or have in his possession any British spirits (*p*) of any strength exceeding that at which a distiller may send out spirits of the like denomination (*q*).

If a dealer or retailer contravenes these provisions he, for each offence, incurs a fine of £50, and in case of the spirits being of unlawful strength they must be forfeited (*r*).

Removing spirits without a permit.

434. No spirits may be sent out or delivered from the stock of a dealer unless accompanied by a certificate, except spirits not exceeding in quantity one gallon at a time sold by him under an additional licence or a licence to retail to a person not being a dealer or retailer (*s*). No spirits exceeding in quantity one gallon of the same denomination at a time for the same person may be sent out or delivered from the stock of a retailer unless accompanied by a certificate (*a*). Except as thus provided, no spirits exceeding the quantity of one gallon of the same denomination at a time for the same person may be sent out, delivered, or removed from any one place to any other place unless accompanied by a permit (*b*).

All spirits found to have been sent out, delivered, or removed, or in the course of being sent out, delivered, or removed, in contravention of these provisions, together with all horses, cattle, carriages, and boats made use of in conveying the same must be forfeited, and every person in whose possession the same are found incurs a fine of £100, or at the election of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise a fine equal to treble the value of the spirits (*c*).

(*l*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 100.
(*m*) *Ibid.*, s. 101 (2).
(*n*) *Ibid.*, s. 101 (3).
(*o*) *Ibid.*, s. 102 (2).
(*p*) That is, spirits liable to a duty of excise (*ibid.*, s. 3).
(*q*) *Ibid.*, s. 102 (3).
(*r*) *Ibid.*, s. 102 (4).
(*s*) *Ibid.*, s. 105 (5).
(*a*) *Ibid.*, s. 105 (6).
(*b*) *Ibid.*, s. 105 (7). As to obtaining a permit, and the form of it, see *ibid.*, s. 106
(*c*) *Ibid.*, s. 105 (8); and see note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.

The onus of proving that spirits correspond to the description in a permit or certificate is cast upon the claimant of the spirits, and has to be discharged by expert evidence in a particular way (*d*).

435. Failure to obtain a permit or to comply with the conditions laid down, or its improper use, renders the offender liable to a fine of £500 in addition to any other penalty or forfeiture (*e*).

Penalty for removing spirits without a permit.

If a beerhouse-keeper, having been asked by a third person to get him two gallons of rum from an hotel-keeper, receives the rum from the hotel-keeper without a certificate and sends it on to the third person without a permit, he is guilty of removing spirits without a permit (*f*).

If any distiller, rectifier, dealer, or retailer is convicted of an offence against these provisions he forfeits his licence, and no new licence must be granted to him for the remainder of the year for which such forfeited licence would have been in force (*g*).

436. There are detailed provisions as to keeping and using a certificate book (*h*), removing spirits without a certificate (*i*), fraudulent use of certificate (*k*), cancellation and delivery up of certificates and permits (*l*), keeping and using a stock book (*m*), and offences relating to certificate books and stock books (*n*), and many other cognate matters (*o*).

Certificate book, stock book etc.

437. If any person knowingly buys or receives, or has in his possession, any spirits after they have been removed from the place where they ought to have been charged with duty, and before the duty payable thereon has been charged and paid or secured to be paid, or the spirits have been condemned as forfeited, he forfeits the spirits and incurs a fine equal to treble the value of the spirits (*p*).

Possession of spirits on which no duty has been paid.

438. A person incurs a fine of £500 if he assaults an officer acting under the Spirits Act, 1880 (*q*), or any person acting in his aid, or any person who has discovered or given, or is about to discover or give, information or evidence against, or has seized, or is bringing to justice, any offender against that Act, or any person who has seized or is about to seize or examine any goods as forfeited under that Act, or forcibly opposes the execution of any of the powers given, or being armed with an offensive weapon, or in a violent manner, rescues an offender arrested or goods seized under that Act, or prevents the arrest of any such offender or

Forcibly opposing execution of Spirits Act, 1880.

(*d*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 105 (9).
(*e*) *Ibid.*, s. 107 (1), (2).
(*f*) *Leese* v. *Jennings* (1898), 79 L. T. 300. The beerhouse-keeper and hotel-keeper were brothers.
(*g*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 107 (2).
(*h*) See *ibid.*, s. 108.
(*i*) See *ibid.*, s. 109.
(*k*) See *ibid.*, s. 110.
(*l*) See *ibid.*, s. 111.
(*m*) See *ibid.*, s. 112.
(*n*) See *ibid.*, s. 113.
(*o*) See *ibid.*, ss. 133—145.
(*p*) *Ibid.*, s. 149.
(*q*) 43 & 44 Vict. c. 24; see *ibid.*, s. 150.

SECT. 6. Offences against Excise Regulations as to Spirits.

seizure of any such goods, or offers or threatens to oppose the execution of any of the powers given by that Act (*r*).

Obstruction of officers.

439. If any person himself, or by any person in his employment, obstructs, hinders, or molests an officer of inland revenue or an officer of customs and excise in the execution of his duty, or any person acting in the aid of any such officer, he incurs a fine of £200, and, if the offender is a distiller, the Commissioners may, upon his conviction, suspend or revoke his licence (*s*).

Neglect of duty by officer of the peace.

440. If any officer of the peace wilfully refuses or neglects to aid in the execution of the Spirits Act, 1880 (*t*), he, on summary conviction, incurs a fine of £20.

Grogging spirit casks.

441. A person must not subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof, or have on his premises any cask which is being subjected to any such process, or any spirits intentionally (*a*) extracted from the wood of any cask (*b*).

If any person contravenes these provisions, he for each offence incurs a fine of £50 (*c*).

All spirits extracted in contravention of these provisions are deemed to be spirits unlawfully kept or deposited, and every cask which is being subjected to such process, or which, being upon premises upon which spirits so extracted are found, has been subjected to any such process, is forfeited (*d*).

SECT. 7.—*Legal Proceedings and Penalties.*

SUB-SECT. 1.—*Under Licensing (Consolidation) Act*, 1910, *and Refreshment Houses Act*, 1860.

Legal proceedings.

442. Except as otherwise expressly provided, every offence under the Licensing (Consolidation) Act, 1910 (*e*), may be prosecuted, and every fine and forfeiture may be recovered and enforced, in manner provided by the Summary Jurisdiction Acts (*f*).

Any officer appointed by the Commissioners of Customs and Excise may sue for any penalties under the Licensing (Consolidation) Act, 1910 (*e*), and when so sued for any fines which may be recovered must be applied in the manner in which excise penalties are for the time being applicable by law (*g*).

All forfeitures must be sold or otherwise disposed of in such manner as the court directs, and the proceeds of such sale or disposal (if any) must be applied in the like manner as fines, but the court may direct that such proceeds may be applied in the first

(*r*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 150.
(*s*) *Ibid.*, s. 152; and see note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*t*) 43 & 44 Vict. c. 24, s. 153. As to officers of the peace, see title POLICE. As to orders of courts of summary jurisdiction, see title MAGISTRATES.
(*a*) *Robinson Brothers* v. *Dixon*, [1903] 2 K. B. 701.
(*b*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 4 (1).
(*c*) *Ibid.*, s. 4 (2).
(*d*) *Ibid.*, s. 4 (3).
(*e*) 10 Edw. 7 & 1 Geo. 5, c. 24.
(*f*) *Ibid.*, s. 99 (1). As to the Summary Jurisdiction Acts, see note (*r*), p. 87, *ante*, and title MAGISTRATES.
(*g*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 103 (1).

instance in paying the expenses of and incidental to any search and seizure which resulted in such forfeiture (*h*).

Where fines imposed by a court of summary jurisdiction for offences under the Licensing (Consolidation) Act, 1910 (*i*), or the Licensing Acts, 1828—1906, are not carried to the pension fund of the police area in which the offence is committed (*j*), the court imposing the fine may direct any part, not exceeding a moiety, of the fine to be paid to that pension fund (*k*).

Fines and forfeitures are not, for the purpose of any Act respecting the application of such penalties, or the costs, charges, and expenses attending proceedings for recovery of such penalties or of forfeitures, deemed to be penalties under any Act relative to excise (*l*).

Appeal.

443. If any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, he may appeal therefrom to quarter sessions (*m*).

Detailed provision is made for an appeal to quarter sessions against a second or third conviction for offences under the Refreshment Houses Act, 1860 (*n*).

Jurisdiction.

444. For all the purposes of the Licensing (Consolidation) Act, 1910 (*o*), any pier, quay, jetty, mole or work extending from any place within the jurisdiction of any licensing justices or court of summary jurisdiction into or over any part of the sea, or any part of a river within the ebb and flow of the tide, is deemed to be within the jurisdiction of such justices and court (*p*).

For the purpose of jurisdiction in any proceeding under that Act, any water or river which runs between or forms the boundary of two or more licensing districts, or of the jurisdiction of two or more courts of summary jurisdiction, is deemed to be wholly within each of those licensing districts and the jurisdiction of each of those courts (*p*).

Penalty.

445. Where the holder of a justices' licence is convicted of any offence against the Licensing (Consolidation) Act, 1910 (*o*), the court may not, except in the case of a first offence, impose a penalty less than a fine of 20*s*., or in cases where any other Act makes provision for a minimum penalty, less than the minimum penalty so provided (*q*).

(*h*) Licensing (Consolidation) Act, 1910 (7 Edw. 7 & 1 Geo. 5, c. 24), s. 105.
(*i*) 10 Edw. 7 & Geo. 5, c. 24.
(*j*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 16.
(*k*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 104.
(*l*) *I bid.*, s. 103 (2).
(*m*) *Ibid.*, ss. 99 (2), 112 (2); as to the effect of this provision, see pp. 78 *et seq.*, *ante*.
(*n*) 23 & 24 Vict. c. 27, ss. 34, 35, 36, which are repealed so far as they relate to the sale of intoxicating liquors or any offences connected therewith (see p. 133, *ante*).
(*o*) 10 Edw. 7 & 1 Geo. 5, c. 24.
(*p*) *Ibid.*, s. 107 (1), (2). Nothing in these provisions limits any jurisdiction which licensing justices or a court of summary jurisdiction have by virtue of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 46, or otherwise (Licensing (Consolidation) Act, 1910 (7 Edw. 7 & 1 Geo. 5, 24), s. 107 (3)). As to courts of summary jurisdiction, see title MAGISTRATES.
(*q*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24) s. 100; and see *Osborn* v. *Wood Brothers* (1896), 76 L. T. 60.

SECT. 7. Legal Proceedings and Penalties.

The justices before whom any person is convicted of any offence against the Refreshment Houses Act, 1860 (*r*), may mitigate, if they see cause, any penalty incurred for such offence, provided that where any conviction takes place on any information exhibited under the laws of excise such penalty must not be mitigated to any sum less than one-fourth part thereof (*s*).

Effect of conviction.

446. A conviction under the Licensing (Consolidation) Act, 1910 (*t*), is not, after five years from the date of the conviction, receivable in evidence against any person for the purpose of subjecting him to an increased fine or to any forfeiture (*u*).

No conviction or order made in pursuance of that Act, originally or on appeal, relative to any offence, penalty, fine, forfeiture or summary order, can be quashed for want of form, or if made by a court of summary jurisdiction, be removed by *certiorari* or otherwise, either at the instance of the Crown or of a private party, into any superior court (*v*).

Costs may be given for or against the Crown upon an information (*w*).

SUB-SECT. 2.—*Under Sale of Beer Act*, 1795.

Sale of Beer Act, 1795.

447. If it is proved to the satisfaction of the justices before whom any person is convicted of any offence against the Sale of Beer Act, 1795 (*x*), that such person has not before been convicted of any offence against that Act, such justices may mitigate and lessen the penalty thereby imposed in case of such first offence but not otherwise, so that the penalty so mitigated and lessened shall not be less than £10 (*y*).

All penalties within the Sale of Beer Act, 1795 (*x*), must be sued for and determined within six months after the offences are committed (*z*).

SUB-SECT. 3.—*Under Spirits Act*, 1880.

Spirits Act, 1880.

448. Where any spirits or goods are forfeited under the Spirits Act, 1880 (*a*), they may be seized by an officer of inland revenue or an officer of customs and excise (*b*).

Where any spirits or materials for making spirits are forfeited under that Act (*a*), all casks or other utensils containing the same are also forfeited.

Where any spirits are forfeited by an excise trader, the Commissioners may take from his stock, instead of the spirits forfeited, the same quantity of any other spirits (*c*).

(*r*) 23 & 24 Vict. c. 27.
(*s*) *Ibid.*, s. 33, which is repealed so far as it relates to the sale of intoxicating liquors or any offences connected therewith.
(*t*) 10 Edw. 7 & 1 Geo. 5, c. 24.
(*u*) *Ibid.*, s. 101.
(*v*) *Ibid.*, s. 102.
(*w*) *Thomas* v. *Pritchard*, [1903] 1 K. B. 209.
(*x*) 35 Geo. 3, c. 113.
(*y*) *Ibid.*, s. 14; compare Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.
(*z*) Sale of Beer Act, 1795 (35 Geo. 3, c. 113), s. 16.
(*a*) 43 & 44 Vict. c. 24.
(*b*) *Ibid.*, ss. 3, 154; and see note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.
(*c*) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 154. "Excise trader" means any person carrying on a business subject to any of the regulations of the Spirits

SECT. 7. Legal Proceedings and Penalties.

Informers.

449. On the commission of any offence against the Spirits Act, 1880 (*d*), the offender who, before any information is lodged against him in respect of the offence, first discovers and informs against any other offender, must, on the conviction of the person against whom the information is given, be discharged and acquitted from all penalties or disqualification to which at the time of giving the information he may be liable by reason of the offence committed by him (*e*).

Recovery of penalties.

450. Any fine for any offence against the Spirits Act, 1880 (*d*), may be sued for and recovered, and any goods, chattels, or commodities forfeited under that Act may be returned for condemnation and condemned in the manner provided by law for the recovery of fines and penalties and the condemnation of goods forfeited under any Act or Acts for the time being in force relating to the revenue of excise or customs (*f*).

Forms of notices etc.

451. The several entries, notices, declarations, books, accounts, and returns under the Spirits Act, 1880 (*d*), must be in the prescribed form. But in any proceeding against an excise trader for an offence against that Act any notice given or declaration made by him or on his behalf is valid as against him, notwithstanding any imperfection or defect in the form thereof, or in the giving, making, or service thereof (*g*).

Where any enactment or document refers to any Act or enactment repealed by the Spirits Act, 1880 (*d*), it is to be construed as referring to that Act, or to the corresponding enactment of that Act (*h*).

Part XVII.—Habitual Drunkards and Inebriate Homes.

SECT. 1.—*Retreats.*

SUB-SECT. 1.—*The Retreat.*

Licence for retreat.

452. The local authority may, subject to any conditions which it deems fit, grant to any applicant, or to two or more persons jointly, a licence for any period not exceeding two years (*i*) to keep a retreat; and may, from time to time, revoke or renew such licence. The application and licence must be in the prescribed

Act, 1880 (43 & 44 Vict. c. 24), and includes a maltster who makes malt duty free for distillation and any proprietor or occupier of an excise warehouse (*ibid.*, s. 3). As to the Commissioners, see note (*a*), p. 17, *ante*, and note (*r*), p. 133, *ante*.

(*d*) 43 & 44 Vict. c. 24.
(*e*) *Ibid.*, s. 155 (1).
(*f*) *Ibid.*, s. 156.
(*g*) *Ibid.*, s. 157.
(*h*) *Ibid.*, s. 161.
(*i*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 15. As to the local authority, see note (*k*), p. 160, *post*. No licence may be given to any person who is licensed to keep a house for the reception of lunatics (Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 7). As to lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND.

SECT. 1. Retreats.

form (*j*) or to the like effect. One at least of the licensees must reside in the retreat and be responsible for its management. A

Medical man.

duly qualified medical man must be employed as medical attendant of such retreat, provided that when the name of the licensee is on the medical register he may himself act as such medical attendant (*k*).

Deputy.

Subject to the approval of the local authority granting the licence a licensee may from time to time appoint a deputy to act for him during his temporary absence, and such deputy during the absence of the licensee has and exercises all powers, and is subject to all the duties, disabilities, prohibitions, and penalties imposed upon the licensee (*l*). But the deputy may not act for the licensee for more than six weeks in any one year (*m*).

Death of licensee.

Transfer of licence.

453. If the licensee of any retreat becomes incapable from sickness or otherwise of keeping such retreat, or dies, or becomes bankrupt, or has his affairs liquidated by arrangement, or becomes mentally incapable or otherwise disabled, the local authority, by writing under hand, indorsed on the licence, may, if it thinks fit, transfer the licence to another person (*n*).

Retreat becoming unfit for habitation.

454. If any retreat becomes unfit for the habitation of the persons detained therein, or otherwise unsuitable for its purpose, the local authority or the inspector of retreats (*o*) must, by order signed by the clerk of the local authority or by the inspector as the case may be, order their discharge from such retreat on a day to be mentioned in the order (*p*).

The licensee must in such case, with all practicable speed, send by post a copy of such order to the person by whom the last payment for each person so to be removed from the retreat was made, or one at least of the persons who signed the statutory declaration that the applicant for admission to the retreat was an habitual drunkard (*p*).

(*j*) Forms prescribed by Secretary of State under Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 20 (2), in substitution for Forms Nos. 1 and 2 in the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), Sched. II. For forms of application, licence, renewal and revocation, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 511 *et seq.*

(*k*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 6. The "local authority" and the clerk of the local authority are, in a borough, the borough council and the town clerk, and elsewhere, the county council and the clerk of the county council respectively, and a county council may delegate any of its powers as such local authority to a committee (Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 13). A "retreat" means a house licensed by the licensing authority named in the Habitual Drunkards Act, 1879, for the reception, control, care, and curative treatment of habitual drunkards (Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 3).

(*l*) Under the provisions of the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).

(*m*) Inebriates Act, 1888 (51 & 52 Vict. c. 19), s. 3.

(*n*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 8.

(*o*) Appointed under s. 13 (*ibid.*).

(*p*) *Ibid.*, s. 9. The declaration is made under *ibid.*, s. 10. For the definition of, and as to the offence of being, an habitual drunkard, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417. For form of agreement to pay for admission to retreat, see Encyclopædia of Forms and Precedents, Vol. VI., p. 527.

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455. Any habitual drunkard desirous of being admitted into a retreat may apply in writing in the prescribed form to the licensee (*q*), stating the time during which the applicant undertakes to remain in such retreat. Such application must be accompanied by the statutory declaration of two persons to the effect that the applicant is an habitual drunkard (*r*). Application for admission.

The signature of the applicant to the application must be attested by a justice of the peace (*s*), who must not attest the signature unless he has satisfied himself that the applicant is an habitual drunkard within the statutory meaning (*t*), and has explained to him the effect of his application and of his reception in the retreat, and the justice must state in writing, and as a part of such attestation, that the applicant understood the effect of the application and reception. Attestation.

An habitual drunkard, after his admission and reception into such retreat, unless discharged or authorised by licence (*u*) is not entitled to leave the retreat till the expiration of the term mentioned in his application, and he may be detained therein till the expiration of such term; but such term must not exceed the period of two years (*a*). Discharge.

Any person so admitted into any retreat may, however, at any time thereafter, be discharged by the order of a justice, upon the request in writing of the licensee of the retreat, if it appears to such justice to be reasonable and proper (*b*).

456. A person who is or has at any time been detained in a retreat may have his term of detention extended, or be re-admitted, Re-admission.

(*q*) Forms prescribed by the Secretary of State under the Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 20 (2), in substitution for Form No. 3 in the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), Sched. II. For forms of application and the accompanying declaration, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 516, 517.

(*r*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 10. For the definition of an habitual drunkard, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417, note (*p*). It includes a man of whom the evidence is that he is constantly drinking, very rarely sober, and that he assaulted his wife and threatened other people (*Robson* v. *Robson* (1904), 68 J. P. 416). A man does not cease to be an habitual drunkard merely because he is, when sober, in the intervals between bouts of drinking, capable of managing his own affairs (*Eaton* v. *Best*, [1909] 1 K. B. 632).

(*s*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 16. "Justice" means a justice or justices of the peace, metropolitan police magistrate, stipendiary or other magistrate by whatever name called, having jurisdiction under the Summary Jurisdiction Acts in the place where the matter requiring the cognisance of a justice arises (Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 3). But so much of this provision and of the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 10, as provides that the signature of an habitual drunkard applying to be admitted to a retreat shall be attested by two justices of the peace having jurisdiction under the Summary Jurisdiction Acts in the place where the matter requiring the cognisance of a justice arises, is repealed, and such attestation may be that of any justice of the peace (Inebriates Act, 1888 (51 & 52 Vict. c. 19), ss. 2, 4; Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 16).

(*t*) See note (*p*), p. 160, *ante*.

(*u*) See p. 164, *post*.

(*a*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 10; Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 16.

(*b*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 12. For a form of request for discharge and discharge, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 519, 520.

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in like manner as an habitual drunkard may be admitted (*c*), except that the statutory declaration is not necessary, and that the attesting justice is not required to satisfy himself that the applicant is an habitual drunkard (*d*).

Regulations.

457. The Secretary of State may make regulations with respect to the procedure on application for admission or re-admission into a retreat, or for the extension of the term of detention of a patient, the medical or other curative treatment of patients in retreats, including the enforcement of such work as may be necessary for their health, the inspection of retreats, and any other matter necessary or proper for carrying into effect the statutory provisions with respect to retreats (*e*).

Notice of reception.

458. Every licensee of a retreat must, within two clear days after the reception of any person received therein (*f*), send a copy of the application under which such person is so received, to the clerk of the local authority and to the Secretary of State (*g*).

Contribution by local authority.

459. The council of any county or borough may contribute such sums and on such conditions as it thinks fit towards the establishment or maintenance of a retreat, and two or more councils may combine for any such purpose (*h*).

Licence stamp.

460. Every licence to keep a retreat is subject to duty, and must be impressed with a stamp of £5, and 10*s.* for every patient above ten whom it is intended to admit into the retreat, and every renewal of a licence must be impressed with a stamp of the same amount. These sums are deemed to be stamp duties, and are under the management of the Commissioners of Inland Revenue (*i*); and all enactments for the time being in force relating to stamp duties and to dies, plates, and other implements provided for the purpose of stamp duties, including all enactments relating to forgery and frauds relating to stamp duties, apply accordingly (*i*). All expense incurred by the local authority in connection with any application for the grant, renewal, or transfer of such licence must be borne by the applicant, together with the stamp and

(*c*) That is, under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 10, as amended by the Inebriates Act, 1888 (51 & 52 Vict. c. 19), s. 4, and by the Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 16.

(*d*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 17. For forms of request for retention and re-admission, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 517, 518.

(*e*) *Ibid.*, s. 20 (1). A regulation so made does not come into effect until it has lain four weeks on the table of each House of Parliament while that House is sitting (Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 21 (1)). The making of any such regulations and the date at which they come into effect must be notified in the *London Gazette* (*ibid.*, s. 21 (2)). As to the powers of a Secretary of State, see, further, pp. 163 *et seq.*, *post*; see also title CONSTITUTIONAL LAW, Vol. VII., pp. 82 *et seq.*

(*f*) That is received therein under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).

(*g*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 11.

(*h*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 14; and as to similar provisions with regard to the maintenance of asylums, compare title LUNATICS AND PERSONS OF UNSOUND MIND. For form of agreement, compare note (*r*), p. 169, *post*.

(*i*) See title REVENUE.

fee for the licence; and all fees for licences and for searches (*k*), if any, must be paid to the clerk of the local authority (*l*).

Fees.

The Secretary of State may, subject as therein mentioned, prescribe the fees to be paid in carrying out the provisions of the Habitual Drunkards Act, 1879 (*m*).

Poor law residence.

The time during which a person is detained in a retreat is for all purposes excluded from the computation of time of residence after which a pauper cannot be removed from a parish (*n*).

Forfeiture.

Persons who hold their estates, other than ecclesiastical benefices, subject to any condition of residence do not incur any forfeiture through being detained in any retreat (*o*).

SUB-SECT. 2.—*Inspection of Retreats.*

Inspector.

461. The Secretary of State may from time to time appoint an inspector of retreats, who holds office during his pleasure, and may also, if it appears to him and to the Treasury necessary (*p*), from time to time appoint a fit person as "assistant inspector of retreats," to hold office during his pleasure, and every person so appointed has such of the powers and duties of the inspector of retreats as the Secretary of State may from time to time prescribe.

Assistant inspector.

Remuneration.

The Secretary of State may, with the consent of the Treasury, assign to the inspector and assistant inspector of retreats proper salaries or remuneration and allowances, which, with the expenses of the inspectors and assistant inspectors (*q*) to such amount as is allowed by the Treasury, are paid out of moneys provided by Parliament in that behalf (*r*).

Inspection.

Every retreat must from time to time, and at least twice in each year, be inspected by the inspector or assistant inspector of retreats.

Discharge.

The Secretary of State may at any time, on the recommendation of the inspector or assistant inspector of retreats, or in his own discretion, order the discharge of any person detained in any retreat (*s*).

Application to judge.

A judge of the High Court of Justice, on an application *ex parte* at chambers, or a county court judge within whose district the retreat is situated, may at any time, by order under his hand, authorise and direct any persons to visit and examine a person detained in a retreat, and to inquire into and report on any matters

(*k*) That is, searches under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).

(*l*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 14. The expression "patient" in the Inebriates Act, 1898 (61 & 62 Vict. c. 60), unless the context otherwise requires, means a person who has been admitted into a retreat, and whose term of detention has not expired or been concluded by his discharge (Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 27).

(*m*) 42 & 43 Vict. c. 19, s. 34.

(*n*) *Ibid.*, s. 32; see Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1; and title POOR LAW.

(*o*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 33.

(*p*) That is, for the due execution of the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).

(*q*) In carrying out the provisions of the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).

(*r*) *Ibid.*, s. 13.

(*s*) *Ibid.*, s. 15.; and see further as to discharge, p. 161, *ante*.

SECT. 1. Retreats.

which such judge may think fit in relation to the person so detained. The judge on receiving such report may, if he thinks fit, order the discharge of any person so detained from any such retreat (*t*).

Report to Secretary of State.

462. The inspector of retreats must, in the month of January in each year, present to the Secretary of State a general report setting forth the situation of each retreat, the names of the licensees, and the number of habitual drunkards who have been admitted and discharged or who have died during the past year, with such observations as he thinks fit as to the results of treatment and the condition of the retreats. The Secretary of State must lay such report, together with the rules, before Parliament (*a*).

SUB-SECT. 3.—*Leave of Absence.*

Leave of absence.

463. A justice of the peace, at the request of a licensee of a retreat, may, at any time after the admission into a retreat of an habitual drunkard, by licence under his hand permit such habitual drunkard to live with any trustworthy and respectable person named in the licence willing to receive and take charge of the habitual drunkard for a definite time for the benefit of his health.

Such licence is not in force for more than two months, but may at any time before the expiration of that period be renewed for a further period not exceeding two months, and so from time to time until the habitual drunkard's period of detention has expired (*b*).

Absence without leave.

464. The time during which an habitual drunkard is absent from a retreat under such licence is deemed to be part of the time of his detention in such retreat; but not where such licence is forfeited (*c*) or revoked (*d*).

Any such licence may be revoked at any time by the Secretary of State on the recommendation of the inspector or assistant inspector of retreats, or by a justice of the peace, by whom such licence was granted, by writing under his hand, and thereupon the habitual drunkard to whom the licence related must return to the retreat (*e*).

SUB-SECT. 4.—*Offences.*

Contravention of Habitual Drunkards Act, 1879.

465. If a licensee of any retreat neglects or permits to be neglected any habitual drunkard placed in the retreat in respect of which he is licensed, or contravenes or wilfully fails to comply with the statutory provisions or fails to observe the rules made by the Secretary of State, he is guilty of an offence (*f*).

(*t*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 18. For procedure in the county court, see title COUNTY COURTS, Vol. VIII., p. 660.

(*a*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 16. A printed copy of rules purporting to be the rules of a retreat, signed by the inspector or assistant inspector of retreats, is evidence of such rules; the rules may from time to time be cancelled or altered by the Secretary of State (*ibid.*, s. 17). For form of model rules, see Encyclopædia of Forms and Precedents, Vol. VI., p. 523.

(*b*) *Ibid*, s. 19. For form of licence, see Encyclopædia of Forms and Precedents, Vol. VI., p. 520.

(*c*) As by the patient escaping (see p. 165, *post*) or refusing to be restrained from intoxicating liquors (Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 21).

(*d*) *Ibid.*, s. 20; as to the calculation of time in case of an escape from a retreat, see p. 165, *post*.

(*e*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 22. For form of revocation, see Encyclopædia of Forms and Precedents, Vol. VI., p. 521.

(*f*) *Ibid.*, ss. 17, 23.

Any person is guilty of an offence who ill-treats, or, being an officer, servant, or other person employed in or about a retreat, wilfully neglects, any habitual drunkard detained in a retreat, or induces or knowingly assists an habitual drunkard detained in a retreat to escape therefrom, or, without the authority of the licensee or the medical officer of the retreat (proof whereof lies on him), brings into any retreat, or, without the authority of the medical officer of the retreat, except in the case of urgent necessity, gives or supplies to any person detained therein any intoxicating liquor, or sedative narcotic, or stimulant drug or preparation (*g*).

Illtreatment or neglect.

Assisting escape.

Bringing intoxicating liquor into retreat.

466. An habitual drunkard, who, while detained in a retreat, wilfully neglects or refuses to conform to the rules thereof, is deemed to be guilty of an offence and is liable upon summary conviction to a penalty not exceeding £5, or, at the discretion of the court, to be imprisoned for any period not exceeding seven days, and at the expiration of his imprisonment (if any) for such offence he must be brought back to such retreat to be detained there for curative treatment until the expiration of his prescribed period of detention in the retreat, and in reckoning such period the time during which such person was in prison must be excluded from computation (*h*).

Refusing to conform to rules.

467. If an habitual drunkard escapes from a retreat, or from the person in whose charge he has been placed under licence as before mentioned (*i*), any justice or magistrate having jurisdiction in the place or district where he is found, or in the place or district where the retreat from which he escaped is situate, may, upon the sworn information of the licensee of such retreat, issue a warrant for the apprehension of such habitual drunkard at any time before the expiration of his prescribed period of detention; and such habitual drunkard must, after apprehension, be brought before a justice or magistrate, and may, if such justice or magistrate so order, be remitted to the retreat from which he so escaped (*j*). Such a warrant may be issued by any justice having jurisdiction in the place where the escaped person resides (*k*). If the patient was absent from the retreat on licence (*l*) the licence is *ipso facto* forfeited by the escape (*m*).

Apprehension after escape.

If a patient escapes from a retreat, the time between his escape and his return to the retreat is not treated as part of his term of detention in the retreat (*n*).

Computation of time of detention.

468. In case of the death of any person detained in any retreat a statement of the cause of the death, with the name of any person

Certificate of death.

(*g*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 24.
(*h*) *Ibid.*, s. 25.
(*i*) See p. 164, *ante*.
(*j*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 26.
(*k*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 18 (2); see also Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 21.
(*l*) See p. 164, *ante*.
(*m*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 21; see note (*c*), p. 164, *ante*.
(*n*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 18 (1).

SECT. 1. Retreats.

As to person detained in retreat.

present at the death, must be drawn up and signed by the principal medical attendant of such retreat, and copies thereof, duly certified in writing by the licensee, must be by him transmitted to the coroner and to the registrar of deaths for the district, to the clerk of the local authority, and to the person by whom the last payment was made for the deceased, or to one at least of the persons who signed the statutory declaration that the applicant was an habitual drunkard (*o*).

Failure on the part of the medical attendant and licensee of a retreat to comply with this provision is an offence (*o*).

As to person absent from retreat under licence.

469. In case of the death of a patient absent from a retreat under licence, a statement of the cause of the death, with the name of any person present at the death, must be drawn up and signed by a duly qualified medical practitioner, and copies thereof, duly certified in writing by the person in whose charge the patient had been placed, must be transmitted to the same persons and authorities as is the case of a death in a retreat (*p*).

If the person in charge of the patient fails to comply with the requirements of this section, he is guilty of an offence (*q*).

Penalties.

470. Any person, not being an habitual drunkard detained in a retreat, who is guilty of an offence against the Habitual Drunkards Act, 1879 (*r*), to which no other penalty is affixed, is liable on summary conviction to a penalty not exceeding £20, or, at the discretion of the court, to be imprisoned for any term not exceeding three months with or without hard labour (*s*).

SUB-SECT. 5.—*Legal Proceedings.*

Legal proceedings.

471. The Summary Jurisdiction Acts (*t*) apply to all offences in respect of which jurisdiction is given to any court of summary jurisdiction by the Habitual Drunkards Act, 1879 (*r*), or which are directed to be prosecuted, enforced, or made before a court of summary jurisdiction, or in a summary manner, or upon summary conviction (*u*).

(*o*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 27; see also title CORONERS, Vol. VIII., p. 243. For form of statement, see Encyclopædia of Forms and Precedents, Vol. VI., p. 521. As to the general duties of a registrar of deaths, see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*p*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 19 (1); see the text, *supra*. For form of statement, see Encyclopædia of Forms and Precedents, Vol. VI., p. 522.

(*q*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 19 (2). That is, an offence against the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19).

(*r*) 42 & 43 Vict. c. 19.

(*s*) *Ibid.*, s. 28.

(*t*) See note (*r*), p. 87, *ante*, and title MAGISTRATES.

(*u*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 29. The expression "court of summary jurisdiction" means as regards England any justice or justices of the peace to whom jurisdiction is given by the Summary Jurisdiction Acts (see title MAGISTRATES); provided that the court when hearing and determining an information or complaint under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), shall be constituted either of two or more justices of the peace in petty sessions, sitting at some place appointed for holding petty sessions, or of some magistrate or officer sitting alone or with others at some court or other place appointed for the administration of justice, and for the time being empowered by law to do alone any act authorised to be done by more than one justice (*ibid.*, s. 3). As to the effect of an order under the Inebriates Act, 1878 (61 & 62 Vict. c. 60), on an old age pension, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 554.

Appeal.

472. If any person thinks himself aggrieved by any conviction or order of a court of summary jurisdiction he may appeal.

The appeal must be made to the next court of quarter sessions for the county, borough, or place in which the cause of appeal has arisen, held not less than fifteen days and (unless adjourned by the court) not more than four months after the conviction or order appealed from (*v*).

Limitation of actions.

473. Any action against any person for anything done in pursuance or execution or intended execution of the Habitual Drunkards Act, 1879 (*w*), must be commenced within two years after the thing done, and not otherwise.

Notice in writing of every such action and of the cause thereof must be given to the intended defendant one month at least before the commencement of the action (*w*).

SECT. 2.—*Supply of Liquor to Habitual Drunkards.*

Black list.

474. Where, upon the conviction of an offender, the court is satisfied that an order of detention in an inebriate reformatory (*x*) could be made, then, whether an order of detention is made or not the court must order that notice of the conviction, with such particulars as may be prescribed by a Secretary of State, be sent to the police authority (within the meaning of the Police Act, 1890 (*y*)) for the area in which the court is situate (*a*).

But a magistrate can only make such an order if the defendant consents to be dealt with summarily (*b*).

Penalties for obtaining and supplying liquor.

475. Where a court in pursuance of the above provision orders notice of a conviction to be sent to the police authority, the court must inform the convicted person that the notice is to be so sent; and if the convicted person within three years after the date of the conviction purchases or obtains, or attempts to purchase or obtain, any intoxicating liquor at any premises licensed for the sale of intoxicating liquor by retail, or at the premises of any club registered in pursuance of the provisions of Part III. of the Licensing Act, 1902 (*c*), he is liable, on summary conviction, to a fine not exceeding, for the first offence, 20*s*., and for any subsequent offence, 40*s*.; and if the holder of any licence authorising the sale of intoxicating liquor by retail, whether for consumption on or off the premises, or any person selling, supplying, or distributing intoxicating liquor, or authorising such sale, supply, or distribution

(*v*) Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 30.

(*w*) 42 & 43 Vict. c. 19, s. 31. As to the protection of public officers generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*x*) Under the Inebriates Act, 1898 (61 & 62 Vict. c. 60), ss. 1, 2. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 417, 418, 554.

(*y*) 53 & 54 Vict. c. 45. See title POLICE.

(*a*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 6 (1).

(*b*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 2; *Commissioner of Police* v. *Donovan*, [1903] 1 K. B. 895. For procedure before courts of summary jurisdiction, see title MAGISTRATES.

(*c*) 2 Edw. 7, c. 28.

SECT. 2. Supply of Liquor to Habitual Drunkards.

on the premises of a club so registered, within that period knowingly sells, supplies, or distributes, or allows any person to sell, supply, or distribute intoxicating liquor to, or for the consumption of, any such person, he is liable on summary conviction for the first offence to a fine not exceeding £10, and for any subsequent offence in respect of the same person to a fine not exceeding £20 (*d*).

Regulations are made by the police authority for the purpose of securing the giving of information to licensed persons and secretaries of such registered clubs of orders made under the provision before referred to, and for assisting in the identification of the convicted persons (*e*).

SECT. 3.—*Inebriate Reformatories.*

State inebriate reformatories.

476. The Secretary of State may establish inebriate reformatories (called State inebriate reformatories), and for that purpose may, with the approval of the Treasury, acquire any land, or erect or acquire any building, or appropriate the whole or any part of any building vested in him or under his control, and any expenses so incurred are paid out of moneys provided by Parliament (*f*).

Regulations.

The Secretary of State may make regulations for the rule and management of any State inebriate reformatory, and for the classification, treatment, employment, and control of persons sent to it in pursuance of the Inebriates Act, 1898 (*g*), and for their absence under licence; and, subject to any adaptations, alterations, and exceptions made by such regulations, the Prison Acts, 1865—1898 (*h*) (including the penal provisions thereof), apply in the case of every such reformatory as if it were a prison. But no regulation must authorise the infliction of corporal punishment in any State inebriate reformatory (*i*).

Certified inebriate reformatory.

477. The Secretary of State, on the application of the council of any county or borough or of any persons desirous of establishing an inebriate reformatory, may, if satisfied as to the fitness of the reformatory and of the persons proposing to maintain it, certify it as an inebriate reformatory, and thereupon, while the certificate is in force, the reformatory is a certified inebriate reformatory (*k*).

Regulations.

478. The Secretary of State may make regulations prescribing the conditions on which such certificates are to be granted and held, and the circumstances in which they may be withdrawn or

(*d*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 6 (2); see also title CLUBS, Vol. IV., p. 431.

(*e*) *Ibid.*, s. 6 (3). As to the clubs and orders referred to, see p. 167, *ante*.

(*f*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 3.

(*g*) 61 & 62 Vict. c. 60.

(*h*) Prison Act, 1865 (28 & 29 Vict. c. 126); Prison Act, 1877 (40 & 41 Vict. c. 21); Prison (Officers Superannuation) Act, 1878 (41 & 42 Vict. c. 63); Prison Act, 1884 (47 & 48 Vict. c. 51); Prison (Officers' Superannuation) Act, 1886 (49 & 50 Vict. c. 9); Prison (Officers' Superannuation) Act, 1893 (56 & 57 Vict. c. 26); Prison Act, 1898 (61 & 62 Vict. c. 41); and see title PRISONS.

(*i*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 4.

(*k*) *Ibid.*, s. 5 (1). Within the meaning of the Inebriates Act, 1898 (61 & 62 Vict. c. 60).

SECT. 3. Inebriate Reformatories.

resigned (*l*), the establishment, management, maintenance, and inspection of certified inebriate reformatories, the classification, treatment, employment, and control of the inmates of certified inebriate reformatories, and the application of their earnings, the transfer of such inmates from one certified inebriate reformatory to another, their absence under licence, and their discharge, and the transfer of inmates from a State inebriate reformatory to a certified inebriate reformatory, or in special cases from a certified inebriate reformatory to a State inebriate reformatory; and may thereby impose a fine not exceeding £20, or imprisonment for a term not exceeding three months with or without hard labour, for the breach of any such regulations (*m*).

Computation of time of detention.

In reckoning the period of detention of any person detained in a certified inebriate reformatory the time during which he is so imprisoned is not computed (*n*).

Procedure on breach.

Where by any such regulations a breach of the regulations is made punishable by fine or imprisonment, the breach is an offence which may be prosecuted summarily (*o*).

Inspectors.

The Secretary of State may, with the consent of the Treasury as to number, appoint inspectors of certified inebriate reformatories and assign them such remuneration out of money provided by Parliament as the Treasury may determine (*p*).

Treasury grant.

479. The Treasury may contribute out of money provided by Parliament such sums, on such conditions as the Secretary of State recommends, towards the expenses of the detention of persons in certified inebriate reformatories (*q*).

Grant by local authority.

The council of any county or borough may contribute such sums, and on such conditions, as it thinks fit, towards, or may itself undertake, the establishment or maintenance of a reformatory certified or intended to be certified, and may defray the whole or any part of the expenses of detention of any person in any certified inebriate reformatory, and two or more councils may combine for any such purpose (*r*).

Borrowing.

The council of a borough may borrow for any such purpose in like manner as if it were a purpose for which it is authorised by the Municipal Corporations Act, 1882 (*s*), s. 106, to borrow (*t*).

Costs of conveyances.

The expenses of conveying a person to a certified inebriate reformatory must be defrayed by the police authority by whom or at whose instance he is conveyed, and are deemed part of the current expenses of that police authority (*u*).

Powers of officer over person ordered to be detained.

480. Every officer of a certified inebriate reformatory authorised in writing by the managers of the reformatory to take charge of

(*l*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 5 (2).
(*m*) *Ibid.*, s. 6.
(*n*) *Ibid.*
(*o*) Inebriates Act, 1899 (62 & 63 Vict. c. 35), s. 2.
(*p*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 7.
(*q*) *Ibid.*, s. 8.
(*r*) *Ibid.*, s. 9 (1); compare p. 162, *ante*. For forms of agreement and conveyance, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 528, 534.
(*s*) 45 & 46 Vict. c. 50.
(*t*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 9 (2).
(*u*) *Ibid.*, s. 10.

SECT. 3. Inebriate Reformatories.

any person ordered to be detained for the purpose of conveying him to or from the reformatory, or of apprehending and bringing him back to the reformatory in case of his escape or refusal to return, has, for the purpose and while engaged in that duty, all the powers, protections and privileges of a constable (*a*).

Escape.

If any person ordered to be detained in a certified inebriate reformatory escapes therefrom, or from the charge of any person in whose charge he is placed under licence, before the expiration of his period of detention, he may be apprehended without warrant and brought back to the reformatory (*b*).

Recovery of expenses.

In certain circumstances a county court judge has power to make an order for the recovery of expenses against the inebriate's estate (*c*).

Poor law.

481. The Poor Removal Act, 1846 (*d*), s. 1, applies to a person detained in or absent under licence from a State inebriate reformatory, or a certified inebriate reformatory, as if he were a prisoner in a prison within the meaning of that enactment (*e*).

Part XVIII.—Sale of Intoxicating Liquors on Credit.

SECT. 1.—*Spirits.*

Limitation of actions for spirits supplied on credit.

482. No person can maintain any action, or suit for, or recover, either at law or in equity, any sum of money, debt, or demand for or on account of any spirituous liquors (except spirituous liquors sold to be consumed elsewhere than on the premises where sold and delivered at the residence of the purchaser in quantities not less at any one time than one reputed quart), unless such debt has been *bonâ fide* contracted at one time to the amount of 20*s.* or upwards. Nor can any particular article or item in any account or demand for distilled spirituous liquors (except such as have been sold and delivered as above mentioned) be allowed or maintained where the liquors delivered at one time, and mentioned in such article or item, do not amount to the full value of 20*s.* at the least, and that without fraud or covin; and where no part of the liquors so sold or delivered have been returned directly or indirectly. Any retailer of spirituous liquors,

(*a*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 11 (1).

(*b*) *Ibid.*, s. 11 (2).

(*c*) *Ibid.*, s. 12. See title COUNTY COURTS, Vol. VIII., pp. 659, 660. The expression "expenses" in relation to the detention of a person in a certified inebriate reformatory, in the Inebriates Act, 1898 (61 & 62) Vict. c. 60), includes, unless the context otherwise requires, the expenses of his custody and maintenance, whether in the reformatory or when absent therefrom under licence, and any other expenses directed by that Act, or by any order made thereunder, to be defrayed by the managers, and also any expenses incurred by the managers in assisting him to return to his home or place of settlement on the expiration of his term of detention (*ibid.*, s. 27).

(*d*) 9 & 10 Vict. c. 66; compare p. 163, *ante*, and see title POOR LAW.

(*e*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 22.

with or without a licence, taking or receiving any pawn or pledge from any person by way of security for the payment of any sum of money owing by such person for such liquors, forfeits the sum of 40*s.* for each pawn or pledge so taken in or received by him, to be levied and recovered by warrant under the hand and seal of one justice of the peace where the offence is committed, one moiety thereof to be to the use of the poor of the parish where the offence is committed, and the other moiety to the informer or informers. The person to whom any such pawn or pledge belongs has the same remedy for recovering such pawn or the value thereof as if it had never been pledged (*f*).

Sale of different spirits.

483. If spirits are sold and delivered at one time to a greater value than 20*s.* it is immaterial that part is one sort of spirits and part another sort, and that the price of each part taken separately is below 20*s.* (*g*).

Purchase for resale.

The prohibition against recovery of the price applies to cases where spirituous liquors are sold in small quantities for the purpose of resale in the purchaser's business and not for his own consumption (*h*).

Innkeeper.

But the prohibition does not apply to spirits sold by an innkeeper for the consumption of a guest residing at his inn (*i*).

Partly spirits

484. If a score is run up for spirits, beer and food, the value of the items other than the spirits can be recovered, although the price of the spirits cannot (*k*); and the price of the spirits cannot be recovered even if merely incidental to other entertainment (*l*).

Bill of exchange.

485. A security, such as a bill of exchange, given for the price of spirituous liquors sold in such quantities that the prohibition against recovering the price applies, is void, and nothing can be recovered in an action upon it, even though the price of the spirituous liquor was only a part of the consideration (*m*).

Double security.

But if a publican takes from a guest two securities, both at one time, for his score which consists partly of a demand for spirits but to a less extent than the amount of either security, he can recover on one of the securities, though not on both (*n*).

Appropriation of payment.

Moreover, if money has been paid on account of a debt which is partly for spirituous liquors of which the price could not, owing to the statutory prohibition, be recovered, and the person

(*f*) Sale of Spirits Act, 1750 (24 Geo. 2, c. 40) (commonly called the "Tippling Act"), s. 12; Sale of Spirits Act, 1862 (25 & 26 Vict. c. 38), s. 1. As to pawns and pledges generally, see title PAWNS AND PLEDGES.

(*g*) *Owens* v. *Porter* (1830), 4 C. & P. 367.

(*h*) *Burnyeat* v. *Hutchinson* (1821), 5 B. & Ald. 241; *Hughes* v. *Done* (1841), 1 Q. B. 294, overruling *Jackson* v. *Attrill* (1793), Peake, 241 [180].

(*i*) *Proctor* v. *Nicholson* (1835), 7 C. & P. 67.

(*k*) *Gilpin* v. *Rendle* (1809), 1 Selwyn, Law of Nisi Prius, 61 (13th ed., Vol. I., p. 75).

(*l*) *Burnyeat* v. *Hutchinson*, *supra*.

(*m*) *Scott* v. *Gillmore* (1810), 3 Taunt. 226; *Gaitskill* v. *Greathead* (1822), 1 Dow. & Ry. (K. B.) 359. But *Spencer* v. *Smith* (1811), 3 Camp. 9, was decided in a contrary sense. As to bills of exchange, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 457 *et seq.*

(*n*) *Crookshank* v. *Rose* (1831), 5 C. & P. 19.

SECT. 1. Spirits.

paying the money on account does not appropriate it to any portion of the debt, the payee is entitled to appropriate the payment to the price of the spirits and to sue for the other items of the debt (*o*).

Cross accounts.

Where a settlement has been come to between two persons upon cross accounts, it is binding even on one whose debt or a part of it consisted of the price of spirits bought on credit, the price of which could not have been recovered owing to the statute on prohibition (*p*).

SECT. 2.—*Beer etc.*

Beer consumed on premises.

486. No action can be brought or is maintainable in any county or other court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or any security given for, in, or towards the obtaining of such ale, porter, beer, cider, or perry (*q*).

SECT. 3.—*For Purposes of Resale.*

Resale.

487. The price of beer sold to the defendant for the purpose of being resold in licensed premises carried on for his benefit, but of which he is not the licensee, can be recovered from him, as such a contract is not a fraud upon the licensing system (*r*); in other words, because the purpose is not illegal (*s*).

(*o*) *Crookshank* v. *Rose*, *supra*; *Philpott* v. *Jones* (1834), 2 Ad. & El. 41; *Dawson* v. *Remnant* (1806), 6 Esp. 24; and see title CONTRACTS, Vol. VII., pp. 409 *et seq.*

(*p*) *Dawson* v. *Remnant* (1806), 6 Esp. 24. For the statutory prohibition referred to, see pp. 170, 171, *ante*.

(*q*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 182.

(*r*) *Brooker* v. *Wood* (1834), 5 B. & Ad. 1052; but see *Meux* v. *Humphries* (1827), Mood. & M. 132.

(*s*) *Hodgson* v. *Temple* (1813), 5 Taunt. 181; but see *Dunning* v. *Owen*, [1907] 2 K. B. 237.

INVENTIONS.

See PATENTS AND INVENTIONS.

INVENTORIES.

See BILLS OF SALE; EXECUTORS AND ADMINISTRATORS; VALUERS AND APPRAISERS.

I. O. U.

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See CONSTITUTIONAL LAW.

ISLE OF MAN.

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SECT. 1.—*Definition.*

Meaning.

488. The terms "judgment" and "order" in their widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court (*a*). The terms as used in this title

(*a*) The judgments and orders referred to in this article are judgments and orders of the King's Bench and Chancery Divisions of the High Court and orders of the Court of Appeal. For judgments and orders of the House of Lords, see title PARLIAMENT; for judgments (or decrees) in the Probate, Divorce, and Admiralty Division, see titles ADMIRALTY, Vol. I., pp. 103, 122 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 174 *et seq.*; HUSBAND AND

SECT. 1. Definition.

exclude decisions of a court in criminal (*b*) as opposed to civil matters; and such decisions of the court in civil matters as do not determine the main question or questions at issue between the parties for the determination of which resort has been had to the court, but only determine preliminary or subsidiary questions relating to procedure, are not considered here in detail (*c*). When considered separately, the terms overlap considerably and are incapable of exact definition (*d*). An order in the nature of a judgment may be enforced as though it were a judgment to the same effect (*e*), but this notwithstanding, there are distinctions between the two terms (*f*).

SECT. 2.—*Classification.*

SUB-SECT. 1.—*In rem; In personam.*

In rem and *in personam.*

489. A judgment may be a judgment *in rem* or a judgment *in personam* or *inter partes* (*g*).

WIFE, Vol. XVI., pp. 543 *et seq.*; in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 56 *et seq.*, 85 *et seq.*, 241 *et seq.*; in lunacy matters, see title LUNATICS AND PERSONS OF UNSOUND MIND; in county courts and other courts of local jurisdiction, see title COUNTY COURTS, Vol. VIII., pp. 533 *et seq.*; and of the Judicial Committee of the Privy Council, see title COURTS, Vol. IX., p. 45. Before the reform of legal procedure effected by the Judicature Acts, 1873—1894, the "judgment" of the courts of common law corresponded to the "decree" of the Court of Chancery; but now the term "judgment" includes decree (see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100). This, however, is only for the purposes of the Judicature Acts (see *Re Binstead, Ex parte Dale*, [1893] 1 Q. B. 199, C. A., *per* Lord ESHER, M.R., at p. 203; compare *Burrows* v. *Holley* (1887), 35 Ch. D. 123, *per* CHITTY, J., at p. 124). The term "court" includes masters, district registrars, and official referees, as well as judges of the court.

(*b*) For judgments in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 376.

(*c*) For orders made in these matters, see title PRACTICE AND PROCEDURE; and see also titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 26, 55, 315; COMPANIES, Vol. V., pp. 410, 548; COUNTY COURTS, Vol. VIII., pp. 503 *et seq.*; HUSBAND AND WIFE, Vol. XVI., pp. 516 *et seq.*; INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*d*) The words have sometimes been used as though "order" was the genus of which "judgment" was a species. *E.g.*, "To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio*, and a final adjudication between the parties" (*Re Faithfull, Ex parte Moore* (1885), 14 Q. B. D. 627, C. A., *per* Lord SELBORNE, L.C., at p. 632).

(*e*) R. S. C., Ord. 42, r. 24.

(*f*) *Ex parte Chinery* (1884), 12 Q. B. D. 343, *per* COTTON, L.J., at p. 345; approved in *Onslow* v. *Inland Revenue Commissioners* (1890), 25 Q. B. D. 465, C. A.; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A., *per* JESSEL, M.R., at p. 349. The most important distinction has reference to the issuing of a bankruptcy notice; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 26. The following are instances of orders which are not judgments:—The decision of the High Court on a case stated by the Commissioners of Inland Revenue under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 19 (*Onslow* v. *Inland Revenue Commissioners, supra*); a consent order staying proceedings (*Joynt* v. *MacCabe*, [1899] 1 I. R. 104); an order of a Divisional Court affirming an order of an alderman of the City of London upon a summons for wages by a seaman under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 164 (*Austin Friars Steamship Co.* v. *Strack*, [1906] 2 K. B. 499, C. A.); and see, further, titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 26; COMPANIES, Vol. V., p. 504; HUSBAND AND WIFE, Vol. XVI., pp. 520, 521.

(*g*) For a full discussion as to judgments *in rem* and *in personam*, see title ESTOPPEL, Vol. XIII., pp. 327 *et seq.*, 338 *et seq.*

SECT. 2. Classification. Interlocutory and final.

SUB-SECT. 2.—*Interlocutory; Final.*

490. A judgment or order which determines the principal matter in question is termed "final" (*h*). An order which does not deal

(*h*) Blackstone says: "Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for" (3 Bl. Com. p. 398). The cases on the subject are not easy to reconcile, and it has been said that the matter is one that ought to be determined by a new rule made by the Rule Committee (see *Re Croasdell and Cammell, Laird & Co., Ltd.*, [1906] 2 K. B. 569, C. A., *per* COLLINS, M.R., at p. 573; *Re Jerome*, [1907] 2 Ch. 145, C. A., *per* COZENS-HARDY, M.R., at p. 147; *Re Page, Hill* v. *Fladgate*, [1910] 1 Ch. 489, C. A., *per* BUCKLEY, L.J., at p. 494). Three alternative tests for ascertaining the finality of a judgment or order may be proposed: (1) Was the order made upon an application such that a decision in favour of either party would determine the main dispute? (2) Was it made upon an application upon which the main dispute could have been decided? (3) Does the order, as made, determine the dispute? The weight of authority seems to be in favour of the second of these tests. The first was adopted in *Salaman* v. *Warner*, [1891] 1 Q. B. 734, C. A.; *Re Reeves* (*Herbert*) *& Co.*, [1902] 1 Ch. 29, C. A.; and in *Standard Discount Co.* v. *La Grange* (1877), 3 C. P. D. 67, C. A., *per* BRETT, L.J., at p. 71, whose reasoning in this case was, however, disapproved in *A.-G.* v. *Great Eastern Rail. Co.* (1879), 27 W. R. 759, C. A., by JAMES, L.J., at p. 763). In *Shubrook* v. *Tufnell* (1882), 9 Q. B. D. 621, C. A., the order in question did not decide the matter in litigation, but referred it back to an arbitrator. Upon the application on which it was made, however, a final adjudication might have been given. The order was held to be final, and this was expressly approved by the court in *Bozson* v. *Altrincham Urban Council*, [1903] 1 K. B. 547, C. A., *per* Lord HALSBURY, L.C., refusing to follow *Salaman* v. *Warner*, *supra*. In *Bozson* v. *Altrincham Urban Council*, *supra*, however, the order did, in fact, determine the matter in litigation, and Lord ALVERSTONE, C.J., stated the test of finality thus: "Does the judgment or order, as made, finally dispose of the rights of the parties?" (No. (3) above). It is, therefore, not perfectly clear whether the second or the third of the tests above set out is to be preferred. The following definitions have been given: The strict and proper meaning of "final judgment" is "a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established" (*Ex parte Chinery* (1884), 12 Q. B. D. 342, *per* COTTON, L.J., at p. 345). "To constitute an order a final judgment, nothing more is necessary than a proper *litis contestatio*, and a final adjudication between the parties to it on the merits" (*Re Faithfull, Ex parte Moore* (1885), 14 Q. B. D. 627, C. A., *per* Lord SELBORNE, L.C., at p. 632). This proposition, subject to the omission of the words after "parties," was adopted in *Re Riddell, Ex parte Strathmore* (*Earl*) (1888), 20 Q. B. D. 512, C. A., *per* Lord ESHER, M.R., at p. 514. His Lordship also suggested the following definition of a final judgment at p. 516, namely: "A judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or of the defendant." An order of a Divisional Court setting aside an award in the form of a special case for misconduct on the part of the arbitrator is interlocutory, as it involves no determination of the rights of the parties as regards the matters in dispute in the arbitration (*Re Croasdell and Cammell, Laird & Co., Ltd., supra*). The decision of the High Court on a special case stated by an arbitrator, who is to make his award thereupon, is interlocutory, since the matter will go back to the arbitrator in any event (*Collins* v. *Paddington Vestry* (1880), 5 Q. B. D. 368, C. A.). The first clause of the head-note to the report is too widely stated: see *Shubrook* v. *Tufnell*, *supra*, *per* JESSEL, M.R., at p. 623). An order made in chambers by consent, ordering that the action be dismissed and the plaintiff pay to the defendants their taxed costs of the action, is final (*Shaw* v. *Hertfordshire County Council*, [1899] 2 Q. B. 282, C. A.); and an order dismissing an originating summons (taken out under R. S. C., Ord. 55, r. 3) is a final order in an action (*Re Fawsitt, Galland* v. *Burton* (1885), 30 Ch. D. 231, C. A.; *Marsden*

with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory" (*i*). No definition is given in the Judicature Acts and the orders and

v. *Lancashire and Yorkshire Rail. Co.* (1881), 7 Q. B. D. 641, C. A.). A final order is none the less final by reason that it is subject to appeal (*Huntly* (*Marchioness*) v. *Gaskell*, [1905] 2 Ch. 656, C. A., *per* STIRLING, L.J., at p. 667); and a judgment may be final though it directs inquiries (*Re Reeves* (*Herbert*) *& Co.*, [1902] 1 Ch. 29, C. A.), or deals with costs only (*Marsden* v. *Lancashire and Yorkshire Rail. Co.* (1881), 7 Q. B. D. 641, C. A.; *The City of Manchester* (1880), 5 P. D. 221, C. A.; *Forbes-Smith* v. *Forbes- Smith*, [1901] P. 258, C. A.); or is made on an interlocutory application (*A.-G.* v. *Great Eastern Rail. Co.* (1879), 27 W. R. 759, C. A.). An order made on an application for summary judgment under R. S. C., Ord. 14, refusing unconditional leave to defend, is not to be deemed an interlocutory order for the purposes of appeal (Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (2)). Other instances of orders held to be final for the purposes of appeal are orders in the ordinary form of a foreclosure judgment made under R. S. C., Ord. 15 (*Smith* v. *Davies* (1886), 31 Ch. D. 595, C. A.); order on summons in an administration action to adjust loss arising from a breach of trust (*Chillingworth* v. *Chambers*, [1895] W. N. 136); order on originating summons for solicitor to pay money to his client in pursuance of an undertaking (*Re Marchant*, [1908] 1 K. B. 998, C. A.).

(*i*) An interlocutory order, though not conclusive of the main dispute, is conclusive as to the subordinate matter with which it deals (*Re Gardner, Long* v. *Gardner* (1894), 71 L. T. 412, C. A.; *Standard Discount Co.* v. *La Grange* (1877), 3 C. P. D. 67, C. A., *per* COTTON, L.J., at p. 72; *Blakey* v. *Latham* (1889), 43 Ch. D. 23, C. A., *per* COTTON, L.J., at pp. 25, 26). The following cases afford instances of interlocutory orders made before judgment, giving directions how the action is to proceed, namely:—*Standard Discount Co.* v. *La Grange*, *supra*; *Re A Debtor, Ex parte the Debtor* (1903), 19 T. L. R. 152, C. A. (order empowering a plaintiff to sign judgment upon a specially indorsed writ is interlocutory because it does not become effectual against the defendant until it has been perfected by the further step of signing the judgment); *Edison-Bell Phonograph Co.* v. *Hough* (1895), 98 L. T. Jo. 374, C. A. (order for a commission to examine); *Monkswell* (*Lord*) v *Thompson*, [1898] 1 Q. B. 353, C. A. (order for a special case to be stated under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 93, following *Harmon* v. *Park* (1880), 6 Q. B. D. 323, C. A.); *Neale* v. *Gordon Lennox* (*Lady*), [1902] 1 K. B. 838, C. A., *per* Lord ALVERSTONE, C.J., at p. 845 (order to refer an action); *Hind* v. *Hartington* (*Marquis*) (1890), 6 T. L. R. 267, C. A. (order staying proceedings against one of several defendants); *International Financial Society* v. *City of Moscow Gas Co.*, *City of Moscow Gas Co.* v. *International Financial Society* (1877), 7 Ch. D. 241, C. A.; *Re Page, Hill* v. *Fladgate*, [1910] 1 Ch. 489, C. A. (order dismissing an action as being frivolous or vexatious); *Jones* v. *Insole* (1891), 64 L. T. 703, C. A.; *Bright* (*Charles*) *& Co.* v. *River Plate Construction Co.* (1901), 17 T. L. R. 708, C. A. (order striking out a statement of claim). The following cases afford instances of interlocutory orders made after judgment and giving directions for working out rights thereunder, namely:—*Cummins* v. *Herron* (1877), 4 Ch. D. 787, C. A., *per* JESSEL, M.R., at p. 788 (order made on an application to vary a certificate of the amount of damages payable by the defendant); *Re Lewis, Lewis* v. *Williams* (1886), 31 Ch. D. 623, C. A. (order in an administration action directing taxation of costs and application of funds in court, and giving liberty to apply as to getting in assets and generally); *Blakey* v. *Latham*, *supra* (order allowing costs, subject to any lien that a specified person could establish before the taxing master); *Re Johnson, Manchester and Liverpool Banking Co.* v. *Beales, Johnson* v. *Hooley* (1889), 42 Ch. D. 505, 509 (order made in chambers on further consideration in an administration action, leaving part of the funds to be dealt with thereafter and reserving liberty to apply); *Re Abdy, Rabbett* v. *Donaldson*, [1895] W. N. 12, C. A. (order in

SECT. 2. Classification.

rules thereunder of the terms "final" and "interlocutory," and it is necessary to note that a judgment or order may be "final" for one purpose and "interlocutory" for another (*k*). The decisions on the question whether an order is "final" or "interlocutory," therefore, must be grouped with reference to the particular purpose for which each was given.

The most important matters in which the question arises are the issuing of a bankruptcy notice (*l*), and appealing to the Court of Appeal.

Final or interlocutory judgments and orders for purposes of appeal.

Generally speaking, an appeal from a final judgment of a judge lies to the Court of Appeal without leave (*m*), but, with certain exceptions, no appeal lies from an interlocutory judgment or order of a judge without the leave of the judge or of the Court of

an administration action that the plaintiff's claim to be a creditor was valid); *Norton* v. *Norton* (1908), 99 L. T. 709, C. A. (order directing partition of premises remaining unsold made on summons taken out in a partition action under a judgment which gave liberty to certain persons to apply). But an order giving costs to a party, supplemental to a final decree, must be treated as part of the decree, and therefore, as a final order (*Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258, C. A., following *Marsden* v. *Lancashire and Yorkshire Rail. Co.* (1881), 7 Q. B. D. 641, C. A., and *The City of Manchester* (1880), 5 P. D. 221, C. A.). Other instances of interlocutory orders are: order under the Trustee Relief Act, 1847 (10 & 11 Vict. c. 96) (*Re Baillie's Trusts* (1877), 4 Ch. D. 785, C. A.); order refusing to remove the applicant's name from a list of contributories (*Taylor's Case* (1878), 8 Ch. D. 643, C. A.); order on petition under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), declaring the construction of a will (*Re Jacques* (*Leonard*) (1881), 18 Ch. D. 392, C. A.); order adjudicating on a claim by a creditor in an administration action (*Re Compton, Norton* v. *Compton* (1884), 27 Ch. D. 392, C. A.; *Re Crosley, Munns* v. *Burn* (1887), 34 Ch. D. 664, C. A.); orders made on the trial of interpleader issues (*McAndrew* v. *Barker* (1878), 7 Ch. D. 701, C. A.; *Hughes* v. *Little* (1886), 18 Q. B. D. 32, C. A.; *McNair & Co.* v. *Audenshaw Paint and Colour Co.*, [1891] 2 Q. B. 502, C. A.); order to review the taxation of a solicitor's bill of costs (*Re Watson, Ex parte Phillips* (1887), 19 Q. B. D. 234, C. A.), or dismissing summons to review (*Re Jerome*, [1907] 2 Ch. 145, C. A.; but see *Re Reeves* (*Herbert*) *& Co.*, [1902] 1 Ch. 29, C. A.); order refusing leave to issue a writ of sequestration (*Spencer* v. *Ancoats Vale Rubber Co., Ltd.* (1888), 58 L. T. 363, C. A.); order in administration action declaring rights, and giving leave to make payments to an annuitant (*Re Gardner, Long* v. *Gardner* (1894), 71 L. T. 412, C. A.); order for compulsory winding up of a company (*Re Naval, Military, and Civil Service Co-operative Society of South Africa, Ltd.*, [1903] W. N. 120, C. A.), or refusing to sanction a reduction of capital (*Re Allsopp* (*Samuel*) *& Sons, Ltd.*, [1903] W. N. 132, C. A.); order to enter a cause in the commercial list (*Sea Insurance Co.* v. *Carr*, [1901] 1 K. B. 7, C. A.); refusal of application for committal (*Bowden* v. *Yoxall*, [1901] 1 Ch. 1, C. A.); see also note (*h*), p. 178, *ante*.

(*k*) *Pheysey* v. *Pheysey* (1879), 12 Ch. D. 305, C. A., where JAMES, L.J., at p. 307, explained that the "Memorandum on Practice" (1875), 1 Ch. D. 41, C. A., directing all summonses which finally settled the rights of the parties, such as summonses under winding-up orders, or in administration suits, to be heard by the full Court of Appeal (although by the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 12, such a hearing by the full court was only necessary in the case of appeals from final orders), was not to be taken as determining the question whether the orders in such cases were final or interlocutory orders (*Re Compton, Norton* v. *Compton* (1884), 27 Ch. D. 392, C. A.; *Re Page, Hill* v. *Fladgate*, [1910] 1 Ch. 489, C. A.).

(*l*) For the judgments which are "final judgments" within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (g), and therefore enable the judgment creditor to serve a bankruptcy notice on the judgment debtor, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 26; and see note (*f*), p. 177, *ante*.

(*m*) See title PRACTICE AND PROCEDURE.

Appeal (*n*). Any doubts as to what decrees, judgments, or orders appealed from are final or interlocutory are to be determined by the Court of Appeal (*o*). The Court of Appeal may hear an appeal without deciding whether the order appealed against is the one or the other (*p*), or even where the appellant has misconceived the nature of such order (*q*).

Appeals to the Court of Appeal from final orders also differ from appeals from interlocutory orders in respect of the time within which they may be brought (*r*), and of the length of notice of appeal that must be given (*s*).

(*n*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1, and see, further, titles COMPANIES, Vol. V., p. 548; PRACTICE AND PROCEDURE.

(*o*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 12; *Gawes* v. *Bonnor* (1884), 33 W. R. 60, 63, C. A. For instances of judgments and orders held to be final or interlocutory on the question as to whether leave is necessary or not, see cases cited in notes (*h*), (*i*), pp. 178, 179, *ante*.

(*p*) *Re Holland Steamship Co. and British Steam Navigation Co.* (1906), 95 L. T. 769, C. A.; *Re Hodgkinson, Hodgkinson* v. *Hodgkinson* (1895), 98 L. T. Jo. 423, C. A.

(*q*) *Re Emmet's Estate, Emmet* v. *Emmet* (1879), 13 Ch. D. 484, 489, C. A.; *A.-G.* v. *Tomline* (1880), 15 Ch. D. 150, 152, C. A.

(*r*) R. S. C., Ord. 58, r. 15. The following orders have been treated as final in respect of the time within which an appeal may be brought: order overruling a demurrer (*Trowell* v. *Shenton* (1878), 8 Ch. D. 318, C. A., *per curiam*, at p. 321; compare *Salaman* v. *Warner*, [1891] 1 Q. B. 734, C. A.); decision of the court on a case stated by an arbitrator, referring the matter back, where a contrary decision would have resulted in judgment being entered for the defendant (*Shubrook* v. *Tufnell* (1882), 9 Q. B. D. 621, C. A.; for the discussion of this and related cases, see note (*i*), p. 179, *ante*); order dismissing an action (*Bozson* v. *Altrincham Urban Council*, [1903] 1 K. B. 547, C. A.); but see *Stewart* v. *Royds* (1904), 118 L. T. Jo. 176, C. A.; *Re Page, Hill* v. *Fladgate*, [1910] 1 Ch. 489, C. A. Where on further consideration of a cause there is heard a summons to vary a certificate, and separate orders are made on each, the time for appealing against both orders is that for appealing against the order on further consideration (R. S. C., Ord. 58, r. 15A; *Marsland* v. *Hole* (1888), 40 Ch. D. 110, C. A.; *Saunders Davies* v. *Baillie*, [1907] W. N. 237, C. A.). For the older rule, see *Cummins* v. *Herron* (1877), 4 Ch. D. 787, C. A.; *White* v. *Witt* (1877), 5 Ch. D. 589, C. A. The following have been treated as interlocutory in respect of the time within which an appeal against them may be brought. Some of them are final in the sense of finally determining the rights of the parties, but are dealt with as interlocutory for convenience and expedition: order on interpleader issue (*McAndrew* v. *Barker* (1878), 7 Ch. D. 701, C. A.; followed in *McNair & Co.* v. *Audenshaw Paint and Colour Co.*, [1891] 2 Q. B. 502, C. A.; distinguishing *Hughes* v. *Little* (1886), 18 Q. B. D. 32, C. A.); a preliminary finding on a definite issue of fact by a judge of the Chancery Division (*Krehl* v. *Burrell* (1878), 10 Ch. D. 420, C. A.; explained in *Lowe* v. *Lowe* (1879), 10 Ch. D. 432, C. A.); order or refusal of application on summons in administration action (*Pheysey* v. *Pheysey* (1879), 12 Ch. D. 305, C. A.; *Re Compton, Norton* v. *Compton* (1884), 27 Ch. D. 392, C. A.; *Re Lewis, Lewis* v. *Williams* (1886), 31 Ch. D. 623, C. A.; *Re Gardner, Long* v. *Gardner* (1894), 71 L. T. 412, C. A.); decision of High Court on special case stated for its opinion by an arbitrator who is thereupon to make his award (*Collins* v. *Paddington Vestry* (1880), 5 Q. B. D. 368, C. A.; see p. 178, *ante*); order allowing costs subject to any lien that a specified person can establish before the taxing master (*Blakey* v. *Latham* (1889), 43 Ch. D. 23, C. A.); order staying proceedings against one of several defendants (*Hind* v. *Hartington* (*Marquis*) (1890), 6 T. L. R. 267, C. A.). *Quære* whether the fact that the order was limited in its effect to one defendant is of any importance

(*s*) For note (*s*) see next page.

SECT. 2. Classification.

Liberty to apply.

491. The circumstances or the nature of a judgment often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them *in gremio* liberty to apply to the court (*a*), and there is no need to expressly reserve such liberty in the case of orders which are not final (*b*). In the case of final judgments, it is usual, where the necessity for such subsequent application is foreseen, to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised (*c*). The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching such interest in a summary way without again setting the case down (*d*). It does not enable the court to deal with matters which do not arise in the course of working out the judgment (*e*). Should the declaration be omitted, application may be made to have the judgment rectified by inserting it (*f*). But it will not be made or implied in favour of a defendant as against whom the action has been dismissed, for any other purpose than enforcing the terms of the order (*g*); nor in favour of a plaintiff whose cause of action disappeared before trial, but who fears that the circumstances giving rise to such cause of action may recur (*h*).

Dismissal of action.

492. A judgment dismissing the plaintiff's action is final. But it may be accompanied by a direction that the dismissal is to be

(see *Re Page, Hill* v. *Fladgate*, [1910] 1 Ch. 489, C. A., *per* COZENS-HARDY, M.R., at p. 492); order dismissing an action unless security given by a named date (*Stewart* v. *Royds* (1904), 118 L. T. Jo. 176, C. A.); order dismissing an action as frivolous and vexatious (*Re Page, Hill* v. *Fladgate, supra*; see also *Price* v. *Phillips* (1894), 11 T. L. R. 86; *Austin Friars Steamship Co.* v. *Strack*, [1906] 2 K. B. 499, C. A.).

(*s*) R. S. C., Ord. 58, r. 3. The following orders have been held to be final in respect of the notice of appeal: order on application by liquidator in a winding-up by the court as to his rights to certain moneys and goods (*Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A.); order made by the Queen's Bench Division on appeal from a county court on an interpleader, affirming the judgment (*Hughes* v. *Little* (1886), 18 Q. B. D. 32, C. A. As to this, see the judgment of BOWEN, L.J., in *McNair & Co.* v. *Audenshaw Paint and Colour Co.*, [1891] 2 Q. B. 502, C. A.). The following have been held to be interlocutory: order dismissing the action at the hearing before trial of a point of law raised by the pleadings under R. S. C. Ord. 25, rr. 2, 3 (*Salaman* v. *Warner*, [1891] 1 Q. B. 734, C. A.; compare *Trowell* v. *Shenton* (1878), 8 Ch. D. 318, C. A.); order dismissing originating summons for delivery of bill of costs by solicitor and taxation (*Re Reeves (Herbert) & Co.*, [1902] 1 Ch. 29, C. A., followed in *Haydon* v. *Cartwright*, [1902] W. N. 163, C. A.).

(*a*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, *per* FRY, J., at p. 561, following *Viney* v. *Chaplin* (1858), 3 De G. & J. 282, C. A.

(*b*) *Penrice* v. *Williams* (1883), 23 Ch. D. 353.

(*c*) *Kevan* v. *Crawford* (1877), 6 Ch. D. 29, 42, C. A; *Pawley* v. *Pawley*, [1905] 1 Ch. 593.

(*d*) *Bund* v. *Green*, [1875] W. N. 213.

(*e*) *Poisson and Woods* v. *Robertson and Turvey* (1902), 50 W. R. 260, C. A.

(*f*) R. S. C., Ord. 28, r. 11; *Warman* v. *Zeal*, [1871] W. N. 241; *Websdell* v. *Jenkins* (1902), 46 Sol. Jo. 484; *Penrice* v. *Williams, supra*.

(*g*) *Huntley* v. *Link* (1881), 26 Sol. Jo. 59.

(*h*) *Carr & Co.* v. *Bath Gas Light and Coke Co.* (1899), [1900] W. N. 265, n.; *Dunning* v. *Grosvenor Dairies, Ltd.*, [1900] W. N. 265.

without prejudice to the plaintiff's right to bring another action (*i*). Where an order is made dismissing an action unless within a specified time the plaintiff takes a certain step, and the plaintiff fails to do so, the action is at an end, and there is no jurisdiction to extend the time for such step, unless the order for dismissal is first got rid of (*k*).

SUB-SECT. 3.—*Enforceable; Declaratory.*

Declaratory judgments.

493. Judgments and orders are usually determinations of rights in the actual circumstances of which the court has cognisance, and give some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may now be given (*l*).

(*i*) *Woollam* v. *Hearn* (1802), 7 Ves. 211, 222; *Lindsay* v. *Lynch* (1804), 2 Sch. & Lef. 1, 12; *M'Neill* v. *Cahill* (1820), 2 Bli. 228, 269, H. L.; *Stevens* v. *Guppy* (1828), 3 Russ. 171, 185; *Rochester Corporation* v. *Lee* (1848), 1 Mac. & G. 467, 470.

(*k*) *Whistler* v. *Hancock* (1878), 3 Q. B. D. 83, followed in *Wallis* v. *Hepburn* (1878), 3 Q. B. D. 84, n., and *King* v. *Davenport* (1879), 4 Q. B. D. 402; and distinguished in *Burke* v. *Rooney* (1879), 48 L. J. (Q. B.) 601; *Carter* v. *Stubbs* (1880), 6 Q. B. D. 116, C. A.; *Metcalfe* v. *British Tea Association* (1881), 46 L. T. 31; *Script Phonography Co.* v. *Gregg* (1890), 59 L. J. (CH.) 406.

(*l*) R. S. C., Ord. 25, r. 5. Before 1852, binding declarations of right could be made only as ancillary to the grant of some present relief. The Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 50, empowered the Court of Chancery to make binding declarations of right without granting consequential relief, but only where the plaintiff was entitled, if he chose to ask for it, to some equitable relief (*Jackson* v. *Turnley* (1853), 1 Drew. 617; *Rooke* v. *Kensington* (*Lord*) (1856), 2 K. & J. 753; *Langdale* (*Lady*) v. *Briggs* (1856), 8 De G. M. & G. 391, C. A.; *Bright* v. *Tyndall* (1876), 4 Ch. D. 189; *Kevan* v. *Crawford* (1877), 6 Ch. D. 29, C. A.). By R. S. C., 1883, Ord. 25, r. 5, the court was authorised to make "binding declarations of right whether any consequential relief is or could be claimed or not" (*Ellis* v. *Bedford* (*Duke*), [1899] 1 Ch. 494, C. A., *per* LINDLEY, M.R., at p. 515; *West* v. *Sackville* (*Lord*), [1903] 2 Ch. 378, C. A.; *Brooking* v. *Maudslay, Son and Field* (1888), 38 Ch. D. 636; *Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1904] 2 K. B. 44, C. A. (the *dictum* of COLLINS, M.R. (*ibid.*, p. 49), in that case was commented on in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, by JOYCE, J., at p. 329); *Dyson* v. *A.-G.*, [1911] 1 K. B. 410, C. A., *per* COZENS-HARDY, M.R., at p. 417). The following are examples of declaratory judgments, namely: declarations have been granted though a claim to consequential relief was (a) not made (*Chapman* v. *Michaelson*, [1908] 2 Ch. 612; affirmed [1909] 1 Ch. 238, C. A.; *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633); or (b) abandoned (*London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242, C. A.; *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A.); or (c) refused (*Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705; *Islington Vestry* v. *Hornsey Urban Council*, [1900] 1 Ch. 695, C. A.), and see *Evans* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1887), 36 Ch. D. 626 (liability in certain possible future circumstances); *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1904), 9 Com. Cas. 289 (whether or not parties to a mercantile contract were bound thereby). Declarations have been refused where other procedure is prescribed by law (*Baxter* v. *London County Council* (1890), 63 L. T. 767; *Warter* v. *Warter* (1890), 15 P. D. 35; *Barraclough* v. *Brown*, [1897] A. C. 615; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, [1898] 2 Ch. 331; *West* v. *Sackville* (*Lord*), *supra*; *Yool* v. *Ewing*, [1904] 1 I. R. 434; *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, *supra*). The rule does not enable the court to make a declaration on a subject as to which relief is beyond its jurisdiction

SECT. 2. Classification.

When declaratory judgment may be obtained.

In order to justify an action which seeks merely a declaration asserting the plaintiff's right without awarding any specific relief, such as damages or an injunction, the declaration claimed must be ancillary to the putting in suit some legal right (*m*), though it may be as to future or reversionary as well as to present and existing rights or titles (*a*).

Power to make declaratory judgment discretionary.

The power to make a declaratory judgment is a discretionary one, and will only be exercised with care and caution. It will not as a rule be exercised where the declaration would be useless or embarrassing, or where some other statutory mode of proceeding is provided (*b*). There is power to make a declaratory judgment against the Crown (*c*). The case of persons claiming to be interested under a deed or other written instrument, and seeking the determination of any question of construction or a declaration as to their rights, is specially provided for (*d*).

SECT. 3.—*Modes of obtaining a Judgment.*

SUB-SECT. 1.—*Default of Appearance.*

Judgment by default of appearance.

494. In some cases judgment may be obtained through default of appearance. Should the defendant to an action fail to enter an appearance within the time allowed for that purpose (*e*), the plaintiff may proceed to obtain such relief as the nature of his claim admits. On a liquidated demand indorsed on the writ of summons

(*Barraclough* v. *Brown*, [1897] A. C. 615, *per* Lord DAVEY, at p. 623); see also *Burghis* v. *A.-G.*, [1911] 2 Ch. 139.

(*m*) *Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1904] 2 K. B. 44, C. A., *per* COLLINS, M.R., at p. 49. The court will not use its power where the plaintiff expects to be made a defendant to an action and seeks a declaration that his opponent has no good cause against him (*Dyson* v. *A.-G.*, [1911] 1 K. B. 410, C. A., *per* COZENS-HARDY, M.R., at p. 417); see also *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342, *per* WARRINGTON, J., at p. 358. A judgment declaratory of the validity of a mortgage of a ship and of the rights of mortgagee in possession may be granted in order to assist the plaintiffs in proceedings in a foreign court (*The Manar, Northern Trust, Ltd.* v. *Strachan Brothers* (1903), 89 L. T. 218); but not as against a defendant who had not made himself a party to such proceedings (S. C., as reported *sub nom. The Manar*, [1903] P. 95).

(*a*) *Barraclough* v. *Brown, supra; Curtis* v. *Sheffield* (1882), 21 Ch. D. 1, C. A.

(*b*) *Austen* v. *Collins* (1886), 54 L. T. 903, *per* CHITTY, J., at p. 905; *Re Berens, Berens* v. *Berens*, [1888] W. N. 95, *per* CHITTY, J.; *Honour* v. *Equitable Life Assurance Society of the United States*, [1900] 1 Ch. 852, *per* BUCKLEY, J., at p. 854; *Faber* v. *Gosworth Urban District Council* (1903), 88 L. T. 549, *per* EADY, J., at p. 550; *A.-G.* v. *Scott* (1904), 20 T. L. R. 630, *per* JELF, J., at p. 633; *North Eastern Marine Engineering Co.* v. *Leeds Forge Co., supra, per* ROMER, L.J., at p. 500; *Dyson* v. *A.-G.*, [1911] 1 K. B. 410, 417, C. A.; and see cases cited in note (*m*), *supra*.

(*c*) *Dyson* v. *A.-G., supra*.

(*d*) R. S. C., Ord. 54A. Such persons may apply by originating summons in any division of the High Court, but the court is not bound to determine a question which in its opinion ought not to be determined on originating summons. The rule does not enable the court to give any other relief, and is only intended to enable it to decide questions of construction, where the decision of those questions, whichever way it may go, will settle the litigation between the parties (*Lewis* v. *Green*, [1905] 2 Ch. 340). See, for instances of relief under this rule, *Cyclists' Touring Club* v. *Hopkinson* (1909), 101 L. T. 848; *Re Fremé's Contract*, [1895] 2 Ch. 256, 778, C. A.; *Bossert* v. *Jones* (1904), 48 Sol. Jo. 636; *Nicholls* v. *Nicholls* (1899), 81 L. T. 811; *Mason* v. *Schuppisser* (1899), 81 L. T. 147.

(*e*) See title PRACTICE AND PROCEDURE.

final judgment may be entered for the sum indorsed, interest, and costs (*f*). On a claim for pecuniary damages, or for detention of goods, alone or together with pecuniary damages, indorsed on the writ of summons, interlocutory judgment may be entered, and the amount of damages or the value of the goods, or both, are then ascertained by means of a writ of inquiry or in any other way directed by the court or judge (*g*). In an action for the recovery of land, judgment may be entered that the person whose title is asserted in the writ shall recover possession of the land but without costs (*h*). There may be indorsed on the writ a claim for mesne profits, arrears of rent, double value, or damages for breach of contract or wrong or injury to the premises claimed; and in that case the plaintiff may enter final judgment for the land, and interlocutory judgment for the other claims, the amounts to be assessed (*i*).

No order is necessary to enter judgment. The proper forms of judgment (*j*) must be taken to the proper officer (*k*), together with the writ, an affidavit of the service of the writ (*l*), and a certificate of no appearance (*m*).

(*f*) R. S. C., Ord. 13, r. 3. If there are several defendants, of whom one or more appear to the writ, and another or others fail to appear, the plaintiff may enter final judgment against the latter and issue execution thereon, and proceed with the action against the former (R. S. C., Ord. 13, r. 4). Judgment should be entered for the amount due at the time of entering, credit being given for payments, if any, made after action brought (*Hughes* v. *Justin*, [1894] 1 Q. B. 667, C. A.; *Hodges* v. *Callaghan* (1857), 2 C. B. (N. S.) 306). Judgment cannot be entered for more than the amount claimed on the writ (*Gee* v. *Bell* (1887), 35 Ch. D. 160; *Law* v. *Philby* (1886), 56 L. T. 230; *Law* v. *Philby* (No. 2) (1887), 56 L. T. 522). If the debt has been paid after service, judgment may be entered for costs alone (*Hughes* v. *Justin*, *supra*). Interest is payable at the rate specified, if any, or if no rate be specified, then at the rate of 5 per cent. per annum (R. S. C., Ord. 13, r. 3). As to interest on an I. O. U., see *Rodway* v. *Lucas* (1855), 10 Exch. 667.

(*g*) R. S. C., Ord. 13, r. 5. The assessment may be made by the sheriff under a writ of inquiry or by a master, official referee, or other officer of the court, if the court so order, without the issue of such a writ (R. S. C., Ord. 36, r. 57). The court or judge may order a statement of claim or particulars to be filed before any assessment of damages takes place (*ibid.*). After assessment, final judgment for the amount found due, together with costs, is entered as a matter of course. If there are several defendants, of whom one or more appear to the writ, and another or others fail to appear, the plaintiff may proceed as above described against the latter, and, at the same time as the value or damages are being assessed, the action may be tried against the former unless the court or judge otherwise direct (R. S. C., Ord. 13, r. 6). If a writ of summons is indorsed for a liquidated demand, and also with a claim for pecuniary damages, or for detention of goods (alone or combined with a claim for pecuniary damages), the plaintiff may proceed as above described against any defendant or defendants who may fail to appear to the writ (R. S. C., Ord. 13, r. 7).

(*h*) *Ibid.*, r. 8.

(*i*) *Ibid.*, r. 9.

(*j*) For forms, see R. S. C., Appendix F, Nos. 1 *et seq.*

(*k*) When the writ is issued from the Central Office, judgment is entered in the Writ, Appearance, and Judgment Department in the King's Bench Division, and in the Registrar's Department in the Chancery Division. When the writ is issued from the district registry, judgment is entered there; see note (*g*), p. 198, *post*.

(*l*) For forms, see R. S. C., Appendix B, No. 23. As to the mode of service, see title PRACTICE AND PROCEDURE.

(*m*) This is obtained in the Writ, Appearance, and Judgment Department of the Central Office, or in the district registry, as the case may be.

SECT. 3. **Modes of obtaining a Judgment.**

Where account claimed.

Where an account is claimed by special indorsement (*n*), or where the indorsement involves taking an account, and the defendant does not appear, or appears but fails to satisfy the court or judge that there is some preliminary question to be tried, on application by the plaintiff by summons an order will be made for proper accounts, with inquiries and directions usual in the Chancery Division in similar cases (*o*).

Other claims.

In actions other than those already mentioned, if the party served with the writ does not appear within the time limited for so doing, the action may proceed as if he had appeared (*p*).

Claim on bond.

495. Where the writ is indorsed with a claim on a bond for non-performance of any covenant or agreement contained in any indenture, deed, or writing (*q*), and the defendant does not appear, the plaintiff, without filing a statement of claim, may suggest a breach or breaches by delivering a suggestion thereof to the defendant or his solicitor. He may enter judgment for the amount of the penalty with a stay of execution until the damages are assessed (*r*).

Default of appearance to originating summons.

Where the respondent to an originating summons to which an appearance is required fails to appear, the applicant may apply for an appointment to hear the summons upon a certificate of no appearance (*s*).

SUB-SECT. 2.—*Default of Defence.*

Judgment where there is default in delivering defence.

496. Upon failure by a defendant who has appeared to deliver a defence to the claim within the time allowed for so doing (*a*), the plaintiff may, if a debt or liquidated demand only is claimed, enter final judgment for the amount claimed with costs (*b*). Where the claim is for pecuniary damages only, or for detention of goods (whether or not a claim for pecuniary damages is included), the

(*n*) Under R. S. C., Ord. 3, r. 8.

(*o*) R. S. C., Ord. 15, rr. 1, 2.

(*p*) R. S. C., Ord. 13, r. 12. The plaintiff must file an affidavit of service, and also a statement of claim unless the writ is specially indorsed under R. S. C., Ord. 3, r. 6 (*ibid.*; *Re Norman, Norman* v. *Norman*, [1900] W. N. 159; *Minton* v. *Metcalf* (1877), 46 L. J. (CH.) 584; *Dykes* v. *Thomson*, [1909] W. N. 104; *Greene* v. *St. John's Mansions, Ltd.*, [1900] W. N. 9). Judgment may be obtained on motion; see p. 194, *post*. As to delivery to a party who has not appeared, of pleadings etc. by filing, see R. S. C., Ord. 19, r. 10; and see, further, title PLEADING.

(*q*) *I.e.*, under stat. (1696) 8 & 9 Will. 3, c. 11, s. 8; see *Cope* v. *Bennett* (1911), 55 Sol. Jo. 251. As to the bonds to which this statute applies, see title BONDS, Vol. III., pp. 94, 102.

(*r*) R. S. C., Ord. 13, r. 14.

(*s*) *Ibid.*, r. 15.

(*a*) See title PLEADING. If the defence is delivered after the time allowed, but before judgment has been given, the plaintiff may be prevented from getting judgment, but the defendant may be ordered to pay the costs occasioned by his delay (*Gill* v. *Woodfin* (1884), 25 Ch. D. 707, C. A.; *Gibbings* v. *Strong* (1884), 26 Ch. D. 66, C. A.); or other order may be made as the judge thinks fit (see *Montagu* v. *Land Corporation of England* (1887), 56 L. T. 730).

(*b*) R. S. C., Ord. 27, r. 2. Should there be several defendants, of whom one or some but not all make such default, final judgment against him or them may be entered, and execution issued thereon without prejudice to the plaintiff's right to proceed against the defendant or defendants who plead (R. S. C. Ord. 27, r. 3).

plaintiff may enter interlocutory judgment and have the value of the goods, or the amount of the damages, or both, ascertained by means of a writ of inquiry, or in any other way directed by the court or judge (*c*). Final judgment for the liquidated demand and interlocutory judgment for damages or value of goods may be entered, where the plaintiff has claims of both kinds, and worked out respectively as above described (*d*).

In actions for recovery of land.

497. In actions for the recovery of land, judgment may be entered that the person whose title is asserted in the writ of summons shall recover possession of the land, with costs (*e*). If the writ also claims mesne profits, arrears of rent, or double value, in respect of the premises claimed, or part of them, or damages for breach of contract or wrong or injury to the premises claimed, interlocutory judgment may be signed as to these claims and the amount assessed in the manner already stated (*f*).

Where defence applies to part only of claim.

498. Where a defence applies only to a part of such claim or claims as above mentioned, the plaintiff may, by leave of the court or a judge, enter final or interlocutory judgment, as may be appropriate, in respect of the part of the alleged cause of action that is unanswered, if such part is a separate cause of action or is severable (*g*).

Practice on entering judgment.

499. In the above cases judgment may be entered without any order. The plaintiff must take to the proper department (*h*) the appropriate forms of judgment (*i*), the original writ, a statement of claim where it is not indorsed on the writ, and proof of entry of appearance.

Where motion for judgment necessary.

In all other actions than those above mentioned, whether the defendant has failed to appear or has appeared and then failed to deliver his defence, the plaintiff may set down the action on motion for judgment (*k*).

Failure to reply to counterclaim.

Where the default is on the part of the plaintiff in not delivering a reply to the counterclaim delivered by the defendant to the action, the defendant may proceed in the same way (*l*). So,

(*c*) R. S. C., Ord. 27, r. 4. If one or some of several defendants are in default, interlocutory judgment may be entered against the defendant or defendants so making default, and the assessment of damages or value, or both, will take place at the same time with the trial of the action against the defendant or defendants who plead (*ibid.*, r. 5).

(*d*) *Ibid.*, r. 6.

(*e*) *Ibid.*, r. 7. It is to be observed that in this case, if the judgment is entered for default of appearance, it does not include costs (R. S. C., Ord. 13, r. 8; see p. 185, *ante*). If the defence be limited to part only of the land claimed, judgment may be entered for recovery of that part to which the defence does not apply (R. S. C., Ord. 13, r. 8).

(*f*) R. S. C., Ord. 27, r. 8; and see the text, *supra*.

(*g*) R. S. C., Ord. 27, r. 9. Should there be a counterclaim, leave must be obtained before issuing execution on such judgment (*ibid.*).

(*h*) See note (*k*), p. 185, *ante*.

(*i*) For forms, see R. S. C., Appendix F, Nos. 1 *et seq.*

(*k*) R. S. C., Ord. 27, r. 11; and see p. 194, *post*.

(*l*) *Street* v. *Crump* (1883), 25 Ch. D. 68; *Higgins* v. *Scott* (1888), 21 Q. B. D. 10; *Jones* v. *Macaulay*, [1891] 1 Q. B. 221, C. A.; *Roberts* v. *Booth*, [1893] 1 Ch. 52; *Verney* v. *Thomas* (1888), 58 L. T. 20.

SECT. 3. Modes of obtaining a Judgment.

also, where in an action an issue arises between any parties other than the original plaintiff and defendant, and a party to such issue makes default in delivering any pleading, the opposite party may apply by motion to the court or a judge for such judgment as he may be entitled to upon the pleadings (*m*).

SUB-SECT. 3.—*Default of other Kinds.*

Default in delivering statement of claim etc.

500. If the plaintiff makes default in delivering a statement of claim where one has to be delivered, the defendant cannot enter judgment, but may apply to dismiss the action for want of prosecution (*n*). In like manner, upon failure to comply with an order to answer interrogatories, or for discovery or inspection of documents, a plaintiff is liable to have his action dismissed for want of prosecution, and a defendant to have his defence, if any, struck out, and to be dealt with as in default of pleading (*o*). If the plaintiff fails to give notice of trial in time, the defendant may give such notice or may apply for the dismissal of the action for want of prosecution (*p*).

SUB-SECT. 4.—*By Consent.*

Court may give effect to consent.

501. If either party is willing to consent to a judgment or order against himself, or if both parties are agreed as to what the judgment or order ought to be, due effect may be given by the court to such a consent on an application being made for such judgment (*q*).

Safeguards against fraud or oppression.

502. Certain safeguards against fraud or oppression are provided by the Rules of the Supreme Court. Where the defendant has not appeared or has appeared in person, no order to enter judgment by consent will be made unless the defendant attends before the judge and gives consent in person, or unless his written consent is attested by a solicitor acting on his behalf, except in cases where the defendant is a barrister, conveyancer, special pleader, or solicitor (*r*). Where the defendant has appeared by solicitor, the consent must be given by his solicitor or agent (*s*).

(*m*) R. S. C., Ord. 27, r. 14. The third party brought in as a defendant to a counterclaim is in the same position in this respect as the plaintiff in the action.

(*n*) R. S. C., Ord. 27, r. 1; and see, further, title PRACTICE AND PROCEDURE.

(*o*) R. S. C., Ord. 31, r. 21; Practice Masters' Rules (17); *Fisher* v. *Hughes* (1877), 25 W. R. 528; *Kennedy* v. *Lyell*, [1882] W. N. 137, C. A.; *Haigh* v. *Haigh* (1885), 31 Ch. D. 478. But no court would dismiss the action for failure to make an affidavit by a plaintiff who was not in a condition to make one (*Wilson* v. *Raffalovich* (1881), 7 Q.B.D. 553, C. A., *per* COTTON, L.J., at p. 561). See, further, title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*

(*p*) R. S. C., Ord. 36, r. 12. See, further, title PRACTICE AND PROCEDURE.

(*q*) The application is made to the master in chambers.

(*r*) R. S. C., Ord. 41, r. 10. In the Chancery Division the practice is for the defendant to appear in person and sign the registrar's book; see *Elliman* v. *Sequah*, [1903] W. N. 187.

(*s*) R. S. C., Ord. 41, r. 9. If the solicitor for the consenting party does not attend the summons, his consent should be in writing indorsed on the summons. A consent written on a summons and signed by a party, or his solicitor, must be initialled by a judge or master, or it will not be drawn up (Practice Masters' Rules (20)).

Persons authorised by the court to defend an action on behalf of others having the same interest cannot consent to judgment against them (*t*).

An order made by consent, but without the sanction or direction of the court, should contain a statement on its face that it is an order by consent (*a*).

Order to state that it is by consent.

Under the Debtors Act, 1869 (*b*), a consent order given by the defendant in a personal action, authorising the plaintiff to enter up judgment, whether or not subject to defeasance, must be filed with the proper officer (*c*) within twenty-one days from the time when the order is made; otherwise the order and any judgment thereon will be void (*d*).

Consent order to be filed.

503. Where in an action for a debt there is no defence, by consent of both parties there may be obtained a master's order to stay the proceedings, with a condition that final judgment may be entered and execution issued in the event of the debt and costs not being paid within a certain time (*e*).

Where there is no defence.

(*t*) *Rees* v. *Richmond* (1890), 62 L. T. 427.

(*a*) *Michel* v. *Mutch* (1886), 34 W. R. 251.

(*b*) 32 & 33 Vict. c. 62, s. 27.

(*c*) The order must be registered in the Bills of Sale Department of the Central Office; see title BILLS OF SALE, Vol. III., pp. 46 *et seq.*

(*d*) *Dimmock* v. *Bowley* (1859), 2 C. B. (N. S.) 542; *Jones* v. *Jaggar* (1886), 54 L. T. 731 (no leave to issue execution under R. S. C., Ord. 42, r. 23); *Re Smith, Ex parte Brown* (1888), 20 Q. B. D. 321, C. A. (void as against trustee in bankruptcy). The order, however, is not void as against the debtor himself (*Gowan* v. *Wright* (1886), 18 Q. B. D. 201, C. A.; *Vibart* v. *Coles* (1890), 24 Q. B. D. 364, C. A.), and therefore a bankruptcy notice may be based on the judgment signed in pursuance of an unregistered consent order (*Re Russell, Ex parte Russell* (1888), 5 Morr. 258, C. A.), and if the debtor should become bankrupt a proof may be put in in respect of the debt for which a judgment has been signed under such an order (*Re Brown, Ex parte Smith* (1886), 17 Q. B. D. 488, C. A.); and see title EXECUTION, Vol. XIV., p. 7. See *Levi* v. *Taylor*, (1903), 116 L. T. Jo. 64. But an order made by the judge on a submission to judgment at the trial need not be prefaced by the words "by consent," and so become liable to registration under the Debtors Act, 1869 (32 & 33 Vict. c. 62) (*Levi* v. *Taylor*, *supra*). A charging order on shares, made under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14, is not a consent by the judgment debtor to pay the judgment debt (*Moritz* v. *Stephan* (1888), 36 W. R. 779). Upon an action being called on in which the defendant had summoned a special jury, the defendant wished to consent to judgment without swearing the jury. The judge had the jury sworn and directed them by consent to enter a verdict for the amount claimed. In such circumstances the judge has a discretion as to hearing the case or not (*Samway* v. *Winch* (1893), 9 T. L. R. 552).

(*e*) *Bray* v. *Manson* (1841), 8 M. & W. 668; *Thorne* v. *Neal* (1842), 2 Q. B. 726; *Bayley* v. *Birch* (1894), 8 R. 647. Proceedings are not stayed during the time allowed for payment of the debt and costs, unless expressly so ordered (*Filmer* v. *Burnby* (1841), 2 Man. & G. 529; *Michael* v. *Myers* (1843), 6 Man. & G. 702). If the plaintiff has liberty to enter final judgment for debt and costs on a particular day, and the defendant dies in the meantime, judgment may not be entered *nunc pro tunc* as of the day when the consent was given, unless the order expressly so provides (*Wilkins* v. *Cauty* (1842), 1 Dowl. (N. S.) 855). The consent of an unmarried woman is not revoked by her subsequent marriage (*Thorpe* v. *Argles* (1844), 8 Jur. 602).

Where an order is made staying all proceedings in an action on terms settled by consent, such an order is not a judgment nor capable of being registered as

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504. An appeal from an order made by the High Court, or any judge thereof, by the consent of the parties, cannot be brought without the leave of the court or judge that made the order (*f*).

Appeal.

SUB-SECT. 5.—*On Warrant of Attorney.*

Judgment or warrant of attorney.

505. It was formerly a common practice for judgment to be entered up upon a warrant of attorney to confess judgment (*g*), but the practice is now almost obsolete. The warrant is filed in the Bills of Sale Department, and judgment is entered upon a certificate given by that department that it has been filed.

SUB-SECT. 6.—*Summary Judgment after Appearance.*

Judgment under Ord. 14.

506. Where the defendant appears to the writ, the plaintiff can in some cases obtain judgment summarily against him without proceeding to the trial of the action (*h*). There are certain conditions precedent before resort can be had to this procedure. The writ must be specially indorsed (*i*); and the plaintiff, or some

such (*Joynt* v. *MacCabe*, [1899] 1 I. R. 104). An order made in chambers by consent dismissing an action against a county council in respect of acts done in pursuance of the Local Government Act, 1894 (56 & 57 Vict. c. 71), and ordering the plaintiff to pay the defendants' costs, is equivalent to obtaining judgment by the defendants within the meaning of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b) (*Shaw* v. *Hertfordshire County Council*, [1899] 2 Q. B. 282, C. A.).

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; *Eade* v. *Winser & Son* (1878), 47 L. J. (Q. B.) 584; *Hadida* v. *Fordham & Sons, Ltd.* (1893), 10 T. L. R. 139, C. A.; *Aldam* v. *Brown*, [1890] W. N. 116, C. A. A consent order in an action based upon and intended to carry out an agreement between the parties can be set aside on any ground on which an agreement in the terms of the order could be set aside (*Wilding* v. *Sanderson*, [1897] 2 Ch. 534, C. A.; *Huddersfield Banking Co., Ltd.* v. *Lister & Son, Ltd.*, [1895] 2 Ch. 273, C. A., approving *Davenport* v. *Stafford, Frisby* v. *Stafford, Davenport* v. *Manners* (1845), 8 Beav. 503; *A.-G.* v. *Tomline* (1877), 7 Ch. D. 388).

(*g*) A warrant of attorney is an authority from a debtor to certain attorneys to appear for him in an action of debt at the suit of the intended plaintiff, and to confess the action or suffer judgment to go by default and to permit judgment to be entered up against him for the amount mentioned besides costs of the suit. The judgment is entered up in the Writ, Appearance, and Judgments Department of the Central Office. As to the requirements for the execution of such a deed, or of a *cognovit*, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 394. The practice of obtaining a judgment by a *cognovit actionem*, or more shortly *cognovit*, by which the defendant confessed the action and suffered judgment to be at once entered up against him, is now quite obsolete.

(*h*) R. S. C., Ord. 14, r. 1.

(*i*) *Anglo-Italian Bank* v. *Wells, Anglo-Italian Bank* v. *Davies* (1878), 38 L. T. 197, C. A. Summary judgment can be obtained only in respect of claims specially indorsed under R. S. C., Ord. 3, r. 6. Should a claim which is not authorised by that rule be included in the indorsement, the judge may amend the indorsement by striking out such claim, or may allow the action to proceed in respect of it, and deal independently with the claim or claims properly indorsed (R. S. C., Ord. 14, r. 1 (b)). Other amendments to a writ of summons may be made under R. S. C., Ord. 28, r. 2 (see *Roberts* v. *Plant*, [1895] 1 Q. B. 597, C. A.; *Haigh* v. *Purcell*, [1908] 2 I. R. 56, C. A., following *Guinness* v. *Caraher*, [1900] 2 I. R. 505, C. A.). A writ of summons may be specially indorsed with a claim arising under a final judgment of a superior court of common law (*Hodsoll* v. *Baxter* (1858), E. B. & E. 884, Ex. Ch., a decision on the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 25, but applicable to R. S. C., Ord. 3, r. 6; *Bickers* v. *Speight* (1888), 22 Q. B. D. 7); or

other person who can swear positively to the facts (*k*), must make an affidavit (*l*), verifying the cause of action (*m*) and the claim and stating that in his belief there is no defence (*n*).

How application made.

The application should be made by summons within a reasonable time after the appearance of the defendant (*o*), and the burden is on the plaintiff to justify delay (*p*).

If the defendant fails to appear on the return of the summons, an order for judgment will be made subject to an affidavit of service of the summons upon the defendant being filed.

How defendant may resist the application.

507. If the defendant appears he may successfully oppose the application if he can satisfy the master by affidavit (*a*), or by his own

under a foreign judgment (*Grant* v. *Easton* (1883), 13 Q. B. D. 302, C. A.), but not with a claim for arrears of alimony due under an order of the Probate, Divorce, and Admiralty Division (*Bailey* v. *Bailey* (1884), 13 Q. B. D. 855, C. A.), nor with any other claim which cannot be enforced by action (*ibid., per curiam*). A specially indorsed writ may combine a claim for the recovery of land with a claim for mesne profits or arrears of rent, and summary judgment may be obtained for both (*Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66, C. A.; *Hamill* v. *M'Donnell*, [1909] 2 I. R. 104, C. A.); see, further, title PRACTICE AND PROCEDURE.

(*k*) *Lagos* v. *Grunwaldt*, [1910] 1 K. B. 41, 46, C. A. If the affidavit is not made by the plaintiff himself, the deponent must state that he is duly authorised to make it, and should state the means he has of knowing the facts on which the action is founded (*ibid.*). An affidavit by the clerk to the plaintiff's solicitor who knew the facts has been held to be sufficient (*Hallett* v. *Andrews* (1897), 42 Sol. Jo. 68).

(*l*) For form of affidavit, see R. S. C., Appendix B, No. 22A.

(*m*) The cause of action may be verified generally and shortly, and it is not necessary to specifically verify all the particulars (*May* v. *Chidley*, [1894] 1 Q. B. 451; *Roberts* v. *Plant*, [1895] 1 Q. B. 597, 605, C. A.).

(*n*) This is a necessary part of the averment (*Kiely* v. *Massey* (1880), 6 L. R. Ir. 445, C. A.). The form "that the plaintiff is advised and believes that the defendant has no answer on the merits" has been held in Ireland to be sufficient (*Manning* v. *Moriarty* (1883), 12 L. R. Ir. 372).

(*o*) Where there are more defendants than one the plaintiff need not wait till all have appeared before applying for leave to enter judgment against those who have appeared. Where the defendants are sued as a firm the appearance of one partner is a sufficient appearance upon which to make the application for judgment against the firm (*Lysaght* v. *Clark & Co.*, [1891] 1 Q. B. 552, C. A; *Harris* v. *Beauchamp Brothers*, [1893] 2 Q. B. 534, C. A.). The pendency of third party proceedings does not prevent the application being made (*Thorne* v. *Steel*, [1878] W. N. 215, C. A.).

(*p*) *McLardy* v. *Slateum* (1890), 24 Q. B. D. 504. But it sometimes happens that a defence which has been delivered, itself discloses facts which make such application right and proper (*ibid., per curiam*). The plaintiff's affidavit must be made and filed before the summons is issued and a copy of it served with the summons four clear days before the return day (R. S. C., Ord. 14, r. 2). The master to whom the application is made has power to deal with it as if the plaintiff had been entitled to take out and had taken out a summons for directions (R. S. C., Ord. 30, r. 1 (c)); or, with the consent of the parties, an order may be made referring the action to a master (R. S. C., Ord. 14, r. 7), who will be in the position of a referee to whom an action is referred for trial under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14. See title ARBITRATION, Vol. I., p. 488.

(*a*) The affidavit need not necessarily be made by the defendant himself, though where he can make one he should do so (*Shelford* v. *Louth and East Coast Rail. Co.* (1879), 4 Ex. D. 317, C. A.). It should meet specifically the plaintiff's claim and affidavit, and state clearly and concisely what the defence is and the facts relied upon to support it. It is not sufficient to merely deny

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vivâ voce evidence (*b*) or otherwise, that he has a good defence to the action on the merits, or can disclose such facts as the master may deem sufficient to entitle him to defend (*c*), or by offering to bring into court the sum indorsed on the writ (*d*). He may also oppose the application by showing that the plaintiff's proceeding is irregular, though a mere technical objection will generally be met by allowing an amendment where that is possible.

Unconditional leave to defend.

508. Leave to defend may be given unconditionally or conditionally (*e*). The defendant should be given unconditional leave to defend in all cases where he shows that he has a *bonâ fide* defence (*f*), or adduces facts which may constitute a plausible defence (*g*), or that there is some substantial question of fact or law to be tried or investigated (*h*), or that he has a counterclaim which is closely

indebtedness without setting out the facts relied upon to negative it (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685, 704; *Whiteley's Case*, [1900] 1 Ch. 365, C. A.). Particulars as to the defence must always be given; it is not sufficient, for instance, to merely allege fraud without showing what the fraud consists of (*Wallingford* v. *Mutual Society*, *supra*). The affidavit must state whether the defence alleged goes to the whole of the plaintiff's claim or to part only, and, if to part only, to what part (R. S. C., Ord. 14, r. 3 (b)).

(*b*) There is power to order the defendant, or in the case of a corporation any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, books, or documents, or copies of, or extracts therefrom (R. S. C., Ord. 14, r. 3 (c)). But the power is only exercised in very exceptional cases (*Millard* v. *Baddeley*, [1884] W. N. 96).

(*c*) See *Wallingford* v. *Mutual Society*, *supra*.

(*d*) This does not mean that he need not make an affidavit if he make such an offer. He must show a reasonable ground of defence as well (*Crump* v. *Cavendish* (1880), 5 Ex. D. 211, C. A.; *Shelford* v. *Louth and East Coast Rail. Co.* (1879), 4 Ex. D. 317, C. A.). A *bonâ fide* plea of tender, together with an offer to bring the money into court, gives the defendant the right to defend the action (*Griffiths* v. *Ystradyfodwg School Board* (1890), 24 Q. B. D. 307).

(*e*) R. S. C., Ord. 14, r. 6.

(*f*) *Yorkshire Banking Co.* v. *Beatson* (2) (1879), 4 C. P. D. 213, 215; *Ray* v. *Barker* (1879), 4 Ex. D. 279, 284, C. A.; *Thompson* v. *Marshall* (1880), 41 L. T. 720, C. A.; *Manger* v. *Cash* (1889), 5 T. L. R. 271; *Lindsay* v. *Martin* (1889), 5 T. L. R. 322; *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L. T. 262, H. L.; *Runnacles* v. *Mesquita* (1876), 1 Q. B. D. 416, 418.

(*g*) *Yorkshire Banking Co.* v. *Beatson* (2), *supra*; *Ray* v. *Barker*, *supra*; *Ironclad* (*Australia*) *Gold Mining Co.* v. *Gardner* (1887), 4 T. L. R. 18; *Saw* v. *Hakim* (1888), 5 T. L. R. 72; *Ward* v. *Plumbley* (1890), 6 T. L. R. 198; *Bowes* v. *Caustic Soda and Chlorine Syndicate* (1893), 9 T. L. R. 328; *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, 62, C. A.; *Lynde* v. *Waithman*, [1895] 2 Q. B. 180, 184, C. A. A mere statement that he has a defence or a mere denial of indebtedness is insufficient (*Wallingford* v. *Mutual Society*, *supra*, at p. 704; *Whiteley's Case*, *supra*, at p. 369).

(*h*) *Ironclad* (*Australia*) *Gold Mining Co.* v. *Gardner*, *supra*; *Saw* v. *Hakim*, *supra*; *Jones* v. *Stone*, [1894] A. C. 122, P. C.; *Woodall* v. *Cresswell* (1893), 9 T. L. R. 619; *Electric and General Contract Corporation* v. *Thomson-Houston Electric Co.* (1893), 10 T. L. R. 103; *Western National Bank of New York* v. *Perez* (1890), 6 T. L. R. 366; *Wells* v. *Allott*, [1904] 2 K. B. 842, 848, C. A.; *Codd* v. *Delap* (1905), 92 L. T. 510, 511, H. L.; *Truffault Cycle and Tube Manufacturing Co.* v. *Saunders* (1897), 14 T. L. R. 40; *Electric and General Contract Corporation* v. *Thomson-Houston Electric Co.*, *supra*; *Warner* v. *Bowlby* (1892), 9 T. L. R. 13. The plaintiff may show by affidavit in reply that the defence set up is a sham or is unfounded in fact, but in order to succeed he must make this clear beyond all reasonable doubt by conclusive documentary or other evidence (*Saw* v. *Hakim*, *supra*; *Davis* v. *Spence* (1876), 1 C. P. D. 719; *Girvin* v. *Grepe* (1879), 13 Ch. D. 174; *Rotheram* v. *Prest* (1879), 49 L. J. (Q. B.) 104).

connected with the claim in the action or may be pleaded in defence (*i*).

Conditional leave to defend.

509. Leave to defend may be given conditionally upon the defendant paying the amount in dispute into court or otherwise giving security for it (*k*), or subject to other conditions (*l*). But this practice is rarely resorted to except where the defendant consents, or the defence set up is so vague and unsatisfactory that there is doubt as to whether there is any defence (*m*).

Where defendant admits part of claim.

510. If the defendant admits part of the claim, or appears to have a defence to part only thereof, he may be permitted to defend in part, and the plaintiff may have summary judgment for the admitted or undefended part of his claim, subject to such terms as the judge may think fit to impose (*n*). Where there are several defendants, of whom some appear to the judge to have, and others not to have, a defence, the plaintiff may be permitted to enter final judgment against the latter and issue execution thereon, without prejudice to his right to proceed with his action against the former (*o*).

Power to give directions.

511. Where leave to defend is given the master has power to and should give all such directions as to the further conduct of the action as if a summons for directions had been issued, and may

(*i*) *Whiteley's Case*, [1900] 1 Ch. 365, 369, C. A.; *Sheppards & Co.* v. *Wilkinson* (1889), 6 T. L. R. 13, C. A.; *Ford* v. *Harvey* (1893), 9 T. L. R. 328; *United Gutta Percha Co.* v. *Welch* (1897), 14 T. L. R. 154, C. A.). But the mere existence of a counterclaim not connected with the claim does not necessarily entitle a defendant to leave to defend (*Anglo-Italian Bank* v. *Wells*, *Anglo-Italian Bank* v. *Davies* (1878), 38 L. T. 197, C. A.; *Rotheram* v. *Priest* (1879), 49 L. J. (Q. B.) 104; *Newman* v. *Lever* (1887), 4 T. L. R. 91), but if the counterclaim is substantial, overlapping the plaintiff's claim, unconditional leave to defend may be given, although part of the plaintiff's claim is admitted (*Court* v. *Sheen* (1891), 7 T. L. R. 556).

(*k*) R. S. C., Ord. 14, r. 6; *Ray* v. *Barker* (1879), 4 Ex. D. 279, 284, C. A.; *Purkiss* v. *Low* (1886), 3 T. L. R. 63, C. A.; *Hong Kong and Shanghai Banking Co.* v. *Java Agency Co.* (1891), 8 T. L. R. 58, C. A. Money so paid into court is paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment (*Re Ford, Ex parte The Trustee*, [1900] 2 Q. B. 211; *Bird* v. *Barstow*, [1892] 1 Q. B. 94, C. A.). If the defendant succeeds he is entitled to have the money paid out, though an appeal is pending (*Yorkshire Banking Co.* v. *Beatson* (2) (1879), 4 C. P. D. 213; *Wing* v. *Thurlow* (1893), 10 T. L. R. 51, 151, C. A.).

(*l*) *E.g.*, that the action be tried without a jury (*Wolfe* v. *De Braam* (1899), 81 L. T. 533, C. A.; *Macartney* v. *Macartney* (1909), 25 T. L. R. 818).

(*m*) *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L. T. 262, H. L.; *Manger* v. *Cash* (1889), 5 T. L. R. 271; *Ward* v. *Plumbley* (1890), 6 T. L. R. 198. Where the master is satisfied that there is some sum due, though the defendant disputes the whole amount claimed, the master may order payment of part of the sum as a condition for giving leave to defend as to that part (*Hodgson* v. *Bell* (1890), 24 Q. B. D. 525, C. A.; *Hoby & Co., Ltd.* v. *Birch* (1890), 62 L. T. 404).

(*n*) R. S. C., Ord. 14, r. 4. The terms imposed may relate to suspension of execution, or payment of the amount levied or part thereof into court by the sheriff or the taxation of costs or otherwise (*ibid.*). There is no power to make the granting of leave to defend a disputed part of the claim to which a *primâ facie* defence is shown conditional on payment of the part admitted (*Dennis* v. *Seymour* (1879), 4 Ex. D. 80). But leave to defend may be given to a defendant who disputes the whole claim, on condition of part payment to the plaintiff (*Hodgson* v. *Bell*, *supra*; *Hoby & Co., Ltd.* v. *Birch*, *supra*).

(*o*) R. S. C., Ord. 14, r. 5.

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order that the action be forthwith set down for trial (*p*). If he thinks a prolonged trial unnecessary he may order the action to be put in the short cause list (*q*).

Renewal of application.

512. If the master dismisses the summons without really adjudicating on the merits, a second summons may be issued (*r*). An application may also be renewed on fresh materials (*s*), and where unconditional leave to defend has been given in consequence of a technical defect in the writ, a second application may be made after the defect has been cured (*a*).

The order.

513. If the defendant appears to the summons and fails to successfully oppose the application, the master makes an order (*b*) that the plaintiff be at liberty to enter final judgment for the amount indorsed on the writ (*c*) with interest, if any (*d*), or for the recovery of the land with or without mesne profits, as the case may be (*e*), and costs (*f*). Such an order is not the final judgment itself, but only a step in the procedure towards obtaining it (*g*). The order must be drawn up in the proper department (*h*), and judgment must be entered upon it in the proper place (*i*) and on the appropriate forms (*k*).

SUB-SECT. 7.—*Motion for Judgment before Trial.*

Cases in which motion for judgment may be made.

514. The chief instances (*l*) in which judgment may be obtained by motion for judgment are: (1) in actions where the

(*p*) R. S. C., Ord. 14, r. 8 (a); *Wolfe* v. *De Braam* (1899), 81 L. T. 533, C. A.; *Macartney* v. *Macartney* (1909), 25 T. L. R. 818; *Langton* v. *Roberts* (1893), 10 T. L. R. 492, C. A.; *Bolton* v. *Thorne-George* (1894), 38 Sol. Jo. 683; *Piggott* v. *Bartlett* (1899), 34 L. J. 602.

(*q*) R. S. C., Ord. 14, r. 9 (a). If an action is put in this list payment into court should not be ordered (*Held* v. *Simons* (1894), 38 Sol. Jo. 340).

(*r*) *Sykes Brewery Co.* v. *Chadwick* (1891), 7 T. L. R. 258.

(*s*) *Wagstaff* v. *Jacobowitz*, [1884] W. N. 17.

(*a*) *Dombey & Sons* v. *Playfair Brothers*, [1897] 1 Q. B. 368, C. A.

(*b*) For forms, see R. S. C., Appendix K, Nos. 1—8.

(*c*) Judgment is not given for the amount indorsed on the writ if in fact less is due, but only for the amount actually due (*Hughes* v. *Justin*, [1894] 1 Q. B. 667, C. A.; *Gerrard* v. *Clowes*, [1892] 2 Q. B. 11; *Lawrence & Sons* v. *Willcocks*, [1892] 1 Q. B. 696, C. A.; *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66, C. A.). Judgment can only be given for a definite amount (*Smith* v. *Edwardes* (1888), 22 Q. B. D. 10, C. A.).

(*d*) As to when a claim for interest can be indorsed, see title MONEY AND MONEY-LENDING.

(*e*) A tenant has the same right to relief after a judgment under the order for recovery of land on the ground of forfeiture for non-payment of rent as if the judgment had been given after trial (R. S. C., Ord. 14, r. 10).

(*f*) As to the amount of costs, see title PRACTICE AND PROCEDURE.

(*g*) *Re a Debtor, Ex parte the Debtor*, [1903] W. N. 6; *Re Gurney, Clifford* v. *Gurney*, [1896] 2 Ch. 863.

(*h*) The Summons and Order Department in the King's Bench Division and Chancery Chambers in the Chancery Division.

(*i*) The Writ, Appearance, and Judgment Department of the Central Office or the district registry, as the case may be.

(*k*) The order and writ must be produced together with an affidavit of service of the summons if that is required by the order, and evidence that any other condition precedent (if any) to the entering of the judgment has been complied with or, where leave to defend is given in terms, that the terms have not been complied with; for forms, see R. S. C., Appendix F, Nos. 5 *et seq.*

(*l*) See also titles ADMIRALTY, Vol. I., p. 99; INFANTS AND CHILDREN, Vol. XVII., p. 142.

writ is indorsed with some claim other than a liquidated claim or a claim for damages or detention of goods, or a claim for the recovery of land, and the defendant has not appeared, or has appeared and not delivered his defence (*m*); (2) where there are admissions of fact either in the pleadings or otherwise (*n*); (3) where in the Chancery Division the action is ordered, under the summons for directions, to be set down on motion for judgment without pleadings, to be heard as a short cause (*o*); (4) where the plaintiff is entitled to have the defence struck out (*p*); (5) where it is sought to make a judgment of the House of Lords an order of the High Court (*q*); (6) where an order has been made for certain issues or questions of fact to be tried or determined, and they or some of them have been so tried or determined (*r*).

Judgment where there are admissions of fact.

515. Where admissions of fact have been made on the pleadings or otherwise, any party may at any stage of the action apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order or give such judgment as they think just (*s*).

How application made.

516. In the Chancery Division the application may be made by motion and the action set down as a short cause on motion for judgment (*t*). Where there are several plaintiffs the motion must be made by all of them (*a*). If the defendant offers to submit to an order being made in chambers, and the plaintiff nevertheless moves

(*m*) See pp. 184, 186, *ante*.

(*n*) R. S. C., Ord. 32, r. 6; see the text, *infra*.

(*o*) See *Re Pringle & Co., Pawnall* v. *Pringle & Co.* (1903), 89 L. T. 743. As to whether such an order should be made in a debenture-holder's action, see *Re Kitson Empire Lighting Co., Ltd., Higgs* v. *the Company*, [1910] W. N. 154. As to the necessity for a statement of claim, see *Re Dupont, Ltd., Dupont* v. *Dupont, Ltd.*, [1906] W. N. 14; *Re Cadogan and Hans Place Estate* (No. 2), *Ltd., Graham* v. *Cadogan and Hans Place Estate* (No. 2), *Ltd.*, [1906] W. N. 112; *Re Kitson Empire Lighting Co., Ltd., Higgs* v. *the Company, supra*; and see title PLEADING.

(*p*) See titles PLEADING; PRACTICE AND PROCEDURE.

(*q*) This is sometimes necessary with regard to applications as to costs; see *Van Grutten* v. *Foxwell* (1897), 41 Sol. Jo. 715; *British Dynamite Co.* v. *Krebs* (1879), 11 Ch. D. 448. As to the procedure on appeal to the House of Lords, see title PARLIAMENT.

(*r*) R. S. C., Ord. 40, rr. 7, 8; *Larkin* v. *Lloyd* (1891), 64 L. T. 507; *Bolivia Republic* v. *National Bolivian Navigation Co.* (1876), 24 W. R. 361.

(*s*) R. S. C., Ord. 32, r. 6. In order that judgment may be obtained under this rule the admissions must be clear and unequivocal (*Bennett* v. *Moore* (1876), 1 Ch. D. 692; *Gilbert* v. *Smith* (1876), 2 Ch. D. 686; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735; *Hughes* v. *London, Edinburgh and Glasgow Assurance Co.* (1891), 8 T. L. R. 81, C. A.; *Landergan* v. *Feast* (1886), 55 L. T. 42, C. A., reversing 54 L. T. 369). The power to order judgment is discretionary (*Mellor* v. *Sidebottom* (1877), 5 Ch. D. 342, C. A.; *Re Wright, Kirke* v. *North*, [1895] 2 Ch. 747; *Jenney* v. *Mackintosh* (1889), 61 L. T. 108, C. A.). See, further, title PLEADING.

(*t*) *Cook* v. *Heynes*, [1884] W. N. 75; *Caroli* v. *Hirst* (1883), 31 W. R. 839; *Cooper-Dean* v. *Badham*, [1908] W. N. 100.

(*a*) *Re Wright, Kirke* v. *North, supra*; see *Re Crigglestone Coal Co., Stewart* v. *Crigglestone Coal Co.*, [1906] 1 Ch. 523, where all the debenture-holders interested were not parties.

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in court for judgment, he may only be allowed such costs as would have been incurred on a summons in chambers (*b*), unless, in the circumstances of the case, the judge thinks the party justified in setting it down as a short cause on motion for judgment (*c*).

In the King's Bench Division the application should, as a rule, be made to a master by summons at chambers (*d*), but may be made to the court by notice of motion (*e*).

Practice on setting down motion.

517. In all other cases the plaintiff must set down the motion for judgment in the proper department (*f*). It cannot be set down without leave after the lapse of a year from the time when the party seeking to set it down first became entitled to do so (*g*). At least two clear days must elapse between the service (*h*) of the notice of motion and the day named in the notice for hearing the motion (*i*). As a rule, no evidence other than affidavits as to

(*b*) *Allen* v. *Oakey* (1890), 62 L. T. 724; *London Steam Dyeing Co.* v. *Digby* (1888), 57 L. J. (CH.) 505.

(*c*) *Cooper-Dean* v. *Badham*, [1908] W. N. 100.

(*d*) *Padgett* v. *Binns*, [1884] W. N. 10; *Croft* v. *Collingwood*, [1884] W. N. 33.

(*e*) See the text, *infra*.

(*f*) Where there are several defendants, not all of whom are in default, the action may be set down at once as against the defendant or defendants who are in default, only if the cause of action is severable (R. S. C., Ord. 27, r. 12). In an action to perpetuate testimony, after the time for delivery of defence had expired, the plaintiff on motion obtained an order that the action should proceed, notwithstanding the defendant's default, and that he should be at liberty to examine witnesses as if the pleadings had been closed (*Bute (Marquis)* v. *James* (1886), 33 Ch. D. 157). As to partition actions, see *Senior* v. *Hereford* (1876), 4 Ch. D. 494; *Ripley* v. *Sawyer* (1886), 31 Ch. D. 494. In the King's Bench Division the motion is set down in the Crown Office, and in the Chancery Division at the registrar's office. Fee, £2 on a *præcipe*. In the King's Bench Division the papers to be left are:—(1) Where no appearance has been entered: an office copy of the statement of claim filed in default indorsed to the effect that no defence has been delivered, a plain copy of the statement of claim, an office copy of the notice of motion filed in default and a plain copy, and the original writ; (2) where appearance entered: two copies of the notice of motion and of the statement of claim, a certificate of default in delivering defence, and the original writ. An affidavit of service of the notice of motion may also be left then or subsequently. Where the motion is for judgment where the defence has been struck out or for judgment on admissions in the pleadings two copies of the order to strike out or two copies of the admissions must be left in addition. In the Chancery Division two copies of the notice of motion, and two copies of the pleadings, if any, must be left, and if set down as a short cause two copies of the draft minutes of the judgment. Where it is desired that the action shall be heard as a "short cause" the notice of motion should contain a statement to that effect and that no further notice will be given of its having been so marked. A certificate of counsel that the action is fit to be so heard and two copies of minutes of the proposed judgment or order must be left on setting down the motion or the notice must show the exact terms of the judgment or order asked for (*De Jongh* v. *Newman* (1887), 56 L. T. 180; *Re Automatic Machines (Haydon and Urry's Patents), Ltd., Graafe* v. *Automatic Machines (Haydon and Urry's Patents), Ltd.*, [1902] W. N. 236). The cause must be marked as a "short cause" at least one clear day before it can be put on the paper to be heard, and if the additional papers have not been left on setting down the notice of motion they must be left with the judge's clerk one clear day before the case is put on the paper (Practice Note, [1901] W. N. 78; *Chapman* v. *Brooke* (1902), 46 Sol. Jo. 215).

(*g*) R. S. C., Ord. 40, r. 9.

(*h*) As to service, see title PRACTICE AND PROCEDURE.

(*i*) R. S. C., Ord. 52, r. 5.

service or default is allowed (*k*). Motions are heard before a judge in open court (*l*), and judgment is drawn up and entered as in the case of a judgment after trial (*m*).

SUB-SECT. 8.—*At or after Trial.*

(i.) *In General.*

518. If none of the modes of obtaining judgment which have already been considered apply, the action must be set down for trial. The ordinary mode of trial is by a judge in open court with or without a jury. But there are other modes available if the court thinks fit to resort to them (*n*). Setting down for trial.

In the Chancery Division many applications are made by originating summons, and are disposed of by a judge in chambers (*o*). But if the action is commenced by writ, judgment is obtained by a trial in court as in the King's Bench Division.

Notice of trial must be given, before the action is set down (*p*), by the plaintiff or other party in the position of plaintiff (*q*) or by the defendant if the plaintiff fails to give notice in the appointed time (*r*). Notice of trial.

After notice of trial has been given the action must be set down by leaving the necessary papers (*s*), and paying the fees (*t*) in the proper department (*a*). Setting down the action.

In due course the action comes on for trial in open court, in the King's Bench Division before a judge either with or without a jury (*b*), and in the Chancery Division before a judge alone. The points at issue are decided after evidence (if any) and argument (*c*). Proceedings at the trial.

If either party should fail to appear when an action is called on, the party appearing may have judgment subject to proving his claim or counterclaim so far as the burden of proof lies on him (*d*). Non-appearance of a party.

(*k*) As to evidence generally, see titles EVIDENCE, Vol. XIII., pp. 415 *et seq.*; PRACTICE AND PROCEDURE.

(*l*) In the King's Bench Division motions to make a judgment of the House of Lords a judgment of the High Court are made before a Divisional Court.

(*m*) See p. 199, *post*.

(*n*) See title ARBITRATION, Vol. I., pp. 482, 487 *et seq.*

(*o*) See title PRACTICE AND PROCEDURE.

(*p*) R. S. C., Ord. 36, r. 15. As to when notice must be given and the length of notice, see title PRACTICE AND PROCEDURE.

(*q*) R. S. C., Ord. 36, r. 11.

(*r*) *Ibid.*, r. 12.

(*s*) Two copies of the pleadings, including the writ and a copy of the notice of trial, must be left (R. S. C., Ord. 36, r. 30).

(*t*) *Ibid.*; the fee is £2, payable in the Chancery Division by an impressed stamp on a *præcipe*, and in the King's Bench Division, on the copy pleadings lodged on setting down.

(*a*) In the King's Bench Division, in the Associates' Department or in the district registry, as the case may be; in the Chancery Division in the Registrar's Department. As to the time, see title PRACTICE AND PROCEDURE.

(*b*) As to what cases must be tried with a jury, see title PRACTICE AND PROCEDURE.

(*c*) R. S. C., Ord. 37, r. 1. See titles BARRISTERS, Vol. II., pp. 409 *et seq.*; EVIDENCE, Vol. XIII., pp. 594 *et seq.*

(*d*) R. S. C. Ord. 36, rr. 31, 32. In favour of a plaintiff the judgment will be for the relief claimed in his statement of claim and such other relief as is incidental thereto (*Stone* v. *Smith* (1887), 35 Ch. D. 188; *Kingdon* v. *Kirk* (1888), 37 Ch. D. 141); but not for relief beyond (*Barker* v. *Furlong*, [1891] 2 Ch. 172).

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Judge must direct judgment to be entered.

519. It is the duty of the judge at or after a trial to direct judgment to be entered as he thinks right (*e*); and his direction that any judgment be entered for any party absolutely is a sufficient authority to the proper officer to enter judgment accordingly (*f*).

If the action be tried with a jury, the judge directs judgment to be entered in accordance with their verdict. If it be tried without a jury, the judge directs judgment to be entered in accordance with his own findings.

Entry of judgment.

The judgment or order having been drawn up and passed must be entered in books kept for the purpose by the proper officer (*g*).

Where the Judicature Acts or the Rules of the Supreme Court provide that judgment may be entered on the filing of any affidavit or the production of any document, the entering officer must examine the affidavit or document produced, and, if the same is regular and complete, enter judgment accordingly (*h*).

Where the entering officer is empowered to enter judgment pursuant to any order or certificate or return to any writ, he may enter judgment upon the production of such order or certificate, sealed with the seal of the court, or of such return (*i*).

Final and interlocutory judgment.

520. A judgment may be drawn up in favour of a plaintiff, containing a final judgment as to part of his claim and an interlocutory judgment as to the remainder; and, when after a trial, judgment is directed in favour of the plaintiff against some of the defendants,

Judgment may be given without proof of service of notice of trial (*Baird* v. *East Riding Club and Racecourse Co.*, [1891] W. N. 144, following *Chorlton* v. *Dickie* (1879), 13 Ch. D. 160). In favour of a defendant who has no counterclaim the judgment will be a dismissal of the action and will have the same effect as if the action had been dismissed on the merits (*Armour* v. *Bate*, [1891] 2 Q. B. 233, C. A.; *Re Orrell Colliery and Firebrick Co.* (1879), 12 Ch. D. 681; *Re South American and Mexican Co.*, [1895] 1 Ch. 37, C. A.). No proof of service of notice of trial is necessary (*Dacres-Patterson* v. *Foote*, [1890] W. N. 70). Should neither party appear the action is struck out of the list. There is power to order the case to be restored where non-appearance was caused by illness, but the relief may be on terms as to payment of costs (*Birch* v. *Williams* (1876), 24 W. R. 700; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A.).

(*e*) R. S. C., Ord. 36, r. 39; *Peters* v. *Perry & Co.* (1894), 10 T. L. R. 366 (judgment entered for defendants where the jury disagreed). "It is the business of judges to send into the world, not doubts, but decisions" (*Lindo* v. *Belisario* (1795), 1 Hag. Con. 216, *per* Sir WILLIAM SCOTT, at p. 220; cited in *Lanston Monotype Corporation, Ltd.* v. *Anderson*, [1911] 2 K. B. 15, *per* HAMILTON, J., at p. 23).

(*f*) R. S. C., Ord. 36, r. 42.

(*g*) R. S. C., Ord. 41, r. 1. The proper officer is, in the Chancery Division, the registrar (R. S. C., Ord. 62, r. 2). All judgments in the King's Bench Division, if entered in London, are entered in the Writ, Appearance, and Judgment Department at the Central Office (R. S. C., Ord. 42, r. 2). Judgments in causes or matters which are proceeding in a district registry should in most cases be entered in the district registry (R. S. C., Ord. 35, rr. 1—3; *Townend* v. *Kirkham*, [1898] 1 Q. B. 51, C. A.). Judgment cannot be entered upon the award of an arbitrator (Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 12, 13, 15; R. S. C., Ord. 54, r. 4F; *Re A Bankruptcy Petition, Ex parte Caucasian Trading Corporation*, [1896] 1 Q. B. 368, C. A.; *Re A Bankruptcy Notice*, [1907] 1 K. B. 478, C. A., *per* FLETCHER MOULTON, L.J., at p. 482); and see title ARBITRATION, Vol. I., p. 473.

(*h*) R. S. C., Ord. 41, r. 6.

(*i*) *Ibid.*, r. 7.

but in favour of other defendants against the plaintiff, the judgment may be entered up on one form (*k*).

It is not necessary to wait till costs have been taxed before entering judgment. The amount of the costs, when ascertained by taxation, is added to the judgment afterwards (*l*).

Judgment for costs.

(ii.) *In the King's Bench Division.*

521. In the King's Bench Division (*m*) the judgment directed to be entered is recorded by the proper officer (*n*) upon a certificate, and in order to enter judgment the judgment must be drawn up, by the party obtaining it, on the proper forms (*o*) and taken, with the associate's certificate and the filed copy of the pleadings, to the proper department (*a*).

Entering judgment in the King's Bench Division.

The judgment is prepared by the party obtaining it, and submitted to the proper officer before entering.

(iii.) *In the Chancery Division.*

522. In the Chancery Division the drawing up of the judgment in an action tried in court, or of the order made on originating summons in chambers, is a more complicated process. In order that the judgment or order may be reduced to writing in the registry or office of the court, the party who desires to prosecute it must bespeak the written record (*b*), and leave with the registrar his counsel's brief and any other documents which may be required for the purpose (*c*); and from those materials, together with the registrar's own note, a draft or minute of the judgment or order is prepared (*d*). The judgment or order must, unless otherwise

Entering judgment in Chancery Division.

(*k*) Practice Masters' Rules (17). A counterclaim is really in the nature of a cross-action (*Stumore* v. *Campbell & Co.*, [1892] 1 Q. B. 314, C. A.; *Hewitt & Co.* v. *Blumer & Co.* (1886), 3 T. L. R. 221, C. A.; but see *Westacott* v. *Bevan*, [1891] 1 Q. B. 774; *Griffiths* v. *Patterson* (1888), 22 L. R. Ir. 656, C. A.; *Bankes* v. *Jarvis*, [1903] 1 K. B. 549, *per* CHANNELL, J., at p. 553). As to the form of judgment when plaintiff succeeds on the claim and the defendant on a counterclaim, see R. S. C., Ord. 21, r. 17; *Lowe* v. *Holme* (1883), 10 Q. B. D. 286; *Shrapnel* v. *Laing* (1888), 20 Q. B. D. 334, C. A.; *Atlas Metal Co.* v. *Miller*, [1898] 2 Q. B. 500, C. A.; *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, [1909] 2 K. B. 344, C. A.; *Sharpe* v. *Haggith* (1911), 27 T. L. R. 541.

(*l*) After taxation the officer who signed the judgment enters on the original judgment the particulars of the master's certificate of taxation, and initials and completes the office copy judgment. Execution for the costs can then issue. See also R. S. C., Ord. 42, r. 18, and title EXECUTION, Vol. XIV., p. 38. As to the old practice, see note (*f*), p. 206, *post*.

(*m*) R. S. C., Ord. 36, r. 39.

(*n*) *I.e.*, the associate.

(*o*) R. S. C., Ord. 41, rr. 1, 8; for forms, see R. S. C., Appendix F, Nos. 11 *et seq.* The fee is £1 on the original judgment and an office copy stamp on the copy.

(*a*) *I.e.*, the Writ, Appearance, and Judgment Department. Entering a judgment by the proper officer is popularly called "signing" the judgment.

(*b*) R. S. C., Ord. 62, r. 2.

(*c*) *Ibid.*, r. 4; *Yeatman* v. *Read* (1865), 14 W. R. 123. The judgment or order must be bespoken, and the briefs and other documents must be left with the registrar, within three days after the judgment or order is pronounced or finally disposed of by the court or judge (R. S. C., Ord. 62, r. 5, as amended by R. S. C., July, 1911).

(*d*) R. S. C., Ord. 62, rr. 7—14.

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ordered, be drawn up and entered within fourteen days from the date thereof, and if not drawn up and entered within that time, the registrar must report to the judge in writing why the provisions of the rule have not been complied with, and give his opinion as to whether any, and which, of the parties or their solicitors are responsible for the delay. The judge may thereupon direct the parties or solicitors to attend before him, and, unless a satisfactory explanation is forthcoming, make such order as to costs of drawing up and entering the judgment or order as he thinks fit. He may also direct that, as against the party responsible for the delay, the time for appealing from the judgment or order shall run as from the date when it ought to have been drawn up and entered (*e*). In the case of orders made on summonses in chambers in the Chancery Division, the formal order is drawn up from the note made and initialled by the judge or master himself on the appropriate document (*f*).

Minutes of the judgment.

523. It is the duty of counsel engaged in the cause to take a note of the substance of the judgment as it is delivered, usually by indorsement on their briefs. Should these indorsements differ, the registrar's note will be conclusive, and no affidavit of the grounds on which the judgment proceeded is necessary or admissible (*g*). Where an order is made by arrangement between the parties, no evidence can afterwards be received as to what terms were intended. Should there be a dispute on this point, the order will be treated as not having been made (*h*). The registrar may require the matter to be mentioned to the court if he should meet with difficulty in settling the order (*i*). When the registrar has settled the minutes of the judgment and communicated them to the parties, if no objection is made, the judgment is passed (*j*) and entered (*k*). If, after (*l*) the registrar has settled the minutes, any difficulty or dispute should arise thereon, any party may apply to the court by

(*e*) R. S. C., Ord. 62, r. 14 a (R. S. C., July, 1911).

(*f*) Every order made in chambers which has not been made by the judge personally must be marked in the margin with the name of the master responsible for the order (R. S. C., Ord. 55, r. 15, as amended by R. S. C., July, 1911).

(*g*) *Ex parte Skerratt* (1884), 28 Sol. Jo. 376, C. A.

(*h*) *Per* PEARSON, J., [1884] W. N. 91. Such disputes may be avoided by at once drafting minutes of the agreed order, and having them signed by the respective counsel of the parties (Daniell, Chancery Practice, 642).

(*i*) *Prince* v. *Howard* (1851), 14 Beav. 208.

(*j*) A judgment or order is said to be passed when the registrar has marked his initials in the margin at the foot of the last page, as an authority to the clerk of entries to enter it in the registrar's books (R. S. C., Ord. 5, r. 13; Ord. 61, r. 19; Ord. 62, rr. 7—14). As to orders to be acted on by the paymaster, see Supreme Court Funds Rules, 1905, r. 24. Where the order is of a simple kind the registrar settles it himself, but in other cases gives notice to the parties of an appointment to settle and pass (*Hart* v. *Tulk* (1849), 6 Hare, 611, 616; *Hargrave* v. *Hargrave* (1851), 3 Mac. & G. 348; *Smith* v. *Acton* (No. 2) (1859), 26 Beav. 559).

(*k*) A judgment, after it has been settled by the registrar, cannot be altered in the absence of any interested party (*Major* v. *Major* (1848), 13 Jur. 1), nor can a consent be arbitrarily withdrawn (*Harvey* v. *Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. 249, C. A.), and when it has been passed and entered it cannot be altered without the sanction of the court (*Blake* v. *Harvey* (1885), 29 Ch. D. 827, C. A.). See, further, p. 212, *post*.

(*l*) Not before (*Prince* v. *Howard*, *supra*).

motion to vary the minutes, specifying the particular matters to which he objects (*m*). The application may be made at any time before the minutes are passed and entered (*n*), but not thereafter (*o*). On the motion to vary minutes, the only question is, What was the order made? (*p*). No enlargement of the order can be permitted, unless all parties consent, or it is impossible to ascertain what was ordered. In the latter event, the case will be put in the paper to be argued again (*q*). The application must be made to the court which made the order (*r*), and no appeal lies from the decision of a judge with reference to the minutes of his order (*s*).

Form and contents of judgment.

524. A judgment or order, in its final shape, usually contains, in addition to formal parts, a preliminary or introductory part, showing the form of the application upon which it was made, the parties appearing, any consents, waivers, undertakings, or admissions given or made, so placed as to indicate whether they relate to the whole judgment or only to part thereof, and a reference to the evidence upon which the order is based; and a substantive or mandatory part, containing the order made by the court. Where this latter part is not of a simple character, declarations of rights will as a rule come first, followed by directions, *e.g.*, for accounts and inquiries (*t*) for the purpose of ascertaining or giving effect to such rights, and lastly, consequential directions, *e.g.*, for payment of money, delivery or sale of property, dealings with funds, taxation and payment of costs (*u*).

Evidence.

525. In all actions and matters tried with witnesses the judgment or order must, unless the judge for some special reason otherwise directs, be drawn up without entering the evidence (*a*). But if the judgment or order be appealed against, the appellant must within four days after service of the notice of appeal take an appointment before the registrar for the purpose of settling a schedule of the evidence used at the trial, and in settling such schedule the same procedure is to be followed as in the drawing

(*m*) *Tennant* v. *Trenchard* (1869), 4 Ch. App. 537, 545. Or liberty may be given at the trial to mention the case again on the minutes (*Hood* v. *Cooper* (1859), 26 Beav. 373). A motion to vary minutes was not a proceeding known to the common law (*Re Swire, Mellor* v. *Swire* (1885), 30 Ch. D. 239, C. A., *per* LINDLEY, L.J., at p. 241).

(*n*) *General Share and Trust Co.* v. *Wetley Brick and Pottery Co.* (1882), 20 Ch. D. 130, C. A.

(*o*) *Re Swire, Mellor* v. *Swire, supra.*

(*p*) *British Dynamite Co.* v. *Krebs* (1877), 25 W. R. 846: *Robinson* v. *Barton Local Board* (1882), 21 Ch. D. 621, C. A.; *South Wales Mineral Rail. Co.* v. *Davies* (1896), 31 Sol. Jo. 110, C. A.

(*q*) Memorandum, [1876] W. N. 296.

(*r*) *Reece* v. *Reece* (1836), 1 My. & Cr. 372; *General Share and Trust Co.* v. *Wetley Brick and Pottery Co., supra.*

(*s*) *James* v. *Jones* (1892), 67 L. T. 584, C. A.

(*t*) R. S. C., Ord. 33, r. 7; and see title PRACTICE AND PROCEDURE.

(*u*) Orders directing funds to be lodged in court or funds in court to be paid or otherwise dealt with must have annexed to them respectively a lodgment or payment schedule bearing a formal heading similar to that of the order (R. S. C., Ord. 62, r. 16; Supreme Court Funds Rules, 1905, rr. 5, 6).

(*a*) R. S. C., Ord. 62, r. 14 b (R. S. C., July 1911).

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up of orders (*b*). If there is any dispute as to what evidence shall be entered as read the matter must be adjourned to the judge before whom the action or matter was tried, to be decided by him. The judge may thereupon give directions as to the costs of the adjournment as he thinks fit, but subject to such direction the costs of settling the schedule are costs in the appeal. The schedule must be signed by the registrar, but must not be entered nor the judgment or order amended so as to incorporate it unless the Court of Appeal so direct (*c*).

Recitals as to the evidence on which judgment is founded.

Other judgments, though merely directing issues or inquiries, should contain a statement of the evidence on which they are founded (*d*), together with a statement of any objections to evidence that may have been taken at the hearing of the cause, and of the decision of the court upon such objections, the evidence objected to being entered as read or not read

(*b*) R. S. C., Ord. 62, rr. 7—14.

(*c*) R. S. C., Ord. 62, r. 14 c (R. S. C., July, 1911). As to marking bundles of correspondence for identification, and supplying copies for the use of the Court of Appeal, see R. S. C., Ord. 62, r. 14 d (R. S. C., July, 1911).

(*d*) It seems to have been the ancient Chancery practice, in drawing up orders, to recite the facts which had been proved by the evidence given (*Brend* v. *Brend* (1684), 1 Vern. 213; *Bonham* v. *Newcomb* (1684), 1 Vern. 214). But the modern view is that the registrar's duty is to say what evidence was admitted, not what was thereby established (*Trulock* v. *Robey* (1847), 2 Ph. 395; *Boyd* v. *Petrie* (1870), 19 W. R. 221; *Bousquet* v. *Bent* (1873), 21 W. R. 749 (decree referring to evidence given by a witness who was not sworn); *M'Mahon* v. *Burchell* (1846), 2 Ph. 127; *Parker* v. *Morrell* (1848), 2 Ph. 453). Every document which it is intended to use in evidence ought to be formally put in and marked by the registrar (*Watson* v. *Rodwell* (1879), 11 Ch. D. 150, C. A.); and only documents which have been actually and specifically referred to at the trial should be entered as read in the judgment (*Mainwaring* v. *Clarina* (*Lord*), [1910] W. N. 14, not following *Law* v. *Law*, [1904] W. N. 152). The judge marks on his copy correspondence each letter read, and no others should be entered in the judgment. If the letters read are numerous, these may be entered as read "a bundle of (so many) letters which is identified by the signature of the registrar." Admissions should be stated in the order (*A.-G.* v. *Murdoch* (1850), 14 Jur. 588, 597; *Watson* v. *Rodwell*, *supra*; *Mainwaring* v. *Clarina* (*Lord*), *supra*; R. S. C., Ord. 61, r. 15 (written admissions of evidence to be filed before an order in which they are entered as read is passed)).

Where a decree has been made in favour of a defendant without his evidence having been heard, there should be entered as read all the evidence which he could have put in at the hearing (*Manby* v. *Bewicke* (1857), 3 Jur. (N. S.) 685). Affidavits should be entered as read if notice has been given of intention to read them, though they were not actually read nor filed specially for the purpose of the applications (*Catholic Printing and Publishing Co., Ltd.* v. *Wyman* (1862), 9 Jur. (N. S.) 436). Evidence on the merits should be entered as read, though the case was disposed of on a preliminary objection, without the necessity of adducing evidence (*Re Lingard, Ex parte Bellott* (1817), 2 Madd. 259, 261; but see *Camille* v. *Donato* (1865), 11 Jur. (N. S.) 26, and *Re Brampton and Longtown Rail. Co., Shaw's Claim* (No. 2) (1875), 10 Ch. App. 186, C. A.). In drawing up an order made by consent, it is not right to enter evidence as read (*Blakey* v. *Shaw* (1887), 31 Sol. Jo. 555). Where the plaintiffs failed on their own evidence, without cross-examination, and their bill was dismissed with costs, the defendants' evidence was entered, not as read, but for the purposes of costs only (*Singer Manufacturing Co.* v. *Wilson* (1876), 2 Ch. D. 434, 448, C. A.; S. C. in the House of Lords, *sub nom.* "*Singer*" *Machine Manufacturers* v. *Wilson* (1877), 3 App. Cas. 376, 381—383 (remarks on the inconvenience of the form of the decree, which treated as read some of the plaintiffs' affidavits which in fact had not been read)). On an appeal to the House of Lords no further evidence can be given; nothing can be looked at but the decree itself, and what is stated or referred to in it (*Fernie* v. *Young* (1866), L. R. 1 H. L. 63).

accordingly (*e*). Objections to admissibility should be disposed of at the time, and evidence should not be entered as having been read "*de bene esse*, saving just exceptions" (*f*). When drawing up an order, the registrar may, with the consent of the parties, make such alterations in it as his experience leads him to believe the court would sanction, and these are binding on the parties (*g*).

SUB-SECT. 9.—*In the Court of Appeal.*

Judgment of the Court of Appeal.

526. The result of an appeal or application for a new trial made to the Court of Appeal is embodied in an order of the Court of Appeal drawn up by the associate in the King's Bench Division and by the registrar in the Chancery Division (*h*). No judgment is entered upon it, but the order is enforceable as though it were a judgment (*i*).

SECT. 4.—*Drawing up of Orders.*

General rule.

527. Apart from orders which are in the nature of judgments (*k*), it is necessary, as a general rule, to draw up all orders, whether made in chambers or in court. But to this rule there are certain exceptions, and, in such cases, the order need not be drawn up unless the court or a judge so directs (*l*). Such exceptions are orders not embodying any special terms, nor including any special directions, but simply enlarging the time for taking any proceeding or doing any act, or giving leave (1) for the issue of any writ other than a writ of attachment (*m*); (2) for the amendment of any writ or pleadings; (3) for the filing of any document; or (4) for any act to be done by any officer of the court other than a solicitor (*n*). It

What orders need not be drawn up.

(*e*) *Watson* v. *Parker* (1846), 2 Ph. 5; *A.-G.* v. *Murdoch* (1850), 14 Jur. 588, 597. But it is not the practice to insert in the judgment as drawn up any mention of a refusal of leave to amend (*Laird* v. *Briggs* (1881), 16 Ch. D. 663, C. A.).

(*f*) *Parker* v. *Morrell* (1848), 2 Ph. 453; *Handford* v. *Handford* (1846), 5 Hare, 212; *Drake* v. *Drake* (No. 1) (1858), 25 Beav. 641. An affidavit used on a motion but not filed until afterwards may be entered in the order as read, if so doing does not interfere with the date of the order; *e.g.*, if filed on the same day (*Re King & Co.'s Trade-mark*, [1892] 2 Ch. 462, C. A.). It is not the duty of a judge of first instance, where the plaintiff's case has failed, to hear the defendant's evidence, merely to put the defendant in a better position in the event of an appeal (*Hammerton* v. *Honey* (1876), 24 W. R. 603).

(*g*) *Davenport* v. *Stafford*, *Frisby* v. *Stafford*, *Davenport* v. *Manners* (1845), 8 Beav. 503). As to making additions to a judgment after it has been pronounced, *e.g.*, adding inquiries, see R. S. C., Ord. 33, rr. 2, 3; *Barber* v. *Mackrell* (1879), 12 Ch. D. 534, C. A.; *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170; *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A.

(*h*) See p. 199, *ante*; and as to appeals generally, see title PRACTICE AND PROCEDURE.

(*i*) See title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 279 *et seq.* As to enforcing judgments generally, EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*k*) See as to these, pp. 176 *et seq.*, *ante*.

(*l*) R. S. C., Ord. 52, r. 14.

(*m*) Notwithstanding this rule it is the usual practice to require an order for the issue of a writ for service out of the jurisdiction, or for the issue of a concurrent writ, or for the renewal of a writ, to be drawn up and filed when issuing or renewing the writ. So also orders giving leave to issue execution are frequently drawn up.

(*n*) Orders for the assessment of damages by a master after interlocutory judgment must be drawn up (Practice Masters' Rules (20)).

SECT. 4. Drawing up of Orders.

is not usual in practice to draw up an order giving leave to appeal.

Authentication of such orders.

Where the order need not be drawn up, it may be carried into effect upon the production of a note or memorandum of the order signed by the judge, master, registrar, or district registrar as the case may be (*o*).

Procedure in the King's Bench Division.

528. In the King's Bench Division, in the case of orders which must be drawn up, it is the duty of the party having the custody of the summons, notice, or other document, on which the master's or judge's order is indorsed, to lodge it forthwith in the Summons and Order Department. If he fails to do so, the other side or any party affected by the order may give him notice to do it, and on non-compliance with the notice may apply to the master by summons for delivery to him of the summons, notice, or document. If after lodgment of the summons, notice, or document the party having the conduct of it does not draw it up within four days, any person affected by it may do so (*p*).

Entry of orders in Chancery Division.

529. In the Chancery Division orders relating to steps in the procedure, which are drawn up in Chancery chambers, need not be entered in the Registrar's Department before the issue of an attachment for disobedience thereof (*q*). In other cases the order must be entered, and cannot be enforced till after entry (*r*), even if the non-entry is due to a mistake of the entering clerk (*s*).

Power to stay drawing up.

530. If before an order, whether made in court or chambers, has been drawn up, the attention of the judge is called to a point which has not been sufficiently considered, the judge may stay the drawing up of the order and rehear the matter (*t*).

SECT. 5.—*Date of Judgments and Orders.*

Date of judgments pronounced in Court.

531. A judgment pronounced by the court or by a judge in court is entered as of the date when it was so pronounced, unless the court or judge otherwise order (*a*). By special leave of the court or a judge such judgment may be ante-dated or post-dated (*b*).

(*o*) R. S. C., Ord. 52, r. 14.

(*p*) Regulations issued by the masters in the King's Bench Division dated 7th August, 1906.

(*q*) R. S. C., Ord. 62, r. 2 (1).

(*r*) *Adkins* v. *Bliss*, *Vale* v. *Bliss* (1858), 2 De G. & J. 286, C. A.

(*s*) *Tolson* v. *Jervis* (1845), 8 Beav. 364, 366; *Ballard* v. *Tomlinson* (1883), 52 L. J. (CH.) 656.

(*t*) See p. 213, *post*.

(*a*) R. S. C., Ord. 41, r. 3.

(*b*) *Ibid.*; the power to ante-date should be exercised with caution and on good grounds (*Borthwick* v. *Elderslie Steamship Co.* (No. 2), [1905] 2 K. B. 516, C. A., *per curiam*; *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, 573 (between the trial of an action and delivery of judgment therein one of the defendants died; the judgment was dated as of the last day of the trial); *Baller* v. *Delander* (1715), cited in *Cumber* v. *Wane* (1719), 1 Stra. 426; and in *Taylor* v. *Matthews* (1716), 10 Mod. Rep. 325; *Cumber* v. *Wane*, *supra* (judgment entered *nunc pro tunc* when defendant died pending *cur. adv. vult*); *Davies* v. *Davies* (1804), 9 Ves.

SECT. 5. Date of Judgments and Orders.

In all other cases the entry is dated as of the day on which the requisite documents are left with the proper officer for the purposes of such entry (*c*).

Where damages assessed after interlocutory judgment.

Where an interlocutory judgment for damages to be assessed has been entered, the amount of the damages, after it has been ascertained, is added to the judgment already entered, and the whole judgment is therefore dated as of that day on which the interlocutory judgment was entered.

Date of order.

An order if and when drawn up must be dated the day of the week, month, and year on which it was made, unless the court or a judge otherwise direct (*d*).

Where order directs act to be done.

Where an order directs an act to be done within a limited time and the order is not drawn up in due course, the order may, by leave of the master, be drawn up as of the date when it was made, but extending the time limited until after service of the order. Where no special time is limited, the order may be drawn up, by leave of the master, as of the original date simply (*e*).

461; *Donne* v. *Lewis* (1805), 11 Ves. 601 (decree lost; redrawn and entered after eighteen years); *Lawrence* v. *Richmond* (1820), 1 Jac. & W. 241 (so after twenty-three years); *Belsham* v. *Percival* (1849), 8 Hare, 157 (decree dated 1847 entered by order made in 1851); *Collinson* v. *Lister* (1855), 20 Beav. 355; *Russell* v. *Tapping* (1855), 3 W. R. 379 (order drawn up and passed, but not entered; after nine years the court directed a reissue of it, on the affidavit of the solicitor who had obtained it); *Troup* v. *Troup* (1868), 16 W. R. 573; *Ex parte St. Paul's* (*Dean and Chapter*) (1870), 18 W. R. 724 (order not entered, the original lost; ordered to be redrawn from the minutes in the minute-book and entered *nunc pro tunc*); *Turner* v. *London and South-Western Rail. Co.* (1874), L. R. 17 Eq. 561 (the plaintiff died after the hearing and before judgment; the court ordered the judgment to be dated as of the date of the hearing); *Moore* v. *Robinson* (1878), 27 W. R. 312 (defendant died after trial and before judgment on further consideration; judgment entered as of the day of the trial); *Winkley* v. *Winkley* (1881), 29 W. R. 628 (after judgment, which referred to hereditaments described in the statement of claim, the statement of claim was amended in respect of such description, and the date of the judgment was altered, no party objecting); *Re Jones* (*S. A.*), *Bullis* v. *Jones* (1891), 39 W. R. 619 (order drawn up and acted on, but never passed and entered: on *ex parte* applications the order was directed to be redrawn up, passed, and entered *nunc pro tunc*). Reversal of a judgment by the Court of Appeal has been held not to be a sufficient ground for antedating the judgment to the date of the first trial so that interest may run from then on the sum recovered under the judgment of the Court of Appeal (*Borthwick* v. *Elderslie Steamship Co.* (No. 2), [1905] 2 K. B. 516, C. A.). Where a judgment or order has not been entered within the proper time (see p. 200, *ante*), no order to enter *nunc pro tunc* is necessary; but in all cases in which such orders were formerly made as of course it is sufficient to leave with the clerk of entries a memorandum in writing, countersigned by the Chancery registrar (R. S. C., Ord. 52, r. 15). If an affidavit verifying formal evidence is allowed to be produced after the judgment is given, the judgment should be dated as of the day when the affidavit is filed (*Patch* v. *Ward*, [1866] W. N. 166). But this does not apply to merely formal affidavits of service. Where these are sworn and filed on a day subsequent to that on which the order was made, the order is not to be post-dated, but a memorandum of the date of filing the affidavit is to be made on the margin.

(*c*) R. S. C., Ord. 41, r. 4; *Re Gurney*, *Clifford* v. *Gurney*, [1896] 2 Ch. 863; and compare *Patch* v. *Ward*, *supra*.

(*d*) R. S. C., Ord. 52, r. 13. An order is "made" when it is pronounced, not when it is drawn up (*Re Risca Coal and Iron Co.*, *Ex parte Hookey* (1862), 4 De G. F. & J. 456). An order ought never to bear a fictitious date (*Ashley* v. *Taylor* (1878), 10 Ch. D. 768).

(*e*) Practice Masters' Rules (20).

SECT. 5. Date of Judgments and Orders.

532. The date of the judgment or order is important in that the judgment or order generally takes effect from that date (*f*). Interest on the judgment debt and costs runs from the date given to the judgment (*g*).

Effect of date of judgment.

But where a plaintiff fails in a court of first instance on a claim for unliquidated damages, and on appeal an order is made that judgment be entered in his favour for damages to be ascertained, the judgment does not as a matter of course take effect from the date of the trial of the action, so as to entitle the plaintiff to interest from that date upon the amount recovered, but will only take effect from the date of the judgment of the Court of Appeal, unless an order is made by that court ante-dating its judgment (*h*).

It is doubtful whether the same rule applies where the amount claimed at the trial was a fixed sum, and the only question for decision was whether it was due or not (*i*).

Garnishee proceedings.

Further, garnishee proceedings can be commenced before judgment is actually entered (*k*). But where it is necessary to enter judgment, execution may not issue till the entry (*l*), and for the purposes of appeal the time runs from the time the judgment is signed, entered, or otherwise perfected, except in the case of an order in chambers, when it runs from the time it was made or the appellant first had notice of it, and in the case of a refusal of an application, when it runs from the date of the refusal (*m*).

Execution.

Appeal.

Service.

Again, an order as a rule takes effect from the day it was made—

(*f*) R. S. C., Ord. 41, rr. 3, 4 (judgments); R. S. C., Ord. 52, r. 13 (orders). As to the priority of judgments, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 215 *et seq.*; COMPANIES, Vol. V., pp. 516 *et seq.*; EXECUTION, Vol. XIV., p. 26; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 244 *et seq.* At common law the rule was that judgments related back to the first day of the term (*Swann* v. *Broome* (1764), 3 Burr. 1595; *Lyttleton* v. *Cross* (1824), 3 B. & C. 317; *Greenway* v. *Fisher* (1827), 7 B. & C. 436; *Whittaker* v. *Whittaker* (1828), 8 B. & C. 768). Prior to the Judicature Acts a judgment was not complete for all purposes until the costs had been taxed (*Butler* v. *Bulkeley* (1823), 8 Moore (C. P.), 104; *Wright* v. *Lewis* (1840), 4 Jur. 1112; *Doe* d. *Ellis* v. *Owens* (1842), 9 M. & W. 455, *per* PARKE, B.; *Peirce* v. *Derry* (1843), 4 Q. B. 635). It was not, however, devoid of all effect before such taxation (*Fisher* v. *Dudding* (1841), 9 Dowl. 872; *Walter* v. *De Richemont* (1844), 6 Q. B. 544; *Fewins* v. *Lethbridge* (1859), 4 H. & N. 418).

(*g*) *West Ham Union Guardians* v. *St. Matthew, Bethnal Green* (*Churchwardens etc.*), [1895] 1 Q. B. 662, C. A.; *Re Clagett, Ex parte Lewis*, [1888] W. N. 100, C. A. (debt); *Boswell* v. *Coaks* (1887), 57 L. J. (CH.) 101, C. A. (costs). But where an order is made that an account be taken and that the defendant do pay what shall be found due, interest runs from the date of the certificate of the amount due (*A.-G.* v. *Carrington* (*Lord*) (1843), 6 Beav. 454); and in ordinary payment of costs, previously taxed, out of a fund the court may direct payment of interest from the date of the certificate (*Carter* v. *Carter* (1863), 2 New Rep. 512).

(*h*) *Borthwick* v. *Elderslie Steamship Co.* (No. 2), [1905] 2 K. B. 516, C. A.

(*i*) *Ibid.*, *per* COLLINS, M.R., at p. 521. Where judgment was given for the defendants by the court of first instance and the Court of Appeal in an action upon a policy of marine insurance, but the judgment was reversed by the House of Lords, interest was allowed from the date of the original judgment (*Macbeth & Co.* v. *Maritime Insurance Co.* (1908), 24 T. L. R. 559).

(*k*) *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A.

(*l*) See title EXECUTION, Vol. XIV., p. 5.

(*m*) R. S. C., Ord. 58, r. 15; see title PRACTICE AND PROCEDURE.

which, as we have seen, is its date (*n*)—without its being drawn up or served, unless it is otherwise expressed (*o*). But some orders by their nature require service to make them operative (*p*).

SECT. 5. Date of Judgments and Orders.

SECT. 6.—*Service of Judgments and Orders.*

When service not necessary.

533. It is not necessary to serve a judgment or order for the recovery by, or payment to, any person of money before issuing execution thereon (*q*), unless the order directs payment within a certain time after service of the order (*r*).

When service necessary.

But a judgment or order requiring a person to do an act thereby ordered must be served (*s*) on the person who is required to obey it within the time limited for doing such act (*t*).

Memorandum to be indorsed.

The judgment or order must state the time, or the time after service of the judgment or order, within which the act is to be done (*u*); and a copy thereof

(*n*) R. S. C., Ord. 52, r 13. As to conversion by an order for sale of real property, see title EQUITY, Vol. XIII., pp. 111, 112, and *Fauntleroy* v. *Beebe* (1911), 55 Sol. Jo. 497, C. A.

(*o*) R. S. C., Ord. 52, r. 13; *Script Phonography Co.*, v. *Gregg* (1890), 59 L. J. (CH.) 406 (order dismissing action in default of pleading); *Hopton* v. *Robertson* (1884), 23 Q. B. D. 126, n. (order for judgment unless money paid into court); *Farden* v. *Richter* (1889), 23 Q. B. D. 124 (order for judgment in default of answer to interrogatories); *Blount* v. *Whitely* (1898), 79 L. T. 635, C. A. (receiving order in bankruptcy). See also *Re Manning* (1885), 30 Ch. D. 480, C. A., *per* COTTON, L.J., at p. 482. In *Metcalfe* v. *British Tea Association* (1881), 46 L. T. 31, it was held that the order did not take effect till it was drawn up and served. This is apparently in conflict with *Script Phonography Co.* v. *Gregg*, *supra*. In each case an order was made dismissing the action unless the plaintiff took a step within a limited time; such step was not taken within the time limited, and the order was drawn up after such time had expired. In the earlier case the time for appealing against the order was enlarged, and in the later the action was treated as at an end on the expiration of the limited time. But in the later case the order had not been appealed from, nor had any application for that purpose been made.

(*p*) As to service, see the text, *infra*.

(*q*) *Land Credit Co. of Ireland* v. *Fermoy* (*Lord*), *Ex parte Munster* (1870), 5 Ch. App. 323; *Re* ——, *a Solicitor* (1884), 33 W. R. 131; *Hopton* v. *Robertson*, *supra*; and see title EXECUTION, Vol. XIV., pp. 5, 6.

(*r*) R. S. C., Ord. 41, r. 5. As to issuing execution in such a case, see title EXECUTION, Vol. XIV., p. 5.

(*s*) R. S. C., Ord. 41, r. 5. As to personal service in the case of a consent order where the party ordered to do the act knows of it, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 313; *Century Insurance Co., Ltd.* v. *Larkin*, [1910] 1 I. R. 91. As to dispensing with personal service where the party to be served evades service, see *ibid.* This rule is not limited to cases where personal service is required, *e.g.*, it applies to an order for discovery which may be served upon the solicitor for the party (*Hampden* v. *Wallis* (1884), 26 Ch. D. 746, C. A.; *Little* v. *Roberts* (1874), 30 L. T. 367; *Re Mulcaster*, *Dalston* v. *Nanson* (1878), 47 L. J. (CH.) 609; and see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 312; see, further, title EXECUTION, Vol. XIV., pp. 5, 6.

(*t*) *Re Chambers*, *Duffield* v. *Elwes* (1840), 2 Beav. 268; *Adkins* v. *Bliss*, *Vale* v. *Bliss* (1858), 2 De G. & J. 286, C. A. Time runs from the pronouncement of the judgment or order in court, but to obviate difficulty which may arise from delay in drawing up and perfecting the order and the necessity for a supplemental order, it is usual to insert after the fixed time the words "or subsequently within four days after service" (*Re Tuck*, *Murch* v. *Loosemore*, [1906] 1 Ch. 692, C. A.). These words ought always to be inserted, even without express instruction (*ibid.*).

(*u*) "Forthwith" is an indication of time, but where the time is not more

SECT. 6. **Service of Judgments and Orders.**

duly indorsed (*v*) must be served on the person who is to obey the order (*w*).

Rule only applies to mandatory judgments.

The rule only applies to a mandatory judgment or order to do something, and not to an order which is merely prohibitive or negative, in the nature of an injunction against the doing of an act (*a*). It does not apply to orders for payment of costs (*b*), nor to orders giving leave to enter judgment if certain steps in procedure are not taken within a specified time (*c*), though, if the order be to do an act to which the rule applies, it applies to an order extending the time to do the act (*d*).

Where service not necessary.

The necessity of serving orders relating to steps in procedure before judgment does not apply where the party to be served has himself to take the next step under the order (*e*).

Notice in lieu of service.

Where the order need not be drawn up a written notice must be given, in lieu of service, by the solicitor of the party on whose application the order was made (*f*).

Service of notice of judgment.

In actions for the administration of estates, for the execution of trusts, and for partition or sale of hereditaments, where an order has

specifically denoted, or no time at all is stated, the order cannot be enforced till a supplemental order (called generally a "four-day" order, though the time is not always four days) has been obtained on motion (*Needham* v. *Needham* (1842), 1 Hare, 633; *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, 266, C. A.; *Halford* v. *Hardy* (1899), 81 L. T. 721, following *Thomas* v. *Nokes* (1868), L. R. 6 Eq. 521). See also *Re Launder, Launder* v. *Richards*, [1908] W. N. 49; *Re Wilde*, [1910] W. N. 128, C. A. In *Carter* v. *Roberts*, [1903] 2 Ch. 312, 321, where the time for payment of money into court was omitted, it was suggested that there might be cases of contempt so gross as to justify attachment without any supplemental order. See also *Re Higg's Mortgage, Goddard* v. *Higg*, [1894] W. N. 73, and title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 311 *et seq.*

(*v*) For the form of the indorsement required, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 311, note (*l*). The indorsement need not be in the exact words; it is sufficient that words to the same effect have been used (*Treherne* v. *Dale* (1884), 27 Ch. D. 66, C. A.). But there must be some such indorsement to enable the order to be enforced (*Hampden* v. *Wallis* (1884), 26 Ch. D. 746, C. A.; *Pace* v. *Pace* (1892), 67 L. T. 383; *Savage* v. *Bentley* (1904), 90 L. T. 641); and an affidavit in support of a motion for attachment which does not state that the copy of the order actually served was so indorsed is bad (*Stockton Football Co.* v. *Gaston*, [1895] 1 Q. B. 453).

(*w*) Where the order directs more than one person to be served, the order may be enforced against anyone who has been served before service has been effected on the other or others (*Re Ellis, Hardcastle* v. *Ellis* (1906), 95 L. T. 80). As to personal service, see p. 207, *ante*.

(*a*) *Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209, 212, followed in *Hudson* v. *Walker* (1894), 64 L. J. (CH.) 204; *Re Seal, Re Seal & Edgelow* (1902), 72 L. J. (CH.) 58 (order to deliver solicitor's bill of costs); *Hampden* v. *Wallis, supra* (order for discovery of documents); and see, further, title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 311, 312.

(*b*) *Re Deakin, Ex parte Cathcart*, [1900] 2 Q. B. 478, following *Re Lumley, Ex parte Cathcart*, [1894] 2 Ch. 271, C. A. See also *Re Wilde, supra*. There is no power to make an order upon a judgment that the judgment debt be paid within a limited time (*Re Oddy, Major* v. *Harness*, [1900] 1 Ch. 93, C. A.; *Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q. B. 244).

(*c*) *Farden* v. *Richter* (1889), 23 Q. B. D. 124, approving *Hopton* v. *Robertson*, [1884] W. N. 77.

(*d*) *Re Seal, Re Seal & Edgelaw* (1902), 72 L. J. (CH.) 58.

(*e*) *Vansandau* v. *Rose* (1820), 2 Jac. & W. 264; *Hopton* v. *Robertson, supra*; approved in *Farden* v. *Richter, supra*.

(*f*) R. S. C., Ord. 52, r. 14.

SECT. 6. Service of Judgments and Orders.

been made for accounts, or issues or inquiries have been directed which affect persons who are not parties to the proceedings, the court or judge may direct that they shall be served with notice of the judgment, and after such notice such persons are bound by the proceedings in the same manner as if they had originally been made parties (*g*).

Such service should be personal unless this is dispensed with and substituted service, or notice in lieu of service, ordered (*h*).

SECT. 7.—*Effect of Judgments or Orders.*

Rate of interest.

534. Every contractual right upon which a judgment or order is obtained merges thenceforth in the judgment, and though interest was payable under the contract at a different rate before judgment, it is thereafter payable at the rate of 4 per cent. (*i*).

Merger.

When judgment has been given in an action (*k*) the cause of action in respect of which judgment is given *transit in rem judicatam, i.e.*, is at an end, and its place is taken by the rights created by the judgment (*l*). But merger is not effected by an order which is not a judgment (*m*), nor by a judgment which is interlocutory and not final (*n*), or which is void (*o*). In many cases the effect of a judgment is to create an estoppel (*p*). As between the same parties a judgment is as a rule conclusive evidence of the matter decided (*q*).

In actions of trover and detinue.

In an action of detinue for goods, or trover, a judgment in favour of the plaintiff does not of itself, without satisfaction, vest the property in the goods in the defendant from the time of the judgment (*r*).

(*g*) R. S. C., Ord. 16, r. 40; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 342; PARTITION; TRUSTS AND TRUSTEES.

(*h*) R. S. C., Ord. 16, r. 40; R. S. C., Ord. 55, r. 35; and as to service generally, see title PRACTICE AND PROCEDURE.

(*i*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 17; *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A.; *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A.; *Arbuthnot* v. *Bunsilall* (1890), 62 L. T. 234. But though the personal remedy on a covenant in a mortgage deed merges in a judgment which only carries interest at 4 per cent., mortgagees may be entitled to retain their security till the principal and the higher rate of interest agreed upon under the covenant is paid (*Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147). Interest is not claimable where by consent the judgment debt and costs are to be paid in equal half-yearly instalments (*Caudery* v. *Finnerty* (1892), 66 L. T. 684). The Judgments Act, 1838 (1 & 2 Vict. c. 110), does not apply where an order is made by consent to refer to a special referee the ascertainment of damages. Such an order is not one whereby a sum of money was payable by the defendants. Interest in such a case can only be obtained from the date of the certificate (*Ashover Fluor Spar Mines, Ltd.* v. *Jackson* (1911), 27 T. L. R. 530). A judgment debt, though by law carrying interest from the date of the judgment, is not a transaction to which the language of the Income Tax Acts, relating to "yearly interest of money," applies (*Re Cooper*, [1911] 2 K. B. 550, C. A.). See, further, title EXECUTION, Vol. XIV., pp. 17, 18.

(*k*) See title ACTION, Vol. I., p. 31.

(*l*) *Greathead* v. *Bromley* (1798), 7 Term Rep. 455; *Langmead* v. *Maple* (1865), 18 C. B. (N. S.) 255; *Re European Central Rail. Co., Ex parte Oriental Financial Corporation, supra;* and see titles CONTRACT, Vol. VII., pp. 457 *et seq.;* ESTOPPEL, Vol. XIII., p. 334; EVIDENCE, Vol. XIII., p. 542.

(*m*) *Westmoreland Green and Blue Slate Co.* v. *Feilden*, [1891] 3 Ch. 15, C. A.

(*n*) *Langmead* v. *Maple, supra.*

(*o*) *Vibart* v. *Coles* (1890), 24 Q. B. D. 364, C. A.

(*p*) See titles ESTOPPEL, Vol. XIII., p. 326; EVIDENCE, Vol. XIII., p. 542.

(*q*) See title EVIDENCE, Vol. XIII., p. 542.

(*r*) *Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584; affirmed (1872), L. R.

SECT. 8. Judicial Decisions as Authorities.

SECT. 8.—*Judicial Decisions as Authorities.*

Ratio decidendi alone binding as authority.

535. It may be laid down as a general rule that that part alone of a decision of a court of law is binding upon courts of co-ordinate jurisdiction and inferior courts which consists of the enunciation of the reason or principle upon which the question before the court has really been determined (*a*). This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi* (*b*). Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand (usually termed *dicta*) have no binding authority on another court, though they may have some merely persuasive efficacy (*c*).

Decisions of superior courts.

The decisions of the House of Lords must be followed by every inferior court (*d*), and are binding upon the House itself in its judicial character (*e*). An erroneous decision of the House upon a question of law can be set right only by Act of Parliament (*f*). The decisions of the Court of Appeal and of the Divisional Courts are binding upon courts of first instance.

Decisions of courts of first instance.

The *ratio decidendi* of a decision by a judge of first instance is not absolutely binding upon another judge of first instance of co-ordinate jurisdiction, and though the second judge ought always to treat the former decision with attention and respect, he may decline to follow it if he thinks the principle of the decision insufficient or inapplicable, or wrong in any other way (*g*).

7 C. P. 547, Ex. Ch.; followed in *Re Ware, Ex parte Drake* (1877), 5 Ch. D. 866, C. A.; and see also title TROVER AND DETINUE.

(*a*) The only thing in a judge's decision binding as an authority is the principle upon which the case was decided (*Osborne to Rowlett* (1880), 13 Ch. D. 774, *per* JESSEL, M.R., at p. 785). The only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him (*Re Hallett's Estate, Knatchbull* v. *Hallett* (1879), 13 Ch. D. 696, 712). "Cases are valuable in so far as they contain principles of law. They are also of use to show the way in which judges regard facts" (*Owners of Ship Swansea Vale* v. *Rice* (1911), 104 L. T. 658, H. L., *per* Lord LOREBURN, L.C., at p. 659).

(*b*) The *ratio decidendi* may be described as being the general reasons given for the decision or the general grounds on which it is based, detached, or abstracted from the specific peculiarities of the particular case which gives rise to the decision (see 2 Austin's Lectures on Jurisprudence, 5th ed., pp. 627, 628). The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law (Salmond's Jurisprudence, 2nd ed., s. 67).

(*c*) *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369.

(*d*) *French* v. *Macale* (1843), 2 Dr. & Wal. 269; *A.-G.* v. *Windsor* (*Dean and Canons*), *supra*; *Topham* v. *Portland* (*Duke*) (1869), 17 W. R. 911.

(*e*) *Tommey* v. *White* (1853), 4 H. L. Cas. 313; *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40; *Thellusson* v. *Rendlesham* (1859), 7 H. L. Cas. 429; *A.-G.* v. *Windsor* (*Dean and Canons*), *supra*; *Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274; *Topham* v. *Portland* (*Duke*), *supra*; *Inland Revenue Commissioners* v. *Harrison* (1874), L. R. 7 H. L. 1.

(*f*) *London Street Tramways Co.* v. *London County Council*, [1898] A. C. 375.

(*g*) *Osborne to Rowlett*, *supra*, *per* JESSEL, M.R., at p. 785; *Gathercole* v. *Smith* (1881), 44 L. T. 439, C. A., *per* JESSEL, M.R., at p. 440; *The Vera Cruz* (No. 2) (1884), 9 P. D. 96, C. A., *per* BRETT, M.R., at p. 98; *Forster* v. *Baker*, [1910] 2 K. B. 636, 638, C. A. A stricter rule is laid down in *Parkin* v. *Thorold* (1852), 16 Beav. 59, 63; *Re Hotchkiss's Trusts* (1869), L. R. 8 Eq. 643, 647; *Re Times Life Assurance and Guarantee Co., Ex parte Nunneley*

SECT. 8. Judicial Decisions as Authorities

Decisions of co-ordinate courts.

As a rule co-ordinate appellate courts consisting of more than one judge ought to follow previous decisions of the court, but, in exceptional cases, they are not bound to do so (*h*). In a proper case, all the members of the co-ordinate courts sitting as a full court may decide whether they will or will not follow a decision arrived at by a smaller number of the members of the court (*i*).

A court is not bound by a decision of its own where the decision is grounded on the fact that the members of the court present were equally divided. The judicial comity, by virtue of which a court bows to its own decisions, does not exist in such a case, for there is no authority of the court as such, and those who follow must choose one of two adverse opinions (*k*).

Where decision has been followed for long period of time.

536. Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally (*l*). But where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes, at any rate, the highest Court of Appeal from correcting the error (*m*). The same considerations do not apply where the decision though followed has

(1870), 39 L. J. (CH.) 297; *Ex parte Whitbread* (1812), 19 Ves. 209; *Cook* v. *Rogers* (1831), 7 Bing. 438, *per* TINDAL, C.J., at pp. 443, 444; *Mirehouse* v. *Rennell* (1833), 1 Cl. & Fin. 527, C. A., *per* PARKE, J., at p. 546. On the other hand, in *Fentum* v. *Pocock* (1813), 5 Taunt. 192, *per* MANSFIELD, C.J., at p. 195, and *Church* v. *Brown* (1808), 15 Ves. 258, *per* Lord ELDON, L.C., at p. 262, decisions at *nisi prius* are considered as having little weight.

(*h*) *The Vera Cruz* (No. 2) (1884), 9 P. D. 96, C. A., *per* BRETT, M.R., at p. 98; *Vernon* v. *Watson*, [1891] 1 Q. B. 400; *Casson* v. *Churchley* (1884), 53 L. J. (Q. B.) 335, 336; *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, C. A., *per* BRETT, M.R., at p. 355.

(*i*) *Kelly & Co.* v. *Kellond* (1888), 20 Q. B. D. 569, C. A. *per* Lord ESHER, M.R., at p. 572.

(*k*) *The Vera Cruz* (No. 2), *supra*, *per* BRETT, M.R., at p. 98.

(*l*) *Smith* v. *Keal* (1882), 9 Q. B. D. 340, 352, C. A.; *Pugh* v. *Golden Valley Rail. Co.* (1880), 15 Ch. D. 330, C. A.; *Harvey* v. *Farquhar* (1872), L. R. 2 Sc. & Div. 192; *Baker* v. *Tucker* (1850), 3 H. L. Cas. 106; *Fraser* v. *Ehrensperger* (1883), 12 Q. B. D. 310, C. A.; *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, 355, C. A.; *Pandorf* v. *Hamilton* (1886), 17 Q. B. D. 674, C. A.; *Re Rosher*, *Rosher* v. *Rosher* (1884), 26 Ch. D. 801, 821; *Philips* v. *Rees* (1889), 24 Q. B. D. 17, C. A.; *Re Wallis*, *Ex parte Lickorish* (1890), 25 Q. B. D. 176, C. A.; *Airey* v. *Bower* (1887), 12 App. Cas. 263, 269; *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (1890), 15 App. Cas. 125; *Re Hallett's Estate*, *Knatchbull* v. *Hallett* (1879), 13 Ch. D. 696, C. A., *per* JESSEL, M.R., at p. 712. See also *R.* v. *Stafford Prison* (*Governor*), *Ex parte Emery* (1909), 25 T. L. R. 440, *per* Lord ALVERSTONE, C.J., at p. 441, and *R.* v. *Martin*, [1911] 2 K. B. 450, *per* Lord ALVERSTONE, C.J., at p. 456.

(*m*) *Airey* v. *Bower*, *supra*; *Hamilton* v. *Baker*, *The "Sara"* (1889), 14 App. Cas. 209; *Mills* v. *Armstrong*, *The "Bernina"* (1888), 13 App. Cas. 1. See also *Evans* v. *George and Rowe* (1823), 12 Price, 76, *per* GRAHAM, B., at pp. 135—137.

SECT. 8. Judicial Decisions as Authorities.

been frequently questioned and doubted. In such a case it may be overruled by any court of superior jurisdiction (*n*).

Decisions of Scottish and Irish courts.

537. Decisions of the Scottish and Irish courts are not binding upon English courts, though entitled to the highest respect (*o*), but a judge of first instance in England ought to follow the unanimous judgment of the higher Scottish or Irish courts, where the question is one which turns upon the construction of a statute which extends to those countries as well as to England, leaving it to be reviewed, if thought fit, by the Court of Appeal (*p*).

Decisions of Privy Council.

538. The decisions of the Judicial Committee of the Privy Council are not theoretically binding on the High Court, but are treated as being of great weight and are commonly followed in like cases (*q*).

SECT. 9.—*Amendment of or Setting Aside Judgments or Orders.*

SUB-SECT. 1.—*In General.*

Where judgment or order entered or drawn up.

539. As a general rule no court, judge, or master has power to rehear, review, alter, or vary any judgment or order after it has been entered or drawn up respectively (*r*), either in an application made in the original action or matter or in a fresh action brought to review such judgment or order (*s*). The rule

(*n*) *R.* v. *Edwards* (1884), 13 Q. B. D. 586, C. A., *per* BRETT, M.R., at p. 590, and *per* BOWEN, L.J., at p. 593; *Pearson* v. *Pearson* (1884), 27 Ch. D. 145, C. A.; *Mills* v. *Armstrong*, "*The Bernina*" (1888), 13 App. Cas. 1.

(*o*) *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, 445, C. A.; *Ivay* v. *Hedges* (1882), 9 Q. B. D. 80, 82; *Morgan* v. *London General Omnibus Co.* (1883), 12 Q. B. D. 201; *Re Brown, Great Western Rail. Co.* v. *Railway Commissioners* (1881), 50 L. J. (Q. B.) 483, C. A., *per* FIELD, J., at p. 486, and as reported 45 L. T. 206, C. A., *per* COTTON, L.J., at p. 208; *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51; *R.* v. *Income Tax Commissioners* (1888), 22 Q. B. D. 276, C. A.

(*p*) *Re Hartland, Banks* v. *Hartland*, [1911] 1 Ch. 459, *per* SWINFEN EADY, J., at p. 466. The decisions of colonial and foreign courts are not authorities at all in English courts, but they may be useful as guides to the court before which they are cited as to what its decision ought to be; see *Castro* v. *R.* (1880), 6 App. Cas. 249.

(*q*) *The City of Chester* (1884), 9 P. D. 182, 207, C. A.; *Leask* v. *Scott* (1877), 2 Q. B. D. 376, C. A., *per* BRAMWELL, L.J., at p. 380; *Ranelagh* v. *Ranelagh* (1893), 41 W. R. 549; *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669, *per* KENNEDY, J., at p. 677.

(*r*) *Flower* v. *Lloyd* (1877), 6 Ch. D. 297, C. A.; *Re St. Nazaire Co.* (1879), 12 Ch. D. 88, C. A.; *Preston Banking Co.* v. *Allsup (William) & Sons*, [1895] 1 Ch. 141, C. A., where *Re Suffield and Watts, Ex parte Brown* (1888), 20 Q. B. D. 693, C. A., was approved, and *Staniar* v. *Evans, Evans* v. *Staniar* (1886), 34 Ch. D. 470, was doubted; *Prestney* v. *Colchester Corporation* (1883), 24 Ch. D. 376, C. A.; *Glasier* v. *Rolls* (1889), 59 L. J. (CH.) 63, C. A.; *Re Gist (a Person of Unsound Mind)*, [1904] 1 Ch. 398, 403, 408, C. A.; *Re Lyric Syndicate* (1900), 17 T. L. R. 162; *The Turret Court* (1901), 84 L. T. 331; *Beynon* v. *Godden* (1878), 4 Ex. D. 246, C. A.; *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488, C. A.; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673.

(*s*) *Re May* (1883), 25 Ch. D. 231; *Preston Banking Co.* v. *Allsup (William) & Sons, supra*; *Re Scott and Alvarez's Contract, Scott* v. *Alvarez*, [1895] 1 Ch. 596, C. A.; *Bright (Charles) & Co., Ltd.* v. *Sellar*, [1904] 1 K. B. 6, C. A., and cases cited in note (*b*), p. 213, *post*. But a supplemental order may be made in a proper case upon new facts directing that something which has been ordered to be done shall only be done on certain terms (*Re Scowby, Scowby* v. *Scowby*, [1897] 1 Ch. 741, C. A.), and, *semble*, by consent, the matter may be

is another example of the great importance attached by the court to finality of litigation (*t*). But the rule is subject to certain qualifications (*a*).

Until a judgment or order has been entered or drawn up there is inherent in every court the power to vary its own orders so as to carry out what was intended and to render the language free from doubt, or to withdraw the order so that the decision may be reconsidered (*b*).

Where not entered or drawn up

SUB-SECT. 2.—*Clerical or Accidental Mistakes.*

540. After the judgment or order has been entered or drawn up there is power, both under the Rules of the Supreme Court (*c*) and inherent in the judge, or master, who gave or made the judgment or order (*d*) to correct any clerical mistake or error arising from any accidental slip or omission, so as to do substantial justice and give effect to his meaning and intention. The power applies to the case of mistakes or accidental slips made by officers of the court (*e*), or by the parties, such as where judgment is entered in default of appearance for too large an amount of costs (*f*), or there has been a miscalculation of interest (*g*), or accidental omissions from a bill of costs (*h*), or neglect to ask for certain costs (*i*),

Clerical or accidental mistakes.

reheard on an amended statement of facts (*Re Caithness, Leslie* v. *Caithness* (1892), 36 Sol. Jo. 216).

(*t*) See *Flower* v. *Lloyd* (1879), 10 Ch. D. 327, 333, C. A.; and see title COURTS, Vol. IX., p. 12.

(*a*) See *infra*.

(*b*) *Lawrie* v. *Lees* (1881), 7 App. Cas. 19, *per* Lord PENZANCE, at p. 35; *Re St. Nazaire Co.* (1879), 12 Ch. D. 88, C. A., *per* JESSEL, M.R., at p. 91; *Re Suffield and Watts, Ex parte Brown* (1888), 20 Q. B. D. 693, C. A.; *Baden-Powell* v. *Wilson*, [1894] W. N. 146; *Re Roberts*, [1887] W. N. 231, C. A.; *Hipkiss* v. *Fellows* (1909), 101 L. T. 701, C. A.; *Willé* v. *St. John*, [1910] 1 Ch. 701, C. A. (compare *Re Adam Eyton, Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.); *Re Crown Bank* (1890), 44 Ch. D. 634; *Preston Banking Co.* v. *Allsup (William) & Sons*, [1895] 1 Ch. 141, C. A., *per* A. L. SMITH, L.J., at p. 144; *Re Thomas, Bartley* v. *Thomas*, [1911] W. N. 143.

(*c*) R. S. C., Ord. 28, r. 11.

(*d*) *Lawrie* v. *Lees, supra*; *Milson* v. *Carter*, [1893] A. C. 638, P. C., following *Hatton* v. *Harris*, [1892] A. C. 547, and approving *Re Swire, Mellor* v. *Swire* (1885), 30 Ch. D. 239, C. A.; *Tucker* v. *New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249, C. A.; *Shipwright* v. *Clements* (1890), 63 L. T. 160; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; *Moore* v. *Gill* (1888), 4 T. L. R. 738, C. A. As to the citation of reported decisions, see title BARRISTERS, Vol. II., p. 380.

(*e*) *Re Gist (a Person of Unsound Mind)*, [1904] 1 Ch. 398, C. A. In *Re Leonard's Estate, Theobald* v. *King* (1899), 43 Sol. Jo. 736, where the order made on the Chancery master's certificate did not follow the certificate, the court refused to vary the order on the ground that it was a matter for appeal. See, further, title MISTAKE.

(*f*) *Armitage* v. *Parsons*, [1908] 2 K. B. 410, C. A.

(*g*) *Barker* v. *Purvis* (1886), 56 L. T. 131, C. A.

(*h*) *Chessum & Sons* v. *Gordon*, [1901] 1 K. B. 694, C. A.

(*i*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; but see *Glasier* v. *Rolls* (1890), 62 L. T. 305, C. A., and *The Turret Court* (1901), 84 L. T. 331, where applications were refused. Other instances as to costs are *Doswell* v. *Norton* (1902), 18 T. L. R. 228, where the judge varied an order after it was drawn up, under which the plaintiff got costs on a higher scale than the judge had intended, owing to his attention not having been drawn to the County Court Rules, 1889, Ord. 50A, r. 9; *Milson* v. *Carter*, [1893] A. C. 638, P. C.; *Re Rudd*, [1887] W. N. 251; *Re Roper, Taylor* v. *Bland* (1890), 45 Ch. D. 126, C. A.

SECT. 9. Amendment of or Setting Aside Judgments or Orders.

or omission of words giving liberty to apply (*k*), or possibly in special cases where the order is founded upon a mistake of fact (*l*). But it does not apply where the judgment or order correctly represents what the court intended and where the court itself was wrong (*m*). The intervention of the rights of third parties based upon the existence of the order and ignorance of the mistake may prevent the exercise of the power to correct the mistake or error if it would be inequitable or inexpedient to exercise it (*n*). Alterations or additions to the judgment or order based upon materials not contained in the pleadings or evidence, or involving matters which were not brought to the attention of the court, cannot be obtained under the rules applying to accidental mistakes or omissions (*o*).

How application made.

The application should be made to the court or judge who made the order (*p*), by motion in the case of a judgment or order of a judge in court or of the Court of Appeal, and by summons in the case of an order made at chambers (*q*). It should be made as soon as the mistake is discovered (*r*); but it may be made at any time (*s*), and amendments have been allowed after the lapse of a considerable number of years (*a*), and it is no objection that the time for appealing against the order or judgment has expired (*b*). The rectification may be effected by altering the judgment or order itself (*c*) or by a separate supplemental order (*d*).

SUB-SECT. 3.—*Judgments in Default.*

Setting aside judgment by default.

541. If an order for judgment has been made or judgment entered either in default of appearance to the writ (*e*), or of delivery

(*k*) *Websdell* v. *Jenkins* (1902), 46 Sol. Jo. 484. See also *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Penrice* v. *Williams* (1883), 23 Ch. D. 353.

(*l*) *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673, *per* ROMER, J., at p. 677. See also *Staniar* v. *Evans*, *Evans* v. *Staniar* (1886), 34 Ch. D. 470, doubted in *Preston Banking Co.* v. *Allsup* (*William*) *& Sons*, [1895] 1 Ch. 141, C. A.; *Re Blackwell*, *Bridgman* v. *Blackwell*, [1886] W. N. 97.

(*m*) *Re Gist* (*a Person of Unsound Mind*), [1904] 1 Ch. 398, C. A.; *Ainsworth* v. *Wilding*, *supra*; *Re Lyric Syndicate* (1900), 17 T. L. R. 162.

(*n*) *Hatton* v. *Harris*, [1892] A. C. 547, *per* Lord HERSCHELL, at p. 558; *Stewart* v. *Rhodes*, [1900] 1 Ch. 386, C. A.

(*o*) *Willis* v. *Parkinson* (1818), 3 Swan. 233; *Brookfield* v. *Bradley* (1824), 2 Sim. & St. 64; *British Dynamite Co.* v. *Krebs* (1877), 25 W. R. 846; *Re Scowby*, *Scowby* v. *Scowby*, [1897] 1 Ch. 741, C. A.

(*p*) *Tucker* v. *New Brunswick Co. of London* (1890), 44 Ch. D. 249, C. A.

(*q*) R. S. C., Ord. 28, r. 11. In the Chancery Division the application may be to vary the minutes (*Re Swire*, *Mellor* v. *Swire* (1885), 30 Ch. D. 239, C. A.) The alteration should not be made, after the order has been passed and entered except on motion or summons (*Blake* v. *Harvey* (1885), 29 Ch. D. 827, C. A.).

(*r*) *Re Tibbits* (1881), 30 W. R. 177.

(*s*) R. S. C., Ord. 28, r. 11.

(*a*) *Shipwright* v. *Clements*, [1890] W. N. 134 (nineteen years); *Hatton* v. *Harris*, *supra* (thirty-three years).

(*b*) *Barker* v. *Purvis* (1886), 56 L. T. 131, C. A.

(*c*) *Re Clinton*, *Jackson* v. *Slaney*, [1882] W. N. 176.

(*d*) *Wallis* v. *Thomas* (1802), 7 Ves. 292; *Lane* v. *Hobbs* (1806), 12 Ves. 458; *Fritz* v. *Hobson*, *supra*; *Eckersley* v. *Eckersley*, [1884] W. N. 133; *Re Scowby*, *Scowby* v. *Scowby*, *supra*. A material omission may sometimes be rectified on payment of the costs by the party responsible for the omission (*Hughes* v. *Jones* (1858), 26 Beav. 24; *Williams* v. *Carmarthen and Cardigan Rail. Co.* (1869), 17 W. R. 346).

(*e*) R. S. C., Ord. 13, r. 10.

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of defence (*f*), or of appearance at the trial (*g*), the court or a judge may set it aside upon such terms as to costs and otherwise as the court or judge may think fit.

Where a judgment in default of appearance or defence has been entered before the proper time, or there has been no service or no sufficient service, or it has been entered for a greater amount than is due, or there has been a breach of good faith, it will be set aside *ex debito justitiæ*, apart from any consideration as to whether there is a good defence on the merits (*h*), and the plaintiff is usually ordered to pay the costs occasioned by the judgment or order.

Right to have the judgment set aside.

But the defendant may be disentitled to have a judgment set aside by his failure to take steps to get it set aside within reasonable time after notice of it (*i*). In such a case the court may refuse to set it aside unless the defendant can show merits and may impose terms (*k*).

Loss of right

Where the order or judgment is regular the court has a discretion in the matter (*l*), and the defendant must as a rule show by affidavit that he has a defence to the action on the merits (*l*). The order or judgment, if set aside, will in such a case as a rule only be set aside on payment of costs by the defendant (*m*) and upon other terms (*n*).

Where court has discretion.

542. The application to set aside an order or judgment in default of appearance or defence should be made as soon as possible after the judgment comes to the knowledge of the defendant (*o*), though some delay is not necessarily fatal to the application succeeding if the parties can be restored to their former position (*p*). It is made to the master in chambers where the action is proceeding in London, or to the district registrar (*q*) where the action is proceeding in the registry.

The application.

Where a verdict or judgment has been obtained after trial in

Non-appearance at the trial.

(*f*) R. S. C., Ord. 27, r. 15.

(*g*) R. S. C., Ord. 36, r. 33.

(*h*) *Anlaby* v. *Prætorius* (1888), 20 Q. B. D. 764, C. A.; *Hughes* v. *Justin*, [1894] 1 Q. B. 667; *Hall* v. *Scotson* (1859), 9 Exch. 238; but where by a mistake the judgment was entered for too large an amount of costs, leave to amend has been given under R. S. C., Ord. 28, r. 11 (*Armitage* v. *Parsons*, [1908] 2 K. B. 410, C. A.).

(*i*) *Wright* v. *Mills* (1889), 60 L. T. 887.

(*k*) *Ibid.*

(*l*) *Furnival* v. *Brooke* (1883), 49 L. T. 134 (still a good authority on this point); *Haigh* v. *Haigh* (1885), 31 Ch. D. 478; *Watt* v. *Barnett* (1878), 3 Q. B. D. 183, 363, C. A.; *Smith* v. *Dobbin* (1877), 37 L. T. 777; *Green* v. *Moore* (1891), 39 W. R. 421; *Wright* v. *Mills*, *supra*; *Farden* v. *Richter* (1889), 23 Q. B. D. 124; *Whiley* v. *Whiley* (1858), 4 C. B. (N. S.) 653; *Maddocks* v. *Holmes* (1798), 1 Bos. & P. 228; *Evans* v. *Gill* (1797), 1 Bos. & P. 52; *Delafield* v. *Tanner* (1814), 5 Taunt. 855.

(*m*) *Smith* v. *Dobbin*, *supra*.

(*n*) It is usually made a term that appearance be entered or defence delivered forthwith. Sometimes payment into court or the giving of security is made a term (*Watt* v. *Barnett*, *supra*). The judgment may be set aside as to part only and allowed to stand as to the rest (*Re Mosenthal*, *Ex parte Marx* (1910), 54 Sol. Jo. 751, C. A.).

(*o*) *Cannan* v. *Reynolds* (1855), 5 E. & B. 301.

(*p*) *Atwood* v. *Chichester* (1878), 3 Q. B. D. 722, C. A.; *Davis* v. *Ballenden* (1882), 46 L. T. 797, C. A.; *Beale* v. *MacGregor* (1886), 2 T. L. R. 311, C. A.

(*q*) It is more convenient to make the application to the district registrar (*Townend* v. *Kirkham*, [1898] 1 Q. B. 51, C. A.), though it may be made to a master in London (*Lewis* v. *Kent* (1877), 63 L. T. Jo. 61).

SECT. 9. Amendment of or Setting Aside Judgments or Orders.

the absence of one party the application must be made within six days after the trial (*r*) to the judge who tried the case (*s*). The verdict or judgment may be set aside by the judge upon such terms as may seem fit (*t*).

A third party who has or can acquire a *locus standi* may apply, either in the name of the defendant with his leave, or he must make both the plaintiff and defendant parties to the application (*a*).

SUB-SECT. 4.—*Judgments obtained by Fraud.*

How and when judgment may be set aside.

543. A judgment, which has been obtained by fraud either in the court (*b*), or of one or more of the parties (*c*), can be impeached by means of an action which may be brought without leave and is analogous to the former Chancery suit to set aside a decree obtained by fraud (*d*). In such an action it is not sufficient merely to allege fraud without giving any particulars (*e*), and the fraud must relate to matters which *primâ facie* would be a reason for setting the judgment aside if they were established by proof (*f*), and not to matters which are merely collateral (*g*). The court requires a strong case to be established before it will allow a judgment to be set aside on this ground (*h*).

(*r*) R. S. C., Ord. 36, r. 33. The time may be enlarged (*Bradshaw* v. *Warlow* (1886), 32 Ch. D. 403, C. A.; *Michell* v. *Wilson* (1877), 25 W. R. 380); but see, *contra*, *Walker* v. *James* (1885), 53 L. T. 597.

(*s*) *Vint* v. *Hudspith* (1885), 29 Ch. D. 322, C. A. The application must not be made to the Court of Appeal (*ibid*). See also *Walker* v. *Budden* (1879), 5 Q. B. D. 267, C. A. In *Armour* v. *Bate*, [1891] 2 Q. B. 233, C. A., *per* Lord ESHER, M.R., at p. 234, it seems to be implied that the application might be made to the Court of Appeal. See also *Allum* v. *Dickinson* (1882), 9 Q. B. D. 632, C. A. (special case). Where the trial has taken place before a commissioner at the assizes, the application must be made to the judge in chambers (*MacGregor* v. *Peek*, April, 1910, unreported, C. A.).

(*t*) Instances are: *Burgoine* v. *Taylor* (1878), 9 Ch. D. 1, C. A.; *Wright* v. *Mills* (1889), 60 L. T. 887; *Cudworth* v. *Hayward* (1896), 75 L. T. 456; *Cockle* v. *Joyce* (1877), 7 Ch. D. 56; *Foakes* v. *Miller* (1900), 108 L. T. Jo. 346; *King* v. *Sandeman* (1878), 26 W. R. 569; *Wright* v. *Clifford* (1878), 26 W. R. 369 (cases restored on party in default paying costs); *Wilkins* v. *Belford* (1876), 35 L. T. 622 (application refused on ground of delay—six months).

(*a*) *Jacques* v. *Harrison* (1883), 12 Q. B. D. 136, C. A.

(*b*) *Cammell* v. *Sewell* (1858), 3 H. & N. 617, *per* MARTIN, B., at p. 646.

(*c*) *Birch* v. *Birch*, [1902] P. 130, C. A., *per* COZENS-HARDY, L.J., at p. 137; *Coaks* v. *Boswell* (1886), 11 App. Cas. 232; *Boswell* v. *Coaks* (1894), 6 R. 167, H. L.

(*d*) *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106; *Flower* v. *Lloyd* (1877), 6 Ch. D. 297, C. A., citing Lord Redesdale on Pleadings, 5th ed., 112, 113. See also *Bright (Charles) & Co., Ltd.* v. *Sellar*, [1904] 1 K. B. 6, C. A., *per* COZENS-HARDY, L.J., at p. 12. This also, *semble*, applies where the fraud alleged consists in having brought before the court counterfeit documents on which it relied in allowing judgment to be entered (*Cole* v. *Langford*, [1898] 2 Q. B. 36; but see *Baker* v. *Wadsworth* (1898), 67 L. J. (Q. B.) 301). See also titles ESTOPPEL, Vol. XIII., p. 352; EVIDENCE, Vol. XIII., p. 542.

(*e*) *Boswell* v. *Coaks*, *supra*.

(*f*) *Ibid.*

(*g*) *Birch* v. *Birch*, *supra*.

(*h*) See observations of JAMES, L.J., in *Flower* v. *Lloyd* (1879), 10 Ch. D. 327, C. A., at p. 333, and of COZENS-HARDY, L.J., in *Birch* v. *Birch*, *supra*. See also *Priestman* v. *Thomas* (1884), 9 P. D. 210, C. A. (will discovered to be a forgery); *Colclough* v. *Bolger* (1816), 4 Dow, 54, H. L. (sale under order of the court set aside on ground of fraud and collusion); and see *Brooke* v. *Mostyn* (*Lord*) (1864), 2 De G. J. & Sm. 373, C. A., as to setting aside a compromise.

SECT. 9. Amendment of or Setting Aside Judgments or Orders.

The fact that there exists a more summary way of setting aside a judgment by default (*i*) than by bringing an action does not prevent recourse being had to this procedure, though possibly in a proper case, if the defendant proceeds by action where he might have proceeded otherwise, he may be put on terms (*k*).

Where bankruptcy proceedings have been taken.

544. A person who has been adjudicated a bankrupt in consequence of his failure to comply with a bankruptcy notice to pay a judgment debt, and who alleges that the judgment was obtained by fraud, cannot bring an action to set the judgment aside while the adjudication of bankruptcy remains in force, but may apply to the court in bankruptcy to be allowed to contest the validity of the judgment (*l*).

Against whom it may be set aside.

As a rule a judgment can only be set aside, if at all, against those who procured it by fraud, but this does not apply to a probate action to set aside the probate of a will (*m*).

SUB-SECT. 5.—*On Fresh Evidence.*

Evidence must be material and new.

545. An action will lie to rescind a judgment where fraud is alleged (*n*) on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court. It must be shown that such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it could not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient (*o*).

Defendant may move to stay proceedings.

546. The action may be commenced without leave, but the defendant may move to stay the proceedings on the ground that they are frivolous and vexatious, and on such application the court should receive evidence on either side as to whether or not there has been a discovery of new and material evidence since the judgment (*p*).

SUB-SECT. 6.—*Consent Judgments.*

How and when consent judgment may be set aside.

547. A judgment given or order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate an agreement not contained in a judgment or order (*q*), such as that the consent was the result of a mistake (*r*)

(*i*) See p. 215, *ante*.
(*k*) *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106, C. A.
(*l*) *Boaler* v. *Power*, [1910] 2 K. B. 229, C. A.
(*m*) *Birch* v. *Birch*, [1902] P. 130, C. A.; and see title MISREPRESENTATION AND FRAUD.
(*n*) See p. 216, *ante*, and the text, *supra*.
(*o*) *Boswell* v. *Coaks* (1894), 6 R. 167, H. L.; *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 57 L. T. 39. As to orders under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 38), see title SALE OF LAND; and compare *Re Scott and Alvarez's Contract*, *Scott* v. *Alvarez*, [1895] 1 Ch. 596, C. A.
(*p*) *Boswell* v. *Coaks*, *supra*.
(*q*) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Hickman* v. *Berens*, [1895] 2 Ch. 638; *Sturrock* v. *Littlejohn* (1898), 68 L. J. (Q. B.) 165.
(*r*) *Huddersfield Banking Co., Ltd.* v. *Lister (Henry) & Son, Ltd.*, [1895] 2 Ch. 273, C. A.; compare *A.-G.* v. *Tomline* (1877), 7 Ch. D. 388.

SECT. 9. Amendment of or Setting Aside Judgments or Orders.

or that it was *ultra vires* on the part of one of the consenting parties (*s*). But unless all the parties agree, an application cannot be made to the court of first instance in the original action to set aside the judgment or order (*t*), except, apparently, in the case of an interlocutory order (*a*).

SUB-SECT. 7.—*Interlocutory Applications.*

Orders on matters of procedure.

548. In the case of matters of mere procedure, a judge or master has power, where new facts are brought before him which show that the following out of the precise directions of that previous order will cause what he considers inconvenience or other injury to the parties, to give directions that, notwithstanding a previous interlocutory order, a different mode shall be adopted of carrying into effect the substance of the previous order (*b*) But the judge or master has no similar power in the case of an interlocutory order by which the rights of the parties have been decided (*c*).

Ex parte orders.

An order made *ex parte* may be set aside by a party affected by it on an application being made to the judge who made the order (*d*).

SUB-SECT. 8.—*Vacation Orders.*

Orders made by vacation judge.

549. An order made by a vacation judge can be reversed or varied only by the judge who made it or a Divisional Court or the Court of Appeal (*e*). But this does not apply to the discharge of an *ex parte* order. In the Chancery Division an application to reverse or vary such an order must be made to the judge to whom the action is assigned (*f*).

SUB-SECT. 9.—*Appeal.*

Appeal.

550. A judgment or order may be reversed or varied on appeal by a court having appellate jurisdiction in the matter (*g*).

(*s*) *Great North-West Central Railway* v. *Charlebois*, [1899] A. C. 114, P. C.

(*t*) *Harrison* v. *Rumsey* (1752), 2 Ves. Sen. 488; *Stannard* v. *Harrison* (1871), 19 W. R. 811; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673. See also *Munster* v. *Cox* (1885), 10 App. Cas. 680; *Australian Automatic Weighing Machine Co.* v. *Walter*, [1891] W. N. 170.

(*a*) *Mullins* v. *Howell* (1879), 11 Ch. D. 763.

(*b*) *Prestney* v. *Colchester Corporation* (1883), 24 Ch. D. 376, C. A.; *Mullins* v. *Howell*, *supra*; *Ainsworth* v. *Wilding*, *supra*; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542.

(*c*) *Ibid.*

(*d*) *Boyle* v. *Sacker* (1888), 39 Ch. D. 249, C. A.; *Daniel* v. *Clapham* (1877), 63 L. T. Jo. 7; *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31, C. A.

(*e*) R. S. C., Ord. 63, r. 12. But though another judge of first instance may not discharge an order of the vacation judge, a judge in the Chancery Division to whose court the cause is attached may direct that no proceedings shall be taken in respect of it without his sanction or that of the Court of Appeal (*Hipkiss* v. *Fellows* (1909), 101 L. T. 516, 701, C. A.).

(*f*) *Boyle* v. *Sacker*, *supra*.

(*g*) See title PRACTICE AND PROCEDURE.

SECT. 10.—*Enforcement of Judgments or Orders.*

SECT. 10. Enforcement of Judgments or Orders.

551. Judgments and orders in the nature of judgments may be enforced by different modes of execution and analogous processes appropriate to their nature (*h*).

Execution.

552. A judgment *in rem*, which determines status (*i*), does not call for specific enforcement. It not only declares the status of the particular person or thing adjudicated upon, but, *ipso facto*, renders it such as it is declared. Thus, a decree of divorce not only annuls the marriage, but makes the wife a *feme sole*; an adjudication in bankruptcy not only declares the debtor a bankrupt, but clothes him with the consequences of that status; a sentence in a prize court not only decrees the vessel to be prize, but vests her in the captor. Such a judgment does not order recovery or payment of money, delivery or transfer of property, nor any specific act or abstinence bringing it within any of the various modes of execution in the widest sense (*k*). The same may be said of merely declaratory judgments (*l*).

Judgments *in rem*.

An action will lie on a judgment which finally establishes a debt, whether the judgment be English or foreign (*m*). Foreign judgments can be enforced in this country in this way alone (*n*), but if an English judgment can be enforced in some other way it is an abuse of the process of the court to bring an action upon it (*o*). A judgment of the High Court cannot be enforced by an action in a county court, and *vice versâ* (*p*).

Action on a judgment.

The right to sue on a judgment becomes statute-barred in twelve years (*q*).

Statute of Limitations.

An order to pay a definite sum of money may be enforced by action as well as execution (*r*), but if the amount ordered to be paid can be obtained by execution it is an abuse of the process of the court to proceed by action, and the plaintiff runs the risk of having his action stayed and having to pay all the costs occasioned by it being brought (*s*).

Action on an order.

(*h*) See titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 56 *et seq.*; CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 297 *et seq.*, 307 *et seq.*; EXECUTION, Vol. XIV., pp. 1 *et seq.* As to colonial judgments, see title DEPENDENCIES AND COLONIES, Vol. X., p. 578.

(*i*) See titles ACTION, Vol. I., p. 48; ESTOPPEL, Vol. XIII., p. 327.

(*k*) See title EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*l*) See p. 183, *ante*.

(*m*) *Grant* v. *Easton* (1883), 13 Q. B. D. 302, C. A.; *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A.; *Hodsoll* v. *Baxter* (1858), E. B. & E. 884, Ex. Ch.

(*n*) See title CONFLICT OF LAWS, Vol. VI., pp. 281 *et seq.*

(*o*) *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q. B. 428, C. A.

(*p*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 63, 151; *Furber* v. *Taylor*, [1900] 2 Q. B. 719, C. A.; see also *Philpott* v. *Lehain* (1876), 35 L. T. 855; and see title COURTS, Vol. IX., p. 136. As to the effect of a judgment as against a person privy in estate to one of the parties, see title ESTOPPEL, Vol. XIII., p. 346.

(*q*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; *Watson* v. *Birch* (1847), 15 Sim. 523; *Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124; *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, 189, C. A.; and see, further, title LIMITATION OF ACTIONS.

(*r*) R. S. C., Ord. 42, r. 24.

(*s*) *Pritchett* v. *English and Colonial Syndicate*, *supra* (action on garnishee

SECT. 10. Enforcement of Judgments or Orders.

Where it is desired to enforce by a bankruptcy notice a final order made upon a motion in bankruptcy to set aside an assignment and obtain repayment of the money paid under it, an action must be brought upon it (*t*).

Action on bankruptcy orders.

SECT. 11.—*Registration.*

Registration of judgments under Land Charges Act, 1900.

553. A judgment or recognisance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after July, 1900, does not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land, unless or until a writ, execution, or order for the purpose of enforcing it is registered in the Land Registry (*a*).

Registration of judgments under Judgments Act, 1864.

Under the Judgments Act, 1864 (*b*), every creditor to whom any land of his debtor has been actually delivered in execution by virtue of any judgment, statute, or recognisance, and who has registered the writ of *elegit* or other process under which the land has been delivered in execution, is entitled at any time while the registry of such writ or process continues in force to obtain, upon petition to the Chancery Division in a summary way (*c*), an order for sale of the debtor's interest in the land (*d*). Under this Act it was held that the appointment of a receiver of equitable interests in land amounted to actual delivery of the land in execution (*e*).

order against a company for purpose of winding-up proceedings); *Godfrey* v. *George*, [1896] 1 Q. B. 48, C. A. (order for payment by a solicitor of costs of application to strike him off the rolls); *Re Boyd, Ex parte McDermott*, [1895] 1 Q. B. 611, C. A. (order for payment of costs); *Seldon* v. *Wilde*, [1910] 2 K. B. 9 (action in King's Bench Division on order for payment of costs in the Chancery Division by a solicitor of proceedings for attachment in not delivering his bill of costs). An order of the Probate and Divorce Division in a probate matter ordering the payment of costs may be enforced by action (*Norton* v. *Gregory* (1895), 73 L. T. 10, C. A., but not orders made in divorce matters, as the Rules of the Supreme Court do not relate to such proceedings (*Bailey* v. *Bailey* (1884), 13 Q. B. D. 855, C. A.; *Robins* v. *Robins*, [1907] 2 K. B. 13; *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A.); see, further, title HUSBAND AND WIFE, Vol XVI., pp. 584 *et seq.*

(*t*) *Re a Bankruptcy Notice, Ex parte Official Receiver*, [1895] 1 Q. B. 609, C. A.; *Re Boyd, Ex parte McDermott, supra;* see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 26, 27.

(*a*) *I.e.*, under the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 2 (1); Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2 (1). See, further, title EXECUTION, Vol. XIV., p. 70; Land Charges and Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 6, as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 3.

(*b*) 27 & 28 Vict. c. 112.

(*c*) Now by originating summons (R. S. C., Ord. 55, r. 9B).

(*d*) Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4, as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 5. Having regard to this unrepealed section, it would seem that before a judgment creditor can obtain an order for sale under it, he must still obtain and register a writ or order for enforcing the judgment under the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51); and see also title EXECUTION, Vol. XIV., p. 71.

(*e*) *Hatton* v. *Haywood* (1874), 9 Ch. App. 229, disapproving *Thornton* v. *Finch* (1864), 4 Giff. 515; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, 293, C. A.; *Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, 257, C. A.; *Re Pope* (1886), 17 Q. B. D. 743, 751, C. A. But in the case of a legal estate in remainder the appointment of a receiver was not an actual delivery in execution

SECT. 11. Registration.

The registration under the Land Charges Act, 1888 (*f*), must be made in the name of the person whose land is affected by the writ or order registered (*g*), and ceases to have effect at the expiration of five years from the date of the registration, but may be renewed, and if renewed has effect for five years from the date of the renewal (*h*). It is no longer necessary to register the writ or order in the Central Office of the Supreme Court (*i*).

In what name registration must be made under Land Charges Act, 1888.

Registration under the Judgments Act, 1864 (*k*), was under the name of the debtor against whom the process was issued, and could not be made till the land was delivered in execution under a writ of *elegit* or other process. The registration was of the writ or process, and no other or prior registration was necessary (*k*).

In what name registration must be made under Judgments Act, 1864.

Judgments do not in themselves affect personal property (*l*).

It is not necessary to enrol any judgment or order (*m*).

Under the Judgments Act, 1839 (*n*), a *lis pendens* does not bind a purchaser or mortgagee without express notice thereof unless it is registered and re-registered every five years (*o*).

Registration of *lis pendens*.

Registration takes place in the Land Registry (*p*).

SECT. 12.—*Satisfaction of Judgments and Orders.*

554. Satisfaction of judgments in the King's Bench Division may be ordered to be entered on the record by a judge or master in the same manner as an order is obtained for entering up satisfaction of a bill of sale (*q*). Application is made to the master *ex parte* on affidavit if the consent of the person entitled under the judgment has been obtained, or by summons if it has not been obtained. Where the order is made on an *ex parte* application, it need not be drawn up (*r*). The order is taken to the Writ, Appearance, and Judgment Department of the Central Office for an entry of satisfaction to be made on the record of the action.

Mode of entering satisfaction of judgment.

Satisfaction may be entered as to a registered *lis pendens* under the Crown Debts and Judgments Act, 1860 (*s*). And the court

Vacating registration of *lis pendens*.

(*Re Harrison and Bottomley*, [1899] 1 Ch. 465, C. A.; see *Jones* v. *Barnett*, [1900] 1 Ch. 370, C. A.).

(*f*) 51 & 52 Vict. c. 51.

(*g*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5 (2).

(*h*) *Ibid.*, s. 5 (3).

(*i*) *Ibid.*, s. 5 (4). As to the searches to be made on purchase of land, see title SALE OF LAND.

(*k*) 27 & 28 Vict. c. 112, ss. 1—3, repealed by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 5.

(*l*) *King* v. *Marissal* (1744), 3 Atk. 192; *Shirley* v. *Watts* (1744), 3 Atk. 200; *Burden* v. *Kennedy* (1757), 3 Atk. 739; *Payne* v. *Drewe* (1804), 4 East, 522; and see title EXECUTION, Vol. XIV., p. 125.

(*m*) R. S. C., Ord. 61, r. 8.

(*n*) 2 & 3 Vict. c. 11.

(*o*) *Ibid.*, s. 7.

(*p*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5 (4); and as to the Land Registry, see title REAL PROPERTY AND CHATTELS REAL.

(*q*) Practice Masters' Rules (17). As to the practice of entering satisfaction of a bill of sale, see title BILLS OF SALE, Vol. III., p. 73.

(*r*) Fees 2*s.* 6*d.* on the affidavit; 3*s.* on the master's indorsement.

(*s*) 23 & 24 Vict. c. 115, s. 2.

SECT. 12. Satisfaction of Judgments and Orders.

may order the vacating of the registration of a *lis pendens* where the suit has determined, or where the court is satisfied that the litigation is not being prosecuted *bonâ fide* (*t*).

Vacating registration of writ or order affecting land.

The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof (*u*).

(*t*) Lis Pendens Act, 1867 (30 & 31 Vict. c. 47), s. 2.
(*u*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 19; see *Cook* v. *Cook* (1890), 15 P. D. 116.

JUDICATURE, SUPREME COURT OF.

See COURTS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

See CONSTITUTIONAL LAW; COURTS; DEPENDENCIES AND COLONIES.

JUDICIAL DECISIONS.

See BARRISTERS; ESTOPPEL; EVIDENCE; JUDGMENTS AND ORDERS.

JUDICIAL SEPARATION.

See HUSBAND AND WIFE.

JUDICIAL TRUSTEE.

See COUNTY COURTS; PRACTICE AND PROCEDURE; TRUSTS AND TRUSTEES.

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Drainage, Acquisition of Land for - - -	,,	COMPULSORY PURCHASE OF LAND AND COMPENSATION; LAND IMPROVEMENT; SEWERS AND DRAINS.
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Metropolis - - -	,,	COMPULSORY PURCHASE OF LAND AND COMPENSATION; METROPOLIS.
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Probate - - - -	,,	EXECUTORS AND ADMINISTRATORS.
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Royal Household - -	,,	CONSTITUTIONAL LAW; CORONERS.
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SECT. 1.—*In General.*

Definition.

555. Juries are bodies of men (*a*) convened by process of law to represent the public (*b*), and to discharge upon oath or affirmation (*c*) defined public duties.

Number of the jury.

556. Except when otherwise provided by statute (*d*), or by consent on the trial of non-criminal issues, the finding of twelve persons is necessary for the presentment or verdict of a jury (*e*), and that number is sworn as a jury of issue or assessment (*f*).

(*a*) Except where in special circumstances a jury of matrons is impanelled; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 375.

(*b*) Trial by jury is also spoken of as trial *per patriam* or *per pais*, as distinguished from trial by ordeal, by battle, or by wager of law, all now abolished. For wager of battle, see *Ashford* v. *Thornton* (1818), 1 B. & Ald. 405. For wager of law, see *King* v. *Williams* (1824), 2 B. & C. 538.

(*c*) The word "jury" denotes a "sworn body," but a juror may now in lieu of taking the oath make a solemn affirmation, the making of which renders him liable to all the penal consequences of perjury (Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1); see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, and title EVIDENCE, Vol. XIII., pp. 590 *et seq.* Under the term "jury" is not here included the House of Lords summoned to try a peer upon indictment of treason or felony; see titles COURTS, Vol. IX., p. 135; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 270 *et seq.*; PARLIAMENT.

(*d*) See title COUNTY COURTS, Vol. VIII., p. 522, note (*p*).

(*e*) The tradition of twelve jurors has been broken through, not only in England and Wales by the County Courts Acts, but in other parts of His Majesty's dominions. As to the practice outside England and Wales, see *Macnaghten* v. *Paterson*, [1907] A. C. 483, 491, P. C. (New South Wales); *Gill* v. *Westlake*, [1910] A. C. 197, P. C. (Isle of Man).

(*f*) See p. 244, *post*. The number to be sworn to try issues has been made statutory (Juries Act, 1825 (6 Geo. 4, c. 50), s. 26), and the presence of thirteen

The number which may be sworn on a jury of inquiry and presentment is, in principle, unlimited, but as the concurrence of twelve, even where more are sworn, suffices (*g*), it is the practice to swear not more than twenty-three persons, and this rule is imperative in the case of grand juries summoned to find indictments (*h*), and of coroners' juries (*i*).

SECT. 2.—*Functions of Juries.*

Duties of juries.

557. These public duties may be comprehensively defined as the making presentments of fact, upon or without inquiry and reception of evidence, to the Crown or to a judicial officer, and may be divided into ten classes:

(i.) Presentments whereon to found the title of the sovereign to lands or tenements, goods or chattels, under inquisitions or inquests of office held by the Sovereign's officer, a sheriff, a coroner, or an escheator, *virtute officii*, or by commissioners specially appointed (*k*);

(ii.) Presentments declaring what debts are due to the Sovereign, and what lands and tenements, goods and chattels, and of what values, are liable to answer the same, in proceedings under extents (*l*);

(iii.) Presentments as to the lands and tenements of a judgment debtor, and their value, in proceedings under writs of elegit (*m*);

(iv.) Presentments of accusation or other matters by grand juries (*n*) to judges, magistrates, and recorders, at assizes (*o*) and quarter sessions of the peace (*p*);

(v.) Presentments under special Acts and customs (*q*);

in the box, if not discovered until after verdict, would be ground for a new trial (*Muirhead* v. *Evans* (1851), 6 Exch. 447, *per* POLLOCK, C.B., at p. 449).

(*g*) *Re Windham* (1862), 4 De G. F. & J. 53, C. A. As to the distinction between juries of issue and assessment and juries of inquiry and presentment, see pp. 228, 240, 244, *post*.

(*h*) *R.* v. *Marsh* (1837), 6 Ad. & El. 236, *per* Lord DENMAN, C.J., at p. 241; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 346.

(*i*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 3; see title CORONERS, Vol. VIII., pp. 259 *et seq.*

(*k*) Chitty, Law of the Prerogatives of the Crown, p. 246. Blackstone defines inquisition of office as the "act of a jury, summoned by the proper officer, to inquire of matters relating to the Crown upon evidence laid before them" (4 Bl. Com. p. 298). The necessity for such inquisitions has been greatly diminished by the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), ss. 5, 6; and as to these inquisitions generally, see title CROWN PRACTICE, Vol. X., p. 35.

(*l*) Stat. (1541-2) 33 Hen. 8, c. 39; and see title CROWN PRACTICE, Vol. X., p. 14; Chitty, Law of the Prerogatives of the Crown, pp. 262 *et seq.*

(*m*) Stat. (1285) Westminster II., 13 Edw. 1, c. 18, as amended by the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11, and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146 (1); see also title EXECUTION, Vol. XIV., pp. 61 *et seq.*

(*n*) See p. 241, *post*.

(*o*) Including the Central Criminal Court (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (5)).

(*p*) The term "quarter sessions" includes general sessions (Juries Act, 1870 (33 & 34 Vict. c. 77), s. 5). As to quarter sessions, see title MAGISTRATES.

(*q*) *E.g.*, under the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 11 (now generally dispensed with under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 33), which provided for presentment by a jury of not more than forty-eight nor less than eighteen; see also titles LAND IMPROVEMENT, pp. 301 *et seq.*, *post*; SEWERS AND DRAINS. The county courts held by the sheriff twice a year,

SECT. 2. Functions of Juries.

(vi.) Verdicts after inquisitions held by coroners (*r*);

(vii.) Verdicts after inquisitions held under an order of the judge in lunacy, or by a master in lunacy, and traverses of the same (*s*);

(viii.) Verdicts upon issues joined in courts of both civil and criminal jurisdiction (*t*);

(ix.) The assessment of damages before the sheriff under a writ of inquiry (*a*);

(x.) The assessment of compensation under the Lands Clauses Consolidation Act, 1845 (*b*), and similar statutes.

SECT. 3.—*Kinds of Juries.*

Kinds of juries.

558. Although the classes into which the functions of juries have been divided are not mutually exclusive—for a jury for whatever purpose summoned is required to make presentment of a fact or facts, whether such be the existence of a certain set of circumstances, the guilt or innocence of a person arraigned on a criminal charge, that a certain sum of money represents the value of real or personal property, or the damage sustained by reason of a breach of contract or a wrong—yet a broad distinction may be drawn between juries summoned to inquire and make presentment, and juries of issue and assessment, a distinction which would include classes (i.) to (vii.), referred to in the preceding paragraph, in the one category, and classes (viii.) to (x.) in the other. This distinction, which is observed hereafter (*c*), appears in the number which it is usual to call on juries of each kind (*d*), and in the manner in which their presentments or verdicts are recorded (*e*).

and courts leet of a lordship or manor, have now generally fallen into disuse; see titles COPYHOLDS, Vol. VIII., p. 12; COURTS, Vol. IX., p. 135 *et seq.* For form of inquisition finding executors entitled to copyholds, see Encyclopædia of Forms and Precedents, Vol. V., p. 201.

(*r*) See p. 244, *post.*

(*s*) *Re Cumming* (1852), 1 De G. M. & G. 537, applied in *Re Gilchrist*, [1907] 1 Ch. 1, C. A.; and see p. 244, *post*, and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*t*) In the ordinary sense, the word "verdict" means the finding of a jury on the trial of an issue (*Reed* v. *Shrubsole* (1849), 7 C. B. 630, *per* CRESSWELL, J., at p. 640, where the question whether the finding of a jury upon an inquisition of damages can be regarded as a verdict is discussed). The word has, however, come to be used loosely even by the legislature, and is applied in the Coroners Act, 1887 (50 & 51 Vict. c. 71), to the finding of a coroner's jury, which is a presentment in the strictest sense; and in common practice the jurors in all inquisitions are sworn to give a true verdict according to the evidence.

(*a*) See title DAMAGES, Vol. X., p. 349. As to challenges on writs of inquiry, see p. 241, and note (*d*), p. 246, *post.*

(*b*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 86 *et seq.* For forms of notices, warrants, and verdict for such procedure, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 59 *et seq.*

(*c*) See pp. 240, 244, *post.*

(*d*) See pp. 240, 246, 253, *post.*

(*e*) A distinction of the kind seems to be recognised in the Lunacy Act, 1890 (53 & 54 Vict. c. 5), where an alternative is offered of inquisition before a jury specially summoned (*ibid.*, s. 91), and of an issue to be tried in the High Court (*ibid.*, s. 94); see title LUNATICS AND PERSONS OF UNSOUND MIND. It may be objected to the putting of inquiries as to damages before sheriffs into the second category that the inquisition is customarily indented,

SECT. 3. Kinds of Juries.

559. Juries are, moreover, spoken of as "grand" and "petty" (*f*), "special" and "common." These classifications again are not mutually exclusive, for grand and petty juries (except at county assizes) are summoned from the same jurors' books (*g*), and jurors marked as "special" therein (*h*) are liable to serve on common juries (*i*). The distinction between "grand" and "petty" has, generally speaking (*j*), reference to different functions discharged in dealing with indictable offences (*k*), while "special" jurors are distinguished by mark in the jury lists (*l*) as possessing particular qualifications, and, when serving as such, may receive a special fee (*m*).

Further classification.

SECT. 4.—*Qualification, Disqualification, and Exemption of Jurors.*

560. All natural-born subjects of the king, and aliens domiciled in England or Wales for ten years or upwards (*n*), being between the ages of twenty-one and sixty, and being:

Who are liable to serve.

(i.) In the City of London, householders, or occupiers of shops, warehouses, counting-houses, chambers, or offices for the purpose of trade or commerce, with real or personal estate of £100 (*o*):

(ii.) In counties (including the boroughs situate therein, which for the purposes of jury service and the making of jury lists are to be deemed part of a county unless a separate commission of assize is directed to be executed therein (*p*)):

(a) Residents beneficially possessed of £10 a year in real estate or rent-charge, or £20 in leaseholds held for not less than twenty-one years, or determinable on any life or lives:

and signed and sealed by the concurring jurors. On the other hand, the procedure on such inquiries follows that of a trial of issues in the High Court (R. S. C., Ord. 36, r. 56), for there is, in fact, an issue of "how much," upon which counsel for the defendant is frequently heard, and although the verdict is recorded in a distinctive fashion, yet had the inquiry been directed to a judge of the High Court under the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41 (as in *Long* v. *Great Northern and City Railway*, [1902] 1 K. B. 813, C. A.), the verdict would have been taken in the manner usually adopted at *nisi prius*, and a formal inquisition been returned by the sheriff alone (2 Chitty's Practice, 14th ed., p. 1333).

(*f*) Otherwise "petit."

(*g*) See p. 235, *post*.

(*h*) Juries Act, 1870 (33 & 34 Vict. c. 77), ss. 11, 15.

(*i*) *Ibid.*, s. 19 (2). Historically special jurors were only common jurors specially struck; see p. 261, *post*.

(*j*) The distinction between grand and petty juries may also be said to correspond broadly with the distinction between juries of inquiry and presentment and juries of issue and assessment; see p. 228, *ante*.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 345 *et seq.*, 359 *et seq.*

(*l*) See pp. 234, 239, *post*.

(*m*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 35; and see p. 264, *post*.

(*n*) Juries Act, 1870 (33 & 34 Vict. c. 77), ss. 8, 9; see title ALIENS, Vol. I., p. 309.

(*o*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 50.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 31. A list of cities and towns which are counties in themselves is given in the Municipal Corporations Act, 1835 (5 & 6 Will. 4. c. 76), s. 61, but separate commissions of assize are directed to but few of them.

SECT. 4. Qualification, Disqualification, and Exemption.

(b) Householders assessed to the poor rate or to the inhabited house duty at not less than £30 a year in Middlesex and the county of London (*q*), or £20 in other counties:

(c) Occupiers of houses with not less than fifteen windows (*r*):

(iii.) In boroughs (*s*), at assizes when a separate commission of assize is directed to be executed therein, in their separate courts of quarter sessions, and in their special civil courts, the burgesses (*t*):

are compellable to serve as jurors (*a*), unless exempted or disqualified.

Who are disqualified from service.

561. The following are disqualified from serving on juries:

(i.) Aliens, until after ten years' domicile in England or Wales (*b*):

(ii.) Persons attainted (*c*) or at any time convicted of treason or felony; who are under outlawry; or who are convicted of a crime that is infamous (*d*). Upon obtaining a free pardon such disqualifications cease (*e*).

(iii.) Lunatics, imbeciles, and persons affected by deafness, blindness, or other permanent infirmity of body. The names of such persons are not to be omitted from the lists by the overseers in the first instance, but should be struck out by the justices at special petty sessions upon proof of such disqualification (*f*).

Who are exempt from service.

562. The following persons are exempt from serving on juries (*g*):

(i.) Peers;

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89 (2).

(*r*) This qualification, though omitted from the precept scheduled to the Juries Act, 1862 (25 & 26 Vict. c. 107), still remains on the Statute Book. Windows have ceased to be a criterion of taxability since the abolition of the window tax in 1851.

(*s*) For definition of "borough," see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7 (1); and title LOCAL GOVERNMENT.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (1); and see title COURTS, Vol. IX., p. 135.

(*a*) See p. 267, *post*. As a general rule jurors can only be called upon to serve in the county in which they reside or possess property, and in respect of matters arising therein (Juries Act, 1825 (6 Geo. 4, c. 50), s. 1). This, however, and the arrangement of jury lists in jurors' books by hundreds (see p. 235, *post*), is nearly all that remains of the rule that jurors must be *de vicinatu* and be able to present as to the truth from personal knowledge. On the contrary, effort is now generally made that jurors to try issues should come from a part of the county, or even of the country, where they are least likely to have heard of the matters in question. The increasing burden thrown by this upon the jurors of London and Middlesex is frequently the subject of protest (see *Times*, 18th December, 1908, p. 6).

(*b*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 8; and see title ALIENS, Vol. I., p. 309.

(*c*) *I.e.*, upon whom judgment has been passed (Juries Act, 1870 (33 & 34 Vict. c. 77), s. 10).

(*d*) As to "infamous crime," see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 666; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 46; Co. Litt. 158 a.

(*e*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 10.

(*f*) *Semble* from form of precept set out in schedule to Juries Act, 1862 (25 & 26 Vict. c. 107). As to disqualification in particular circumstances, see pp. 243, 249 *et seq.*, *post*. For costs of petty sessions, see title MAGISTRATES.

(*g*) Where the authority is not appended the exemption arises under the Juries

(ii.) Members of the House of Commons;
(iii.) Officers of both Houses of Parliament;
(iv.) Clergymen of the Established Church
(v.) Priests of the Church of Rome;
(vi.) Ministers of any congregation of Protestant Dissenters and of Jews whose place of meeting is duly registered (*h*), provided they follow no secular occupation except that of a schoolmaster;
(vii.) Judges;
(viii.) Barristers-at-law, certificated conveyancers, and special pleaders, if actually practising;
(ix.) Solicitors, if actually practising and having taken out their annual certificates, and their managing clerks;
(x.) Notaries public, if actually practising;
(xi.) Officers of the Supreme Court (*i*);
(xii.) Magistrates of the metropolitan police courts, their clerks, ushers, door-keepers and messengers (*k*);
(xiii.) Clerks of the peace and coroners, with their respective deputies, while actually exercising the duties of their offices;
(xiv.) Sheriffs' officers and servants, and servants of such officers (*l*);
(xv.) Officers of the rural and metropolitan police (*m*);
(xvi.) Justices of the peace so far as regards juries summoned to serve at any sessions of the peace for the jurisdiction of which they are justices (*n*);
(xvii.) Members of municipal corporations, and justices of the peace for any borough, with their town clerks and treasurers for

Act, 1870 (33 & 34 Vict. c. 77), Schedule. The form of precept contained in the schedule to the Juries Act, 1862 (25 & 26 Vict. c. 107), to be issued by clerks of the peace to overseers, contemplates the persons falling under heads (v.) and (vi.) (see the text, *supra*) having taken oaths and subscribed declarations, the necessity for which ceased in 1866. See the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1 (2); and titles CONSTITUTIONAL LAW, Vol. VII., p. 28; ECCLESIASTICAL LAW, Vol. XI., pp. 803 *et seq.*

(*h*) Such places of meeting need no longer be registered, but they may be, and must be, if it is desired to obtain for them exemption from rating and other privileges; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 817—827.

(*i*) Juries Act, 1870 (33 & 34 Vict. c. 77), Schedule, as modified by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 77. Officers of county courts and borough civil courts do not appear to be formally exempted by statute, unless a county court is a court of law and equity within the meaning of *Re Flint* (1823), 1 B. & C. 254.

(*k*) Stipendiary magistrates appointed under the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161, by virtue of *ibid.*, sub-s. 3, fall under (xvii.) (see the text, *supra*).

(*l*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 12. A sheriff, as the nominal summoning officer, is necessarily exempted during his term of office, so far as regards the county for which he is sheriff. As to sheriffs generally, see title SHERIFFS AND BAILIFFS.

(*m*) See title POLICE.

(*n*) But as they are liable to serve on juries at the assizes their names must appear in the lists. The same observation applies to persons who are only entitled to exemption in special circumstances: for instance, by the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 78, the members of the Manchester City Council and others are exempted from service in the Salford Hundred Court; and see title COURTS, Vol. IX., pp. 197 *et seq.*

SECT. 4. Qualification, Disqualification, and Exemption.

the time being, so far as regards juries summoned to serve in the county in which such borough is situate;

(xviii.) Burgesses of any borough, having a separate court of quarter sessions, so far as regards service on petty juries at any sessions of the peace for the county wherein the borough is situate (*o*);

(xix.) Governors of prisons, and their subordinate officers and gaolers (*p*);

(xx.) Superintendents and keepers of public lunatic asylums (*q*);

(xxi.) Registered medical practitioners, and pharmaceutical chemists, if actually practising or carrying on business (*r*);

(xxii.) Registered dentists if they so desire (*s*);

(xxiii.) Officers of the army and navy, while on full pay; soldiers in the regular forces (*a*); and officers and men of the Territorial Force (*b*);

(xxiv.) The master, wardens, and brethren of the Corporation of Trinity House of Deptford Strond (*c*);

(xxv.) Pilots duly licensed, and masters of vessels in the buoy and light service, employed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne (*c*);

(xxvi.) The members of the Mersey Docks and Harbour Board, and of the Port of London Authority (*d*);

(xxvii.) The household servants of the Sovereign;

(xxviii.) All persons concerned in carrying on the business of the Post Office (*e*), the management or collection of the Customs, or employed in any way relating to the Inland Revenue (*f*);

(xxix.) General and Additional Commissioners holding certificates under the Income Tax Act, 1842 (*g*);

(xxx.) Members of the London County Council, so far as regards service within the administrative county of London (*h*).

(*o*) By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (12), jurors for the Middlesex Sessions are not to be summoned from within the county of London.

(*p*) For which see title PRISONS.

(*q*) For which see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*r*) For which see also title MEDICINE AND PHARMACY.

(*s*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 30. The overseers should insert the names in the lists, leaving it to those desiring to claim exemption to do so at the special petty sessions; see also title MEDICINE AND PHARMACY.

(*a*) Regulation of the Forces Act, 1881 (44 & 45 Vict, c. 57), s. 37; Army Act, 1881 (44 & 45 Vict. c. 58), s. 147; and see title ROYAL FORCES.

(*b*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (4); see title ROYAL FORCES.

(*c*) See title SHIPPING AND NAVIGATION.

(*d*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 39.

(*e*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 43; and see title POST OFFICE.

(*f*) See Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 9; and title REVENUE.

(*g*) 5 & 6 Vict. c. 35, s. 35; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 40. This clause would seem to fall within the preceding one. The Commissioners, however, being unpaid, cannot be regarded in the light of employees as are the persons designated in (xxviii.) (see the text, *supra*). As to these Commissioners, see title INCOME TAX, Vol. XVI., p. 613.

(*h*) London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 26: see title METROPOLIS.

Exemptions after previous service or in particular circumstances are dealt with hereafter (*i*).

SECT. 4. Qualification, Disqualification, and Exemption.

SECT. 5.—*Jury Lists and Jurors' Books.*

Preparation of jury lists in counties.

563. The clerk of the peace in every county or county division (*k*) (other than the county of the City of London and cities and towns being counties of themselves (*l*)) must on or before the 20th July in every year issue a precept (*m*) to the overseers of the poor (*n*) of the parishes and townships (*o*) within the county or county division for which he acts, requiring them to make out before the 1st September then ensuing a list of all persons within their respective parishes and townships qualified and liable to serve on juries (*p*). The precepts are sent to one or more of the overseers by registered letter, indorsed "jury precept" on the envelope, and enclosed are printed forms, divided into columns, for names and surnames, places of abode, titles, qualities, callings, or businesses, and the nature of the qualifications (*q*).

Duty of the overseers.

564. Upon receipt of such precept and forms the overseers must fill in the latter with names arranged in alphabetical order (*r*). To do this they refer to the rate-books (*s*), and if they think fit they may make inspection of house, land, and other tax assessments, the assessors, custodians, and collectors of which may be required to produce them (*t*) for the inspection not only of the overseers, but of the justices at the special sessions, at any reasonable time between the 1st July and the 1st October. On the lists

(*i*) See pp. 265 *et seq.*, *post*. Registrars of births, deaths, and marriages (as to whom see title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS) were exempted by the Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 18, but such exemption would appear to be taken away by the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, as they are not mentioned in the schedule thereto. From the same schedule, too, are omitted parish clerks, to whom exemption was given by the Juries Act, 1825 (6 Geo. 4, c. 50), s. 2 (now repealed).

(*k*) *E.g.*, the ridings of Yorkshire and the divisions of Lincolnshire.

(*l*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 25; Juries Act, 1825 (9 Geo. 4, c. 50), s. 50; see p. 236, *post*, and title LOCAL GOVERNMENT.

(*m*) See form in schedule to Juries Act, 1862 (25 & 26 Vict. c. 107), which usually is, or ought to be, modified to meet alterations introduced by the Juries Act, 1870 (33 & 34 Vict. c. 77) and subsequent statutes.

(*n*) The term "overseers" includes churchwardens (Juries Act, 1870 (33 & 34 Vict. c. 77), s. 5), who are mentioned jointly with the overseers in the Juries Acts, 1825 and 1862 (6 Geo. 4, c. 50; 25 & 26 Vict. c. 107).

(*o*) As to churchwardens of rural parishes, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5 (2). For definition of "parish," see the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 42; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 5. As to churchwardens generally, see title ECCLESIASTICAL LAW, Vol. XI., p. 460.

(*p*) Juries Act, 1862 (25 & 26 Vict. c. 107), s. 4.

(*q*) *Ibid.*, s. 4, and Schedule; Juries Act, 1825 (6 Geo. 4, c. 50), Schedule.

(*r*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 8; Juries Act, 1862 (25 & 26 Vict. c. 107), s. 6.

(*s*) Poor Relief Act, 1601 (43 Eliz. c. 2); Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 23; Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 14; and, as to the rate books, see titles METROPOLIS; RATES AND RATING.

(*t*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 11; Juries Act, 1862 (25 & 26 Vict. c. 107), s. 6. The valuation lists made under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), are conclusive, so far as concerns the value of any hereditament, as to the qualification of a juror (*ibid.*, s. 45 (3)).

SECT. 5. Jury Lists and Jurors' Books.

so made out are to be specified the names of persons qualified as special jurors, together with the amount of their rating or assessment (*u*), and from them are to be omitted the names of persons entitled to exemption so far as they are enumerated in the precept (*v*).

Publication on church doors.

565. Printed (*w*) copies of the lists, signed by the overseers, are exhibited on the first three Sundays in September on the principal door of every church, chapel, or public place of religious worship within the respective parishes and townships (*x*), and the originals (which remain in the custody of the overseers), or true copies thereof, may be inspected by any of the inhabitants, during that period, with a view to exemptions being claimed or omissions being rectified at a special petty sessions, notice of which, with the time and place thereof, is subjoined to the lists (*y*).

Special petty sessions to revise lists.

566. Special petty sessions, at which at least two justices must be present, are held in every sessional division (*z*) in the last week of September, the precise date and place of which has been fixed before the 20th of August, in time to be specified on the lists already referred to (*a*). At such petty sessions (*b*), or at such adjournments thereof, in no case exceeding seven days from the time originally fixed (*c*), as may be necessary, the overseers attend with the lists, and the justices upon sworn or such other proof of facts as they deem sufficient, or acting upon their own knowledge, strike out the names of persons not qualified (*d*), or not liable to serve (*e*), insert the names and other necessary particulars of persons whose names have been omitted, and rectify any errors or omissions as to the names and qualifications of persons already appearing therein (*f*). From their decision there is no appeal (*g*), and no person who fails to get his name removed from the lists at these sessions can claim exemption from service on any ground other than sudden illness (*h*). Intimation of this fact is given on the printed lists posted on the church doors (*i*). No name, however,

(*u*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 11. As to special jurors, see p. 259, *post*.

(*v*) See Juries Act, 1862 (25 & 26 Vict. c. 107), Schedule.

(*w*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 60.

(*x*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 9.

(*y*) *Ibid.* It would appear to be proper to give this notice, even where the overseers have entered no names on the forms received from the clerk of the peace.

(*z*) See Division of Counties Act, 1828 (9 Geo. 4, c. 43); Petty Sessions Act, 1849 (12 & 13 Vict. c. 18), s. 1; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (8), (9); and see titles LOCAL GOVERNMENT; MAGISTRATES.

(*a*) See p. 233, *ante*, and the text, *supra*.

(*b*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 10.

(*c*) *Ibid.*; Juries Act, 1862 (25 & 26 Vict. c. 107), s. 8.

(*d*) See p. 235, *post*.

(*e*) See p. 230, *ante*.

(*f*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 10.

(*g*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 14. The justices do not sit as a court of summary jurisdiction, and have no power to state a case (*Hagmaier* v. *Willesden Overseers*, [1904] 2 K. B. 316); and, as to courts of summary jurisdiction, see title MAGISTRATES.

(*h*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 12.

(*i*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 9.

if omitted can be inserted, or misdescription rectified, except upon the application of or with notice to the person affected (*k*).

Revised lists delivered to clerk of the peace.

567. The lists thus revised are allowed by the justices (*l*), who certify that they have examined them, and that they are, to the best of their knowledge and belief, true and proper lists of the common and special jurors (*m*). When allowed and signed, they are forwarded by the justices' clerk, together with a schedule of the parishes or townships for which they have been allowed (*n*), by the next available post, in registered envelopes, to the clerk of the peace for the county or county division.

Preparation of county jurors' book.

568. The clerk of the peace, upon receipt of the various jury lists, arranges the parishes and townships in alphabetical order under the heading of the hundred (*o*) within which they are situate, the hundreds again in like alphabetical order, and the whole are made records of the court of quarter sessions held in the first whole week after the 11th October (*p*). They are then copied into a book, which, when complete, is known as the jurors' book. This is delivered, within six weeks after the holding of the quarter sessions, to the sheriff for use during the year beginning the 1st January following, and he, on the expiration of his term of office (*q*), delivers it to his successor (*r*). Provision is made for corrections upon the conviction of an overseer for having wrongfully omitted or inserted names from or in the lists originally made out by him (*s*). Except as hereafter indicated (*t*), the jurors' book is the source whence the names of persons to serve as jurors are drawn (*a*).

Cost of preparing jury lists etc.

569. The cost of printing, copying, and posting the precepts and forms (*b*) sent by the clerk of the peace to the overseers, of returning the same to him by the clerk to the justices (*c*), and of

(*k*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 10. By a provision apparently applicable to no other class of person exempted, no person acting in the management or service of the Customs can be required to serve, even if he has not claimed exemption in the manner prescribed by the Juries Acts (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 9).

(*l*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 10.

(*m*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 14.

(*n*) Juries Act, 1862 (25 & 26 Vict. c. 107), s. 9.

(*o*) The significance of the "hundred" has greatly diminished since it ceased to be necessary to summon jurors from the locality in which an issue to be tried arose; see note (*a*), p. 230, *ante*.

(*p*) Quarter Sessions Act, 1814 (54 Geo. 3, c. 84); or, if specially fixed, fourteen days earlier or later (Quarter Sessions Act, 1894 (57 Vict. c. 6), s. 1). As to courts of quarter sessions, see title MAGISTRATES.

(*q*) Which, except in the City of London, where it is at Michaelmas, and in county boroughs, where it is on 9th November (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 170 (1)), is in March. As to sheriffs generally, see title SHERIFFS AND BAILIFFS.

(*r*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 12.

(*s*) *Ibid.*, s. 45.

(*t*) See p. 236, *post*.

(*a*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 14. The fact that the jurors' book has been irregularly prepared is no ground of challenge to the array; see p. 249, *post*; and *R.* v. *Burke* (1867), 10 Cox, C. C. 519 (an Irish decision under stat. (1833) 3 & 4 Will. 4, c. 91 (since repealed)).

(*b*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 5; Juries Act, 1862 (25 & 26 Vict. c. 107), s. 5.

(*c*) Juries Act, 1862 (25 & 26 Vict. c. 107), s. 9.

SECT. 5. **Jury Lists and Jurors' Books.**

preparing the jurors' book (*d*), is borne by the county or county division. The clerk to the justices is also entitled to receive a small fee from the same source (*e*). The costs and expenses properly incurred by the overseers in carrying out their duties are discharged out of the poor rates of the parish (*f*).

Preparation of list in the City of London.

570. In the City of London, which is now constituted one parish for all other than ecclesiastical and charitable purposes, and in which the Common Council are overseers, it is the duty of the Secondary to prepare a list of persons qualified and liable to serve as jurors (*g*). For this purpose he causes to be set against each house number in an alphabetical list of the streets within his jurisdiction the names of the occupants liable to serve, with their callings and their rateable qualifications, where such exceed £100. To the name of each person qualified to serve as a special juror is prefixed the letter S, and a number to which reference is made whenever it becomes necessary to specially strike a jury (*h*). The names of such persons as are partners are bracketed, with a view to their not being summoned simultaneously.

Certified by justices but not published.

571. The list, thus prepared, is examined and certified by justices of the City at special sessions (*i*) held early in December, and when certified becomes the jurors' book for the year commencing in the following January. It remains in the hands of the Secondary, who is also the summoning officer. There is no provision for the publication of the list, nor for the appearance of persons affected before the certifying justices.

Jury lists in cities, boroughs and towns which are counties.

572. In cities, boroughs, and towns, being counties of themselves, the burgess roll serves as a jury list (*j*).

SECT. 6.—*Summoning of Jurors.*

Juries generally summoned by the sheriff.

573. Except as already (*k*) or hereafter specially mentioned, the summoning officer is the sheriff (*l*), and to him are addressed precepts, warrants, and writs for the return of good and lawful men from the body of his county (*m*). If he is a person interested in the inquisition

(*d*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 12.

(*e*) Juries Act, 1862 (25 & 26 Vict. c. 107), s. 9.

(*f*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 60. It appears that their duties are at an end when they have brought the lists to the special petty sessions (*R.* v. *Haslingfield* (1874), L. R. 9 Q. B. 203).

(*g*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 11. As to the local authorities of the metropolis, see title METROPOLIS.

(*h*) See p. 261, *post.*

(*i*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 26. Compare p. 234, *ante.*

(*j*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (1); and see title COURTS, Vol. IX., p. 135.

(*k*) See the text, *supra.*

(*l*) The sheriff in practice employs a summoning officer or bailiff, but such person being the sheriff's servant only, the former is under no obligation in inquisitions held before himself to adopt his bailiff's panel (Manning, Practice of the Court of Exchequer, p. 34).

(*m*) Such was the wording of the old writs of *venire facias juratores;* see, too, Juries Act, 1825 (6 Geo. 4, c. 50), s. 13.

to be held, or the issue to be tried, the precept, warrant, or writ may be addressed to the coroner; or, if a similar objection lies against him, to elisors nominated by the court (*n*). The term "sheriff," in practice, generally means the under-sheriff, who now holds a statutory position (*o*); and under the term "sheriff," when used hereafter in connection with the summoning and control of juries, are comprehended the coroners and elisors, who may for the time being be acting in his place, the Secondary of the City of London, and their deputies.

The High Court of Justice.

574. Jurors are summoned to the King's Bench and Probate, Divorce, and Admiralty Divisions of the High Court of Justice (*p*) in obedience to precepts under the hand of any judge of the court, directing the sheriffs of London (*q*) and Middlesex to summon a sufficient number of common (*r*) and special (*s*) jurors to give their attendance at such time and place as may be required (*t*).

Grand jurors are not summoned to the High Court unless the Master of the Crown Office has notice of business for which they will be required, in which case notice is given to the sheriffs to summon a sufficient number (*a*).

Assizes.

575. Jurors are summoned to assizes (other than those held at the Central Criminal Court (*b*)), in obedience to precepts, under the

(*n*) Objection to a sheriff's array, though very rare, is now usually taken on an interlocutory application at chambers, though it may be taken by challenge (see p. 247, *post*). The court now acts in the first instance through a master in chambers (R. S. C., Ord. 54, r. 12). The summoning officer for the time being is given the right of access to the jurors' book (Juries Act, 1825 (6 Geo. 4, c. 50), s. 14.

(*o*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 23; and see title SHERIFFS AND BAILIFFS. So, too, by the interpretation clause of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3, the word "sheriff" is made to include "under-sheriff" or other legally competent deputy.

(*p*) Although in principle a trial with a jury may be had in any division of the High Court, in practice a jury is never summoned to the Chancery Division, issues requiring a jury being transferred to the King's Bench Division (R. S. C., Ord. 49, r. 3; *Re Martin, Hunt* v. *Chambers* (1882), 20 Ch. D. 365, C. A.). But cases are still occasionally tried with juries in the Chancery Court of the County Palatine of Lancaster, as to which court see title COURTS, Vol. IX., pp. 120 *et seq.*

(*q*) Including now the sheriff of the County of London (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89 (3)).

(*r*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 107.

(*s*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 16, as extended by the Special Juries Act, 1898 (61 & 62 Vict. c. 6).

(*t*) The formality of a precept under the hand of a judge has fallen into disuse in London and Middlesex since the passing of the Judicature Acts, and it is now the practice for a letter, under the hand of the Master of the Crown Office (see note (*a*), *infra*), to be sent to the sheriffs ten days before the services of a jury in any court are required, directing them to summon to such court to serve as special or common jurors, as the case may be, seventy-five persons for the period of a week.

(*a*) The Middlesex Grand Juries Act, 1872 (35 & 36 Vict. c. 52). They are practically only required before a trial at bar, criminal cases tried in the High Court having generally been moved up on *certiorari* after true bills found in the country or at the Central Criminal Court; see p. 260, *post*. As to the Master of the Crown Office, see title COURTS, Vol. IX., p. 66.

(*b*) See p. 227, *ante*, and p. 238, *post*.

SECT. 6. Summoning of Jurors.

hands of the judges or commissioners appointed by the Crown to travel the circuit on which the assize is to be held, directing the sheriff of each county to return a competent number to serve as grand jurors, and a sufficient number as special (*c*) and common jurors (*d*). Common jurors are required to serve indiscriminately on the trial of both civil and criminal issues (*e*), and they may be directed to attend in two sets, so that the whole number may not be detained during the continuance of a long assize (*f*).

Central Criminal Court.

576. Jurors are summoned to the Central Criminal Court in obedience to precepts issued by the judges of the court (*g*) to the sheriffs of the City of London, and of the counties of London (*h*), Middlesex, Essex, Kent and Surrey, directing them to return from the parts within the statutory limits (*i*) a competent number of persons to serve both as grand and petty jurors (*j*).

County and borough sessions.

577. Jurors are summoned to sessions of the peace in counties other than county boroughs, in obedience to precepts under the hand of the King or two justices of the county (*k*), directing the return of a competent (*l*) number of persons to serve both as grand and as common jurors; and to sessions of the peace in boroughs (including county boroughs) and to borough civil courts, by the clerk of the peace, or registrar of the civil court, as the case may be, who summons a sufficient number of persons to serve as jurors, in any capacity, upon the fixing of the date for the holding of the sessions or court by the recorder or judge (*m*).

To other tribunals.

578. To all other tribunals jurors are summoned, in the absence of special provisions, in virtue of precepts and warrants issued by the person or persons holding the same *virtute officii* (*n*), in accordance with statute (*o*), or in obedience to writs specially addressed to them (*p*). The number of persons to be summoned may be

(*c*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 108, as extended by the Special Juries Act, 1898 (61 & 62 Vict. c. 6).

(*d*) Juries Act, 1825 (6 Geo. 4, c. 50), ss. 20, 22; County Common Juries Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 17).

(*e*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 22; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 105.

(*f*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 22.

(*g*) See title COURTS, Vol. IX., pp. 87 *et seq.*

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89.

(*i*) See Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 2.

(*j*) *Ibid.*, s. 4. It is usual to select as grand jurors those who are marked in the jurors' books as special jurors.

(*k*) Chitty's Criminal Law (1826), Vol. IV., p. 176.

(*l*) It is usual to summon thirty, as grand jurors (twenty-three of whom are sworn), and as many, as common jurors, as the volume of business may seem to require.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 165 (1), 186 (2), (3); see title COURTS, Vol. IX., p. 135.

(*n*) As by a coroner or escheator; see pp. 227, 228, *ante*.

(*o*) As by the Commissioners of Sewers (Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 11); or under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 89. See also titles CONSTITUTIONAL LAW, Vol. VI., p. 470; ECCLESIASTICAL LAW, Vol. XI., p. 588; HIGHWAYS, STREETS AND BRIDGES, Vol. XVI., p. 77.

(*p*) As by the sheriff himself in executing writs of *elegit* and inquiry.

expressed therein (*q*), otherwise it will be the duty of the summoning officer to take care that not less than twelve attend (*r*).

Service of summonses on jurors.

579. The persons selected by the sheriff are served six clear days before their attendance is required (*s*) with notice of the place and time at which they must attend. This may be done by showing them a note in writing under the hand of the sheriff (or of the clerk of the peace or registrar, as the case may be (*t*)) containing the substance of the summons, or, if they are absent from their usual place of abode, by leaving it with some person resident there (*u*); or a summons properly attested by the sheriff's seal, and bearing the words "jury summons" on the side of the address, may be sent by registered post, two additional days being allowed for the transmission (*a*).

Cost of service.

580. The cost of service by post (within certain limits) is allowed to the sheriff by the Commissioners of the Treasury (*b*).

Notice to jurors not to attend.

581. If not more than five days before commission day (in the case of assizes), or the day appointed for holding the court (in the case of quarter sessions), it appears to the clerk of assize or the clerk of the peace, as the case may be, that there will be no business for the transaction of which jurors will be required, he must cause notice to be sent by post to the jurors summoned to attend the same, dispensing with their attendance (*c*).

Declaration by summoning officer.

582. Every person concerned in the summoning and impanelling of a jury of any kind (*d*) must, before acting, make a declaration that he will not act corruptly, and neither will himself take, nor consent to any other person taking, fee or reward beyond such as are allowed by law (*e*).

Names of jurors summoned to be attached to precept.

583. The names of the persons selected to serve, and served with notice to attend, are entered in different panels (printed if for use in the High Court of Justice or at assizes), according as they are summoned to serve as grand, special, or common jurors. The

(*q*) Under the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 11, the sheriff must summon not less than eighteen nor more than forty-eight.

(*r*) See p. 226, *ante*. For the summoning of juries to try criminal issues, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 359.

(*s*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 20. Though a shorter notice is frequently accepted, it is apprehended that, except in the case of coroners' juries, no penalty for non-attendance can be imposed without such notice. Persons summoned to serve as grand jurors at borough sessions are entitled to seven days' notice at least (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (2).

(*t*) See p. 238, *ante*.

(*u*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 25; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (4).

(*a*) Juries Act, 1862 (25 & 26 Vict. c. 107), s. 11, which casts upon the postmaster, to whom the summonses are handed, the duty of comparing the addresses on them with duplicates, the latter of which he stamps and returns to the summoning officer.

(*b*) *Ibid.*, s. 13.

(*c*) Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), s. 1 (1).

(*d*) "Inquest, jury, or tales."

(*e*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 26. For form, see Schedule (*ibid.*).

SECT. 6. Summoning of Jurors.

names in each panel arranged in alphabetical order (*f*), with the profession and place of abode of each person appended, are then attached to the precept, and so returned to the issuing authority (*g*). It is, moreover, the duty of the sheriff to forward therewith the name of each special and common juror (with the place of abode and addition) (*h*) written on a separate card for the purpose of balloting on the trial of issues in civil courts (*i*).

SECT. 7.—*Juries of Inquiry and Presentment.*

SUB-SECT. 1.—*In General.*

Proceedings on inquiry and presentment.

584. Juries of inquiry and presentment are sworn diligently to inquire and true presentment make of the matters which are mentioned in the writ pursuant to which they are summoned, or which are given them in charge (*k*). It has been customary (*l*) to administer the oath to the foreman first, and the others then swear to observe the oath he has taken. They are bound to hear such evidence as is called before them, though it is no objection to them that they have personal knowledge of the matter in hand (*m*). They view if necessary (*n*), and, except in the case of grand juries, receive such assistance as the presiding officer thinks fit, by comment or otherwise, to render them.

The presentment.

585. Twelve concurring (*o*), they make a presentment in writing and on parchment (*p*), signed and sealed by each concurring member and by the presiding officer (*q*), to be by him dealt with as he is in

(*f*) Precedence of rank is recognised on grand jury panels in counties. See p. 241, *post*.

(*g*) Unless the issuing authority be the sheriff himself. Upon the precept, warrant, or writ he certifies: "the execution of this precept appears in divers panels hereto annexed." See Chitty's Criminal Law (1826), Vol. IV., p. 172, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 359.

(*h*) "Addition," according to Murray's New English Dictionary, is something annexed to a man's name to show his rank, occupation, or place of residence, or otherwise to distinguish him.

(*i*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 26. See p. 246, *post*.

(*k*) *E.g.*, by a judge charging a grand jury, or a coroner opening the matter of an inquest.

(*l*) The Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 3 (1), and Sched. II., prescribes an oath, which is taken conjointly, and, except with grand juries, juries on lunacy inquisitions, and juries of matrons, the custom of swearing the foreman first has gone out of fashion. As to juries of matrons, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 375.

(*m*) A grand juror may act upon what he has read in a newspaper (*R.* v. *Bullard* (1872), 12 Cox, C. C. 353, *per* BYLES, J.), and jurors upon lunacy inquisitions are specially sought from the neighbourhood.

(*n*) See p. 245, *post*.

(*o*) After verdict it will be assumed that the requisite number sat on the jury (*Lambert* v. *Taylor* (1825), 4 B. & C. 138).

(*p*) One of the grounds, upon which it was sought to quash the coroner's inquisition in the well-known case of Constance Kent (1860), was that it was written on paper, and not on parchment. The Crown afterwards waived the objection. See Atlay, The Victorian Chancellors, Vol. II., p. 245.

(*q*) The marks of those unable to write must be verified by attestation (*R.* v. *Stockdale and Darlington Rail. Co.* (1840), 8 Dowl. 516; *R.* v. *Bowen* (1829), 3 C. & P. 602), but they will be assumed to have been made in each other's

each case directed; or as the law prescribes. Jurors of inquiry and presentment cannot be challenged (*r*).

SECT. 7. Juries of Inquiry and Presentment.

SUB-SECT. 2.—*Grand Juries.*

586. The function of grand juries is to make presentments to judicial bodies (*s*) or personages (*t*), mainly of accusation (*a*) against persons against whom criminal proceedings are pending. Presentments of accusation are (with the exception noted below) conditions precedent to the putting of any person on his trial before a petty jury (*b*), and are now made only after the hearing of evidence (*c*). They are reduced into writing (*d*), and are then called indictments or bills of indictment (*e*).

Function of grand juries.

587. Grand juries are usually drawn from the same source as petty juries, namely, the jurors' books (*f*) and the burgess lists (*g*). But in counties, other than London and Middlesex and boroughs which are counties in themselves (*h*), it is customary that grand jurors summoned to assizes should be freeholders, and persons of consequence ranking immediately after peers (*i*).

Whence grand juries are drawn.

588. At the opening of the court (*k*) to which persons have been summoned as grand jurors, names taken from a panel attached to

Swearing.

presence (*Lewen's Case* (1834), 2 Lew. C. C. 125). Persons of the same name need not be distinguished (*R.* v. *Nicholas* (1836), 7 C. & P. 538). The presentment of a grand jury is neither signed nor sealed.

(*r*) 2 Roll. Abr. 660; *Anon.* (1703), 6 Mod. Rep. 43.

(*s*) *E.g.*, justices assembled in quarter sessions.

(*t*) His Majesty's judges, commissioners of assize, or recorders.

(*a*) But not solely. Before being discharged grand juries may make presentments upon subjects of public importance, *e.g.*, that it is desirable in certain circumstances that corporal punishment should be inflicted.

(*b*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 359; stat. (1351-2) 25 Edw. 3, stat. 5, c. 4. The only exception to this rule is where an information has been exhibited by the Attorney-General in respect of some misdemeanour, which information, by an officer of the Crown, is regarded as tantamount to an indictment (4 Bl. Com. 305). The verdict of a coroner's jury, upon which a man can be put on his trial for murder or manslaughter, is no exception to the rule.

(*c*) For grand jurors (as also common jurors) are no longer summoned from particular neighbourhoods, or even from particular hundreds (Juries Act, 1825 (6 Geo. 4, c. 50), s. 13); see note (*a*), p. 230, *ante*.

(*d*) In practice, before the grand jury see them; see p. 242, *post*. See also *R.* v. *Ingham* (1864), 5 B. & S. 257, where the procedure of a grand jury in dealing with indictments is discussed by BLACKBURN, J., at p. 274.

(*e*) The term "indictment" is, in the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 30, used generally to include information, inquisition, and presentment.

(*f*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 1; Central Criminal Court Act 1834 (4 & 5 Will. 4, c. 36), s. 4; see p. 235, *ante*.

(*g*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (1); see p. 236, *ante*.

(*h*) See p. 236, *ante*.

(*i*) 2 Hale, P. C. 154. But a person may serve on a county grand jury although he is not a freeholder (*Case* (1810), Russ. & Ry. 177); and the only peer who ought to serve on a jury of any description is an Irish peer who is also a member of the House of Commons (*Irish Peer's Case* (1806), Russ. & Ry. 117).

(*k*) At county assizes by the reading of the commission, which issues under

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the precept (*l*) by the Master of the Crown office, the clerk of assize, or clerk of the peace, as the case may be, are called until twenty-three have responded and entered the box (*m*), when they are duly sworn diligently to inquire, and true presentment make, not only of the articles, matters, and things "given them in charge," but "which come to their knowledge touching the present service." They are furthermore sworn to secrecy (*n*), and cannot be challenged (*o*).

The charge.

589. The grand jury, having been sworn, receive from the judge, commissioner, recorder, or chairman of quarter sessions a charge, in which may be introduced references to recent statutory changes, the increase or diminution of crime, and other matters of public interest, and in which it is usual to refer to the law and facts bearing upon the more important cases which are to come before the jury for consideration.

Each judge sitting may charge.

590. When an indictment is preferred in the King's Bench Division of the High Court of Justice (*p*), where two or more judges sit as a divisional court (*q*), though it is the practice for the senior puisne judge to charge the grand jury, yet where there is any difference of opinion as to the direction to be given it is the right, as well as the duty, of each judge to deliver his own charge (*r*).

The findings.

591. The grand jury, having been charged in the manner above indicated, retire to consider what bills of indictment and other matters they shall present (*s*). Their proceedings are private (*t*). Indictments founded on the depositions transmitted by magistrates pursuant to the Indictable Offences Act, 1848 (*a*), or the Vexatious

the Sign Manual at the beginning of each circuit. At the Central Criminal Court the commission is a general one, remaining in force until a new one issues (Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 2).

(*l*) Four panels are attached to the precept, containing respectively the names of:—(i.) the grand jurors; (ii.) the special jurors; (iii.) the common jurors; and (iv.) the magistrates, bailiffs, and other officers within the county.

(*m*) See p. 227, *ante*.

(*n*) The oath continues: "The King's counsel, your own, and your fellows', you shall well and keep secret. You shall present no man for hatred, malice, or ill-will, nor leave any unpresented for fear, favour, or affection, or for any reward, hope, or promise thereof"; see p. 267, *post*.

(*o*) *R.* v. *Sheridan* (1812), 31 State Tr. 543, 576.

(*p*) Preparatory to a trial at bar.

(*q*) As the successor of the old common law courts sitting *in banc*.

(*r*) *Per* COCKBURN, L.C.J., in the court of Queen's Bench, after the throwing out of the bill by the grand jury in *R.* v. *Eyre* (1868), L. R. 3 Q. B. 487. See report of the case by W. F. Finlason.

(*s*) As to delivery of bills found or ignored, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 347.

(*t*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77, C. C. R., *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 80. In *R.* v. *Cooke* (1838), 8 C. & P. 582, PATTESON, J., thought it better not to receive any explanation of what the grand jury meant by their finding, and in *R.* v. *Marsh* (1837), 6 Ad. & El. 236, of how many had concurred in the finding; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 346.

(*a*) 11 & 12 Vict. c. 42, s. 20.

Indictments Act, 1859 (*b*), and on other charges which may be preferred before them (*c*), are placed in their hands (*d*).

Throwing out a bill.

592. A bill of indictment thrown out cannot be presented a second time at the same assize or sessions of the peace, but may be preferred to another grand jury at a future assize or sessions (*e*).

Discharge.

593. Upon completion of their business, all the persons sworn on the grand jury return into court, where the foreman (*f*) announces that they have dealt with the bills of indictment brought before them, and proceeds to make any general presentments (*g*) which he and his fellow jurors have agreed upon. The judge or presiding magistrate makes a reply of acknowledgment, and discharges them with the thanks of the county or borough, as the case may be (*h*).

Disqualification for serving on petty jury.

594. No member of the grand jury which have found a true bill against any person may, if challenged, serve on the petty jury sworn to try that person, whether on the same or any other indictment wherein the same matter is material (*i*).

(*b*) 22 & 23 Vict. c. 17, s. 2. Strictly speaking the grand jury cannot refer to the depositions (*R.* v. *Denby* (1789), 1 Leach, 514), except by permission of the judge, and that only upon proof of the facts required by the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17 (*R.* v. *Beaver and Shore* (1866), 10 Cox, C. C. 274). The rule has not, however, been strictly enforced, *e.g.*, by BYLES, J., in *R.* v. *Bullard* (1872), 12 Cox, C. C. 353, and DENMAN, J., in *R.* v. *Gerrans* (1876), 13 Cox, C. C. 158.

(*c*) By any person who likes to go before them, who must now, however, give five days' notice to the proper officer of his intention to do so (Assizes and Quarter Sessions Act, 1908 (8 Edw. c. 41), s. 1 (5)). It is only in the cases provided for in the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), that previous investigation before a magistrate is necessary, though the fact that it should not be necessary in every case was pointed out by the Criminal Code Bill Commissioners in 1878 as a grave defect in the law (Report, p. 32). BLACKBURN, J., had previously spoken strongly on the matter (*R.* v. *Eyre* (1868), L. R. 3 Q. B. 487, 494).

(*d*) As to the evidence that may be heard by a grand jury, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 346, 347. The grand jurors may take into consideration their own knowledge of the facts (*R.* v. *Tong* (1847), 2 Cox, C. C. 290); and it has been held that where a grand juror heard a witness swear in court directly contrary to the evidence which he had given before the grand jury, his previous statement might be proved. See Christian's Blackstone (1809), 15th ed., Vol. IV., p. 126.

(*e*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 347, note (*m*).

(*f*) At county assizes it is usual to elect as foreman the person of highest rank impanelled.

(*g*) These, no doubt, were formerly on parchment, signed and sealed by the concurring members of the grand jury. They are now generally verbal, but if they are of a novel or unusually important character the judge will direct that they be reduced to writing.

(*h*) See, however, title CRIMINAL LAW AND PROCEDURE, Vol IX., p. 347, note (*n*). If a bill be not brought into court before the grand jury have been discharged, it would seem that it must go before another grand jury (*R.* v. *Thompson* (1846), 1 Cox, C. C. 268).

(*i*) Stat. (1351-2) 25 Edw. 3, stat. 5, c. 3; Co. Litt. 157 b; 2 Hawk. P. C., 8th ed., c. 48, s. 27. In *R.* v. *Sullivan* (1838), 8 Ad. & El. 831, the Court of Queen's Bench, however, refused to order a new trial where a member of the

SECT. 7. Juries of Inquiry and Presentment.

SUB-SECT. 3.—*Lunacy Juries.*

Who are summoned on lunacy juries.

595. When the judge in lunacy (*k*), in his order for an inquisition, directs the return of a jury (*l*), or the masters, after certifying that an inquisition before a jury is expedient, issue their precept to the sheriff (*m*), the sheriff summons (generally) thirty-four persons, marked as special jurors in the jurors' book, and resident in the immediate neighbourhood of the place where the inquisition is to be held (*n*), of whom not more than twenty-three are sworn (*o*). It is, however, proper, where the estate is small, to summon only common jurors (*p*).

SUB-SECT. 4.—*On Coroners' Juries.*

Coroners' juries.

596. The practice and procedure relating to coroners' juries is dealt with elsewhere (*q*).

SECT. 8.—*Juries of Issue and Assessment.*

SUB-SECT. 1.—*In General.*

When juries are required.

597. In all causes in which issue is joined between the Crown and a person charged by the presentment of a grand jury (*r*) or by the filing of an information (*s*), and in all causes in which the custom (*t*) or order of the court, or the parties or any of them (as

grand jury had sat on a convicting petty jury without challenge. A grand jury may not try the sanity of any person against whom a bill is presented (*R.* v. *Hodges* (1838), 8 C. & P. 195). On the subject of grand juries, see, further, CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 345 *et seq.*

(*k*) See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*l*) Under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 91; see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 93.

(*n*) Elmer, Practice in Lunacy, 7th ed., p. 23. A survival of the old writ of *venire facias*, which always directed the sheriff to summon a jury from the neighbourhood of the parish or place within which the fact to be tried was alleged. There is still, however, no objection to a sheriff summoning a jury from a particular hundred if convenience justifies it (*Taylor* v. *Loft* (1853), 8 Exch. 269).

(*o*) The Lord Chancellor may, by order, regulate the number to be sworn, so that the inquisition be found by twelve men at least (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 97). Where an issue is directed to be tried in the High Court, under *ibid.*, s. 94, it is conceived that twelve persons only should be sworn on the jury. Having regard to the language of *ibid.*, s. 94, and to the Juries Act, 1825 (6 Geo. 4, c. 50), s. 26, it is difficult to understand why twenty-one were sworn to try the issue in the *Townsend Case* (1906, *Times*, 25th July to 13th August). The presence of an excessive number in the jury box may be ground for a new trial; see note (*f*), p. 226, *ante*. The question was again raised on the trial of another lunacy issue, but it was there agreed that twelve jurors were sufficient, and no more were sworn (*R.* v. *Gilchrist* (1907), *Times*, 5th March).

(*p*) Elmer, Practice in Lunacy, 7th ed., p. 23.

(*q*) See title CORONERS, Vol. VIII., pp. 259 *et seq.*

(*r*) See p. 241, *ante*.

(*s*) Which may be done by the Attorney-General, or by the Master of the Crown Office upon a rule obtained in the King's Bench Division; see p. 241, *ante*.

(*t*) *E.g.*, of the Mayor's Court; see title MAYOR'S COURT (LONDON). Under the Judicature Acts trial by jury can no longer be regarded as customary in the High Court in civil matters (*Jenkins* v. *Bushby*, [1891] 1 Ch. 484, 492, C. A.; see also *Garling* v. *Royds* (1876), 25 W. R. 123; *Wedderburn* v. *Pickering* (1879), 13 Ch. D. 769); and it seems that the surrendering the right to a jury may be made a condition of leave to defend upon an application for judgment under R. S. C., Ord. 14 (*Wolfe* v. *De Braam* (1899), 81 L. T. 533, C. A.).

of right) require, a jury is sworn to try the issues (*u*). Juries of issue and assessment are common or special (*x*).

SECT. 8. Juries of Issue and Assessment.

SUB-SECT. 2.—*Publication of Jury Panels.*

Publication of jury panels

598. It is the duty of the sheriff or other summoning officer to keep in the office of his under-sheriff or deputy, for seven days at least before the sitting of any court for the trial of issues, copies of the printed panels which he has returned to any precept commanding him to summon jurors for the trial of such issues, and to permit the parties thereto to inspect the same without fee. Copies may be purchased for 1*s.* each, and one must be annexed to the *nisi prius* record or its present equivalent (*a*).

Person indicted for treason entitled to copy of panel ten days before trial.

599. A panel of the petty jury must, ten days at least before the arraignment (*b*) (or, if the trial is to take place in the High Court, ten days before the trial), be delivered by the prosecution, in the presence of two or more credible witnesses, to any person indicted for treason or misprision of treason (*c*). This requirement does not extend to cases of:

(i.) Violence or attempted violence against the king's person;

(ii.) Counterfeiting coin, the great seal or privy seal, the sign manual or privy signet (*d*).

SUB-SECT. 3.—*Viewing.*

Viewing.

600. In any case in which it is expedient that the jury should view a place in question, an order may be obtained from the court (*e*) that a view be had, and thereupon, on the depositing in the hands of the sheriff of a sum named in the order, some of those persons, whose names are on the panel for the trial of the issue, are nominated by him to visit the place, at an appointed time, under his conduct (*f*). There they are shown over it by two

(*u*) Compare titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 176; HUSBAND AND WIFE, Vol. XVI., pp. 528, 541. If the jury have been summoned, either party (with the sanction of the judge) is entitled to have the verdict of the jury, even although the other party may consent to judgment (*Samway* v. *Winch* (1893), 9 T. L. R. 552, qualifying *Twycross* v. *Grant* (1877), 2 C. P. D. 469, 475, C. A.). For trial by jury in the High Court, see R. S. C. Ord. 36, rr. 2, 9.

(*x*) See p. 259, *post.*

(*a*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 106, 107; Juries Act, 1870 (33 & 34 Vict. c. 77), s. 16; see also *R.* v. *Edmonds* (1821), 4 B. & Ald. 471, 479; *R.* v. *Dowling* (1848), 3 Cox, C. C. 509.

(*b*) Because trial now generally follows arraignment, except in the High Court (Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 27).

(*c*) Together with a copy of the indictment (Treason Act, 1708 (7 Anne, c. 21), s. 14).

(*d*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 21; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 359, *et seq.*; and as to these offences, see *ibid.*, pp. 450 *et seq.*, 514 *et seq.*, 735.

(*e*) Including a master at chambers (R. S. C., Ord. 54, r. 12), a district registrar (*ibid.*, Ord. 35, r. 6), and, in criminal matters, the clerk of assize, or clerk of the peace acting as delegate of the judge, or justices in quarter sessions. The application may be made *Ex parte* under R. S. C., Ord. 50, r. 5, where the consent of the other side has been obtained (*Pickard* v. *Great Northern Rail. Co.*, [1883] W. N. 194).

(*f*) The court cannot, however, even by consent, order a view in one county by the sheriff of another, nor can a jury be compelled to go out of their own county to view (*Malins* v. *Dunraven* (*Lord*) (1845), 9 Jur. 690; *Stoke* v.

SECT. 8. Juries of Issue and Assessment.

persons mentioned in the order, called "showers," one nominated by each party, and, upon the conclusion of the view, the sheriff certifies that it has been had, and returns the names of the viewers to the proper officer of the court, that they may be called upon the jury sworn to try the issue in question (*g*).

When view may be made.

601. A jury may be taken to view a place in question after the commencement of the trial, and even after the summing-up of the judge in a criminal issue, but care is taken that irregular communications are not made to them while viewing (*h*).

SUB-SECT. 4.—*Calling the Jury.*

Calling the jury.

602. Upon the coming on of the issue for trial, the persons first called into the box to form the jury are those (if any) who have viewed (*a*), and thereafter:

(i.) Upon the trial of criminal issues, persons whose names are on the panel returned by the sheriff, called in the order or manner customary in the court (*b*);

(ii.) Upon the trial of civil causes, those whose names are written on the cards in the manner before mentioned, and drawn indiscriminately from a box (*c*).

SUB-SECT. 5.—*Challenging.*

Challenge. When it arises.

603. Upon a full body of twelve persons being assembled in the box the right of challenge arises (*d*). Challenge is of two kinds:

(i.) Challenge to the array;

(ii.) Challenge to the polls;

and may be exercised by either party, including the Crown.

Robinson (1889), 6 T. L. R. 31); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 350, 369.

(*g*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 23; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 114. It has been held good ground for a new trial that the viewers being engaged in another court, none of them could be called on the jury which tried the case (*Kingston Union Guardians* v. *Landed Estates Co.* (1873), 28 L. T. 644; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 369).

(*h*) *R.* v. *Martin* (1872), L. R. 1 C. C. R. 378; see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 369.

(*a*) See the text, *supra*. They may, however, be challenged (*Anon.* (1705), 6 Mod. Rep. 211; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 359 *et seq.*

(*b*) The Criminal Code Bill Commission recommended that ballotting for names, at present only statutory on the trial of causes (see note (*c*), *infra*), should be extended to criminal trials. In practice it is largely resorted to. At the Central Criminal Court, at the commencement of each sessions, the names of persons summoned from the six districts mentioned at p. 238, *ante*, are put into as many different boxes or glasses, and are drawn out, an equal number from each, to form various juries who are told off between the courts. When a case of great public interest is to be tried the jury is drawn specially from a large panel, as in the trial of the Mile End Guardians (August, 1908), where the names consisted of as many as three hundred. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 359.

(*c*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 26; and see p. 240, *ante*.

(*d*) *Vicars* v. *Langham* (1618), Hob. 235; *R.* v. *Edmonds* (1821), 4 B. & Ald. 471, 473; *Barrett* v. *Long* (1851), 3 H. L. Cas. 395, 410. In *Pryme* v. *Titchmarsh* (1842), 10 M. & W. 605, it was doubted whether jurors summoned to try a cause under the old writ of trial addressed to a sheriff could be challenged; and see p. 252, *post*. No challenge is permissible on a writ of inquiry to assess damages, 2 Roll. Abr. 660; *Anon.* (1703), 6 Mod. Rep. 43, *per* HOLT, C.J.;

604. Challenge to the array is exception taken to the whole panel of persons returned by the sheriff or other summoning officer, by reason of matter personal to himself, and is commonly divided into two classes:

Challenge to the array may be:

(i.) Principal challenge, where the summoning officer is in a position inconsistent with indifference, as by being party to the action, or related to one of the parties, or as having impanelled certain persons at the request of one of the parties, or as having an action pending against him by either party;

Principal;

(ii.) Challenge for favour, where the position of the summoning officer is not necessarily inconsistent with indifference, but may be suspected.

Or to the favour.

605. The distinction between the two is one of degree rather than of essence (*e*), but on the matters constituting cause of principal challenge being admitted, it is the duty of the court to quash the array, and to order the coroner (*f*) (or if a similar challenge prevails against his jury, two elisors or electors nominated by itself (*g*)) to return a new panel. If the facts alleged are controverted, the court nominates two "triers" (who may be persons summoned as jurors) to ascertain them upon oath (*h*), and if they do not constitute cause of principal challenge, to try further whether the array be impartial or favourable. On the challenge being on either ground upheld, the same result follows (*i*).

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and it was doubted whether there was right of challenge on an issue (involving less than £20) remitted to the sheriff for trial under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 17 (now repealed) (*Pryme* v. *Titchmarsh* (1842), 10 M. & W. 605). As a general rule jurors are not to be challenged where there is no issue joined between parties, and *a fortiori* where they are jurors of inquiry and presentment only. Coke mentions writs to inquire of waste and *de proprietate probanda* as exceptions to the rule (Co. Litt. 158 b), and be this well or ill founded, it is conceived that if the sheriff or other officer taking the inquest accept jurors not properly qualified, the fact would be ground for quashing the proceeding. See also Duncomb, Trials per Pais, c. 9.

(*e*) *E.g.*, it is a principal challenge if the sheriff is of kin or affinity to one of the parties, but to the favour if there is affinity between the sheriff's son and a party's daughter (Co. Litt. 156 a). The Juries Procedure (Ireland) Act, 1876 (39 & 40 Vict. c. 78), s. 17, which was embodied in the bill prepared by the Criminal Code Bill Commission of 1878, limits the causes of challenge to the array to partiality, fraud, and wilful misconduct.

(*f*) *R.* v. *Dolby* (1823), 2 B. & C. 104.

(*g*) They are sworn for the purpose (*ibid.*). Against them and their array no objection can be maintained (Co. Litt. 158 a.; 3 Bl. Com. 355). For the same reason there can be no challenge to the array of a jury summoned by the Master of the Crown Office (*R.* v. *Edmonds* (1821), 4 B. & Ald. 471, 474).

(*h*) The person challenging the array, as also the challenger of a poll, must give *primâ facie* evidence of cause (*R.* v. *Savage* (1824), 1 Mood. C. C. 51; *R.* v. *Hughes* (1843), 1 Car. & Kir. 235).

(*i*) Co. Litt. 156 a; for the quashing of an array upon a successful challenge is matter of right, and not of the court's discretion (*R.* v. *Edmonds*, *supra*, at p. 473). It is doubtful whether the array can be challenged for favour where the Crown is a party (Co. Litt. 156 a); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 359 *et seq.* It has been laid down (Co. Litt. 156 a) that the determination of a principal challenge is for the court, and of a challenge to the favour for triers. The rule as thus baldly stated is unsatisfactory. If certain facts are not in dispute the court is entitled and ought to draw from them inferences which necessarily follow (as did COLERIDGE, J., in *R.* v. *Swain* (1838), 2 Mood. & R. 112, where the jurors

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If both parties challenge the array, it must be quashed (*k*).

Challenge to array of tales.

606. The array of a tales (*l*) may be challenged in the same way as a principal array (*m*), and a party is not precluded from doing so by the fact that he had prayed a tales (*n*). The array of the tales is not tried until after the principal, nor by the same triers, if they have quashed the latter. If the plaintiff challenges the array of the principal panel, and the defendant that of the tales, then one of the principal and one of the tales act as triers of both arrays (*o*).

Time for challenge.

607. A challenge to the array must be made promptly (*p*), must be in writing, and must contain every cause of objection (*q*). Every cause of challenge, whether to the array or to the polls, ought to be propounded in such a way that the opposite party may have an opportunity of controverting the facts alleged (*r*), and of appealing from a decision of the court (*s*).

Challenge to the array before trial.

608. A challenge to the array in open court may be anticipated, and failure by the party intending to challenge to make such previous application may be visited by an adverse order as to

challenged being examined upon the *voir dire* (see p. 251, *post*) admitted the matters complained of). Apparently the existence of various sets of circumstances had been ruled by the courts from time to time to be good ground of challenge, and these rulings left no discretion when similar facts arose. (See a list in "The Complete Juryman," a book published in 1752 after the passing of stat. (1730) 3 Geo. 2, c. 25). This view is borne out by the recognition of principal challenge by the legislature, which has enacted, *e.g.*, in the Juries Act, 1825 (6 Geo. 4, c. 50), s. 50, that certain want of qualification in a person impanelled shall, if found, be taken as a principal challenge, *i.e.*, as something which *ipso facto* will necessitate his leaving the box. On the other hand, if different inferences could reasonably be drawn from the same facts, it would be proper to leave the matter to triers, and this, one may imagine, was the origin of challenge to the favour and the traditional method of adjudicating upon it.

(*k*) Co. Litt. 156 a; Duncomb, Trials per Pais, p. 9.

(*l*) See p. 252, *post*.

(*m*) *R.* v. *Dolby* (1821), 1 Car. & Kir. 238 (where a challenge that the sheriff was a subscriber to a society which was prosecuting was upheld). See, however, *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch. D. 366, C. A.

(*n*) *Vicars* v. *Langham* (1618), Hob. 235. It is too late, however, to challenge the array after challenging the polls of the principal panel (Bro. Abr. tit. Challenge, pl. 140). As to calling a tales, see p. 252, *post*.

(*o*) Co. Litt. 158 a; *Denbawd's Case* (1612), 10 Co. Rep. 102 b, 104, 105.

(*p*) If possible before the jury is sworn. In *Brunskill* v. *Giles* (1832), 9 Bing. 13, the court would not entertain an application for a new trial where the applicant's affidavit did not state that the facts relied on had come to his knowledge since the hearing. In *Mason* v. *Vickery* (1804), 1 Smith, K. B. 304, and *Briggs* v. *Sowton* (1840), 4 Jur. 1014, the fact that the under-sheriff, who presided, was attorney to one of the parties was held no ground for a new trial; see further *Brunskill* v. *Giles*, *supra*; *Pryme* v. *Titchmarsh* (1842), 10 M. & W. 605.

(*q*) A challenge to the array once tried there cannot be challenge for another cause. For form of challenge to the array, see *R.* v. *Dolby*, *supra*; and see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 360.

(*r*) In *O'Brien* v. *R.* (1849), 2 H. L. Cas. 465, 469, a challenge to the array was followed by a plea, a replication, and a rejoinder.

(*s*) *R.* v. *Edmonds* (1821), 4 B. & Ald. 471, 474. It was necessary to propound a challenge in such a way that it might be put on the record, and when that was done a writ of error would lie.

costs (*t*), by an application under the order for directions (*a*) that for cause stated in the summons the coroner or elisors summon the jury or that the venue be changed (*b*).

Insufficient grounds of challenge to the array.

609. It is not a ground of challenge to the array that the jury has been summoned from an improperly compiled jurors' book (*c*).

A challenge to the array of a special jury struck according to the old practice (*d*) cannot be maintained (*e*).

Challenge to the polls.

610. Challenge to the polls is exception taken to individual members of a jury before they are sworn (*f*), and may be:

(i.) Peremptory; or

(ii.) For cause.

Peremptory only in cases of treason and felony.

611. Challenge peremptory and without cause exists only, as of right, in cases of treason and felony (*g*), and then only in favour of a prisoner standing upon his deliverance (*h*).

A peremptory challenge, once exercised, cannot be withdrawn in order to be exercised against another juror (*i*). But it seems that a defendant who has challenged for cause, which has been disallowed, may challenge the same person peremptorily (*k*).

Position of the Crown.

612. The Crown may challenge for cause only (*l*). But the Crown may direct any person whose name is called to "stand

(*t*) Which are now entirely in the discretion of the judge (R. S. C., Ord. 65, r. 1).

(*a*) R. S. C., Ord. 30, r. 5.

(*b*) Since jury panels at county assizes and on trials in the High Court have been open to inspection, challenges to the array have become almost unknown.

(*c*) *R.* v. *Burke* (1867), 10 Cox, C. C. 519; see also *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, 247, H. L.

(*d*) See p. 261, *post*.

(*e*) For the party desirous of challenging could have had his challenge before (*R.* v. *Sutton* (1828), 8 B. & C. 417, *per* Lord TENTERDEN, C.J., at p. 419). But the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 108, and the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 16, in enacting that a general panel should be returned for the trial of all special jury causes, conferred a right of challenge.

(*f*) *R.* v. *Frost* (1839), 9 C. & P. 129, 137, and *R.* v. *Giorgetti* (1862), 4 F. & F. 546, following the opinion expressed in *Hopestill Tyndal's Case* (1633), Cro. Car. 291, and 2 Hawk. P. C., 8th ed., c. 43, s. 1. So, when it was discovered after the opening of the case that the prisoner had a relative on the jury, no exception could be taken (*R.* v. *Wardle* (1842), Car. & M. 647). Challenge, however, has been allowed up to the time the prisoner has been given in charge (*R.* v. *Flint* (1848), 3 Cox, C. C. 66).

(*g*) *Gray* v. *R.* (1844), 11 Cl. & Fin. 427, H. L.

(*h*) *Creed* v. *Fisher* (1854), 9 Exch. 472. It would seem to follow that no peremptory challenge can be allowed upon a collateral issue, *e.g.*, as to whether the person arraigned has been previously convicted (*R.* v. *Radcliffe* (1746), 1 Wm. Bl. 3, 6). As to the number of challenges allowed, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 360, 361. Any peremptory challenge beyond those permitted by law is void, and the trial will proceed as if it had not been made (Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 3).

(*i*) *R.* v. *Parry* (1837), 7 C. & P. 836.

(*k*) See, however, Fitzherbert, Grand Abridgment, tit. Challenge, 180. But after challenge for not being on the jurors' book for the current year had been disallowed, a peremptory challenge was admitted in *Mulcahy* v. *R.* (1868), L. R. 3 H. L. 306, 309; see also Co. Litt. 158 a, and 2 Hawk. P. C., 8th ed., c. 43, s. 10.

(*l*) Juries Act, 1825 (6 Geo. 4, c. 58), s. 29. The right of the Crown to peremptory challenge was abolished by stat. (1305) 33 Edw. 1; see also

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by" (*m*) until the panel has been called over and exhausted (*n*), and will not be put to assign cause until it appears that there will not be a full jury without recourse to such person.

Challenge for cause.

613. The right to challenge for cause is unlimited and may be exercised by a prisoner without stint after his peremptory challenges are exhausted (*o*). He is bound, however, to conclude his challenges, whether peremptory or for cause, before the Crown can be required to justify its challenges (*a*). In civil causes, whichever party first challenges must justify every challenge before the other party can be required to do so (*b*).

Classification:

614. Challenge for cause is generally divided into four classes (*c*) :—

(i.) *Propter honoris respectum.*

(i.) *Propter honoris respectum*,—where a peer of Parliament is summoned (*d*).

(ii.) *Propter defectum.*

(ii.) *Propter defectum*,—where the person called does not possess the necessary qualifications (*e*).

(iii.) *Propter affectum.*

(iii.) *Propter affectum*,—as the whole array may be challenged, if impanelled by an unindifferent person, so bias, necessary or suspected on the part of an individual member of the jury, is ground for challenge (*f*). As in the former case, the challenge is

Mansell v. *R.* (1857), 8 E. & B. 54, 70, 71, Ex. Ch.; and see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 361.

(*m*) 2 Hale, P. C. 271; 2 Hawk. P. C., 8th ed., c. 43, s. 3; *R.* v. *Geach* (1840), 9 C. & P. 499. As may also an individual who prosecutes in the name of the Crown (*R.* v. *M'Gowan* (1858), C. C. R., cited in *R.* v. *M'Cartie* (1859), 11 I. C. L. R. 188, 207). It has been held that the privilege extends to prisoners, but on a re-calling they can only challenge for cause (*R.* v. *Blakeman* (1850), 3 Car. & Kir. 97; and see 2 Hawk. P. C., 8th ed., c. 43, ss. 4, 10).

(*n*) Which will not be until every proper attempt has been made to secure the presence of those on the panel whose duty it is to attend (*R.* v. *Blakeman*, *supra*, *per* COCKBURN, C.J., at p. 104). Thus, if twelve jurors whose names are on the panel are discharged in another case, and become available, the Crown may require their names to be called before recourse is again had to those who have been ordered to "stand by."

(*o*) *R.* v. *Geach*, *supra*.

(*a*) 2 Hawk. P. C., 8th ed., c. 43, s. 3.

(*b*) Duncomb, Trials per Pais, c. 9, where times of challenge are exhaustively dealt with.

(*c*) Co. Litt., 156 b.

(*d*) It is stated by the authorities that a peer, when called, may challenge himself, or be challenged by either party (Co. Litt., 156 b; 3 Bl. Com. 361; 2 Hawk. P. C., 8th ed., c. 43, s. 11, the latter, however, adding "*quære*"). But if he has allowed his name to get into the jurors' book, it would seem from the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 12, that he cannot afterwards claim exemption. Nor does it appear on what principle either of the parties can challenge him, unless it be that he is the "peer" of neither. At the same time there is authority for a juror challenging himself (*R.* v. *Cook* (1696), 13 State Tr. 311, 316, 317).

(*e*) The fact of being over sixty years of age is not, however, a personal disqualification so as to be ground for challenge (*Mulcahy* v. *R.* (1868), L. R. 3 H. L. 306). A disqualification not discovered until after verdict would not be ground for new trial (*Peermain* v. *Mackay* (1845), 9 Jur. 491); see p. 229, *ante*.

(*f*) Some *primâ facie* evidence of bias must be given before the person challenged can be examined on the *voir dire* (*R.* v. *Dowling* (1848), 3 Cox, C. C. 509). As to examination upon the *voir dire*, see p. 251, *post*. In *R.* v. *Nicholson* (1840), 4 Jur. 558, the court expressed the view that the defendant should be

principal or to the favour (*g*), and, if resisted, is tried in the same way, the triers being preferably the jurors who have already been sworn (*h*).

(iv.) *Propter delictum*,—as where a person offering himself as a juror has committed some crime or misdemeanour that affects his credit, and renders him infamous.

(iv.) *Propter delictum.*

615. A person challenged may and ought to be examined upon oath as to the matters alleged concerning him (*i*), though not as to whether he has expressed an opinion unfavourable to one of the parties (*j*), or if the cause of challenge touch his dishonour or discredit (*k*).

Examination upon the *voir dire.*

616. Persons called upon to serve as "tales-men" (*l*), and jurors specially struck under the old system, are subject to challenge in

Tales-men and jurors specially struck.

furnished with the names of the members of a society which was instituting the prosecution with a view to challenge if any appeared on the jury. Political bias by an inhabitant of a town upon a trial for riot arising there has been held ground for allowing a challenge (*R.* v. *Swain* (1838), 2 Mood. & R. 112). On the other hand, challenges have been disallowed where the juror challenged did not, in other trials, find a verdict for the Crown (*Sawdon's Case* (1838), 2 Lew. C. C. 117); where, in an action to recover a penalty for bribery at an election, the juror was tenant of a nobleman whose brother had been candidate, and in a similar action arising out of the same election had been foreman of a jury which had returned a verdict (*Marsh* v. *Coppock* (1840), 9 C. & P. 480); where the juror had been a client of the prisoner (an attorney), and had visited him in gaol (*R.* v. *Geach* (1840), 9 C. & P. 499); where the juror was a director of an insurance company, in a case to which an insurance company was a party, unless his office had granted a policy to one of the parties (*Craig* v. *Fenn* (1841), Car. & M. 43); and where a juror had shown dissatisfaction with the law as laid down by the judge in favour of the party challenging in a previous case (*Pearse* v. *Rogers* (1860), 2 F. & F. 137). *A fortiori*, a verdict will not be set aside on the ground that one of the parties was on intimate terms with a juror (*Onions* v. *Naish* (1819), 7 Price 203); or that a juror was shareholder in a defendant company (*Williams* v. *Great Western Rail. Co.* (1858), 3 H. & N. 869). In *Bailey* v. *Macaulay* (1849), 13 Q. B. 815, a new trial was, however, granted upon terms, where a juror was a fellow committee-man of one of the parties.

(*g*) If the person called is of kindred or godparent to a party; has been his counsel or servant; has eaten or drunk at his charge; has indicted him or returned a verdict on a similar cause or matter; has land depending upon the title about to be tried; has been nominated by either party as his arbitrator; has had litigation with either, which implied malice or displeasure—all these circumstances would be ground for principal challenge. If, on the other hand, the litigation had not entailed angry feeling, or if the proposed juror had been nominated, not as arbitrator, but as a commissioner to examine witnesses, it would be challenge to the favour. The above are some of the fine distinctions drawn by Coke (Co. Litt., 157 a, b).

(*h*) If challenge has been to the first juror called, and two triers have been nominated by the court, upon the challenge being disallowed, the person objected to is sworn and added to the triers, and upon a second challenge being disallowed, the original triers are discharged and their places taken by the two persons so found indifferent.

(*i*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 50; *Anon.* (undated), 1 Salk. 153; this is called examination upon the *voir dire.*

(*j*) *R.* v. *Edmonds* (1821), 4 B. & Ald. 471, 490.

(*k*) Co. Litt. 158 b; *R.* v. *Cook* (1696), 13 State Tr. 311, 334; *R.* v. *Martin* (1848), 6 State Tr. (N. S.) 925. The court refused to let a juror be asked whether he belonged to an association for prosecuting frauds upon tradesmen (*R.* v. *Stewart* (1845), 1 Cox, C. C. 174).

(*l*) See p. 252, *post.*

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the same way as if they had been summoned in the ordinary manner (*m*).

Incompetent persons.

617. It is the duty of the judge on the trial of a criminal issue, even without challenge by the Crown or on behalf of the prisoner, to refuse to allow to be sworn any juror who from physical or mental infirmity, temporary or permanent, is incapable of duly attending to the evidence (*n*).

Effect of improperly disallowing a challenge.

618. The improper disallowance of a challenge renders the subsequent proceedings before the jury absolutely void, and it is not within the province of the appellate court to consider whether the person complaining has been prejudiced, and to exercise a discretion as to granting a new trial (*o*).

Omission to challenge.

619. If a party entitled to challenge omits, by ignorance of the facts entitling him thereto, to exercise the right at the proper time, a new trial may, if the court thinks fit, be had (*p*).

SUB-SECT. 6.—*Making up the Numbers.*

Making up the numbers.

620. When by reason of the persons summoned to attend not appearing, or of the number of those appearing being reduced by successful challenge or other cause, there is or there appears likely to be an insufficient number of jurors to discharge the duties devolving upon them, the court may:

Resort to other panels.

(i.) Cause any deficiency on the special jury panel to be made up out of the common jury panel (*q*), or any deficiency on the common jury panel to be made up out of the special jury panel (*r*);

Tales de circumstantibus.

(ii.) At the request of any interested party (*s*), command the

(*m*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 37 (tales-men); *R.* v. *Casey* (1877), 13 Cox, C. C. 645; *R.* v. *Parnell* (1880), 14 Cox, C. C. 505 (jurors specially struck).

(*n*) *Mansell* v. *R.* (1857), 8 E. & B. 54, 81, 109, Ex. Ch. This duty continues throughout the trial, and the exercise of it may be ground for discharging a jury without giving a verdict. WILLS, J., at the Wells Summer Assizes in 1902, discharged a juror who received news in the middle of a case that his farm was on fire, and commenced the trial *de novo*, although the man could not leave the town for three hours, and it was obvious the case would be concluded by that time.

(*o*) *R.* v. *Edmonds* (1821), 4 B. & Ald. 471, *per* ABBOTT, C.J., at p. 473.

(*p*) See *Baylis* v. *Lucas* (1774), 1 Cowp. 112 (where the array might have been quashed); *R.* v. *Tremearne* (1826), 5 B. & C. 254 (where an unqualified tales-man had been sworn and served). See, however, Co. Litt. 158 a; *R.* v. *Sheppard* (1773), 1 Leach, 101, C. C. R.; *Falmouth* (*Earl*) v. *Roberts* (1842), 9 M. & W. 469; and pp. 246 *et seq.*, *ante*.

(*q*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 37.

(*r*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 19 (2). The common law practice of taking mere bystanders had been prohibited by stat. (1696) 7 & 8 Will. 3, c. 32, s. 3 (*R.* v. *Hill* (1825), 1 C. & P. 667, *per* GARROW, B.).

(*s*) Including the Crown (Juries Act, 1825 (6 Geo. 4, c. 50), s. 37), which must be signified by the warrant of the Attorney-General (Short and Mellor, Practice of the Crown Office, 2nd ed., p. 115). The warrant of the Attorney-General has not, however, always been deemed necessary, nor is it when he personally (as distinguished from the Crown) is a party (*A.-G.* v. *Parsons* (1836), 2 M. & W. 23). See cases referred to in Archbold, Criminal Pleading, 23rd ed., p. 206.

sheriff to add and annex to existing panels the names of any persons there present or to be found (*a*);

(iii.) In the exercise of its inherent power, order the return by the sheriff of a new or enlarged panel of jurors (*b*).

Return of new panel.

SUB-SECT. 7.—*Swearing and Giving in Charge.*

Swearing the jury.

621. On the conclusion of the challenges, the twelve men in the box, or if there have been no challenges, the twelve first called into the box, are sworn to try the issues joined between the parties, and the cards with their names are kept apart until they have given a verdict or been discharged. From the names left in the box or remaining on the panel further juries are called in the same way if occasion requires, and on any jury giving a verdict or being discharged, the cards are returned into the box for further use (*c*).

Trials for treason and felony.

On trials for treason and felony, every member of a jury is sworn separately (*d*), and the prisoner is formally given into their charge, "to inquire whether he be guilty or not, and to hearken to the evidence." Until he is so given in charge there is no necessity or right that he should be tried by the men already sworn (*e*).

In other cases.

On the trial of all other issues the jury may be sworn together, three or four persons joining in the holding of a book. But where the words of the oath are repeated (*f*), or a solemn affirmation

(*a*) "Able men of the county present." The words would seem to point to persons whose names are or might be in the jurors' book. But in practice it is not unusual to requisition any person, whatever his residence or qualification. It is to be observed that a *tales de circumstantibus* cannot be had at a trial at bar which is a trial at common law (*Hunt* v. *Hollis* (1658), 2 Sid. 77; *Layburn* v. *Crisp* (1838), 8 C. & P. 397, 398); and that a custom to try by *tales de circumstantibus* in an inferior court is bad, because such would admit of trial by persons "both profligate and unfit" (*Basely* v. *Basely* (1647), Sty. 16; *Ball* v. *Knight* (1731), Fitz-G. 274). As the term implies, a tales can only be had where there are *quales*, *i.e.*, where one or more of those summoned have appeared (2 Hawk. P. C., 8th ed., c. 41, s. 14).

(*b*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 20; County Common Juries Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 17), s. 1. In *R.* v. *Cropper* (1837), 2 Mood. C. C. 18, C. C. R., a judge of assize, having discharged a jury upon disagreement on a Saturday night, ordered the sheriff to return a new panel of seventy-two on the Monday morning: held, that he was within his powers although it was objected that no more than forty-eight should have been summoned.

(*c*) At any rate on the trial of causes (Juries Act, 1825 (6 Geo. 4, c. 50), s. 26; Juries Act, 1870 (33 & 34 Vict. c. 77), s. 16).

(*d*) The prisoner is expressly warned of his right of challenge. "These good men whose names you shall hear called and do appear are the jury who are to pass between our sovereign lord the King and you upon your trial. If therefore you would challenge them or any of them your time is as they come to the book to be sworn, and before they are sworn, and you shall be heard." In ancient times a folio Bible was placed upon a stand in view of the prisoner, and each member of the jury after his name was called approached it to lay his hand upon it, at which moment the prisoner had a full view of him (*R.* v. *Mellor* (1858), Dears. & B. 468, 470, C. C. R.); and see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 362.

(*e*) So that where on a trial for murder a juror, after being sworn, but before the prisoner had been given in charge, stated that he had conscientious scruples against capital punishment, he was discharged (*Mansell* v. *R.* (1857), 8 E. & B. 54, 79, Ex. Ch.); and see p. 250, *ante*.

(*f*) As is generally now the case under the Oaths Act, 1909 (9 Edw. 7, c. 39), s. 2; see title EVIDENCE, Vol. XIII., pp. 590 *et seq.*

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made (*g*), it is more convenient that this be done by each member of the jury separately (*h*).

Effect of person not called serving.

622. If a person whose name is not on the panel answers to a name called, and is sworn and serves on a jury, the proceedings taken before such jury may be set aside, whether the mistake be discovered before or after verdict, but the court will be slow to interfere with a verdict in the absence of a substantial miscarriage of justice, even though the Crown or a prisoner may have been unable to exercise a right of challenge (*i*).

SUB-SECT. 8.—*Conduct during the Hearing.*

Incapacity of juror.

623. If a juror dies or is taken ill beyond the hope of speedy recovery, a fresh jury must be sworn (*k*).

Misconduct of juror.

624. If, after being sworn, jurors, or any one of them, are guilty of misconduct, and in particular, if they separate without the leave of the court (*l*); eat or drink before verdict at the expense of one of the parties (*m*); hold communication with any person,

(*g*) Under the Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1. A person is entitled to be sworn in any way which he declares binding on his conscience (*Miller* v. *Salomons* (1852), 7 Exch. 475, 534, 556, *per* ALDERSON, B., and POLLOCK, C.B.).

(*h*) It is no objection that jurors have been sworn as for felony when they are to try a misdemeanour (*R.* v. *Turner* (1909), 26 T. L. R. 112, C. C. A.); see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 362.

(*i*) If the mistake be discovered before verdict, the jury should be discharged, and the trial commenced *de novo* (*Dovey* v. *Hobson* (1816), 6 Taunt. 460; *Doe* d. *Ashburnham* (*Earl*) v. *Michael* (1851), 16 Q. B. 620; *R.* v. *Phillips* (1868), 11 Cox, C. C. 142); and, even after verdict, the judge, on discovering that a person not called had served, has refused to give judgment and ordered the prisoner to be tried on another indictment (*R.* v. *Metcalfe & Slater* (1848), 3 Cox, C. C. 220). On the question of ordering a new trial after verdict and judgment judicial opinion has varied. It was refused in *Wray* v. *Thorn* (1744), Willes, 488, where a Christian name appeared on the panel as Henry instead of Harry; in *Dickenson* v. *Blake* (1772), 7 Bro. Parl. Cas. 177, where a person summoned under a wrong name had not been allowed to serve; in *Hill* v. *Yates* (1810), 12 East, 229, where a son had taken his father's place; and in *Falmouth* (*Earl*) v. *Roberts* (1842), 9 M. & W. 469, in similar circumstances. However, in *Norman* v. *Beamont* (1744), Willes, 484, a new trial was ordered; and in *R.* v. *Tremearne* (1826), 5 B. & C. 254 (approved by Lord CAMPBELL, C.J., in *R.* v. *Mellor* (1858), Dears. & B. 468, C. C. R.), *Hill* v. *Yates*, *supra*, was disapproved. In *R.* v. *Mellor*, *supra*, a new trial was only refused (the judges being equally divided) by two holding that the court (which was a specially constituted one for Crown Cases Reserved) had no jurisdiction. The result of *R.* v. *Mellor*, *supra*, was, however, followed in *Wells* v. *Cooper* (1874), 30 L. T. 721, and in *R.* v. *Rothwell* (1895), mentioned in *Ex parte Morris* (1907), 72 J. P. 5, where a son of eighteen having taken the place of his father on a jury which had convicted, a divisional court discharged a rule which had been obtained for a *certiorari* to bring up and quash the verdict.

(*k*) The convenient practice, wherever a retrial is desirable by reason of the default of single members of the jury, is to call as many as are left of the old jury on to the new one (*R.* v. *Beere* (1843), 2 Mood. & R. 472; *R.* v. *Lawrence* (1909), 25 T. L. R. 374). But even so the challenges (see p. 246, *ante*) may be had anew, including in cases of treason and felony the peremptory challenges (see p. 249, *ante*) of the prisoner (*R.* v. *Edwards* (1812), Russ. & Ry. 224, C. C. R.).

(*l*) *Hughes* v. *Budd* (1840), 8 Dowl. 315 (a juror left the court during a hearing before the sheriff, and returned with cigars; he had been seen talking to the plaintiff's attorney in an adjoining public-house); *R.* v. *Ward* (1867), 17 L. T. 220, C. C. R. (a juror left the court-house without leave after being sworn).

(*m*) To eat and drink at his own expense without the leave of the court might

or receive evidence, oral or documentary, out of court (*n*); or determine their verdict by lot (*o*); the jury may be discharged, or a new trial ordered, and such conduct will be more strictly scrutinised when it occurs after the summing-up and during the consideration of the verdict (*p*).

Expression of opinion before verdict.

625. The mere expression of an opinion by a jury at an early stage of a case is not in itself such misconduct as would justify any person in refusing to submit his case to that tribunal, but if the jury do not honestly and judicially approach the question before them, a new trial may be ordered (*q*).

Discharge before verdict.

626. On the trial of any issue (*r*), civil or criminal, a juror may

be misconduct of a kind which would be visited by fine (Co. Litt. 227 b); but a new trial will rarely be ordered if the delivery of food has not been by one of the parties, and has not turned the event of the trial (*Everett* v. *Youells* (1833), 1 Nev. & M. (K. B.) 530; see, however, *Cooksey* v. *Haynes* (1858), 27 L. J. (EX.) 371, where POLLOCK, C.B., ordered a new trial). The maintenance of a jury summoned to assess the value of property under a private Act was often provided for in the Act (*Forster* v. *Taylor* (1811), 3 Camp. 49).

(*n*) Co. Litt. 227 b; 2 Roll. Abr. 686. The deputy chairman of the London Sessions recently discharged a jury because a woman had spoken to one of their number during the adjournment (*R.* v. *Shepherd* (1910), 74 J. P. (Journal) 605). The jury may, however, act upon their general knowledge and look at documents of a public character when such are sent to them by or with the approval of the court (*Vicary* v. *Farthing* (1595), Cro. Eliz. 411; *Graves* v. *Short* (1598), Cro. Eliz. 616).

(*o*) *Hale* v. *Cove* (1725), 1 Stra. 642. Where the court was satisfied with the verdict, albeit arrived at by lot, a new trial was not ordered (*Prior* v. *Powers* (1664), 1 Keb. 811). The fact cannot be proved by the evidence of the jurors themselves (*Vaise* v. *Delaval* (1785), 1 Term Rep. 11; *Straker* v. *Graham* (1839), 4 M. & W. 721; *Quinlane* v. *Murnane* (1885), 18 L. R. Ir. 53, C. A.), partly because it would be the admission of a great misdemeanour, and partly because otherwise no verdict would be safe. It is, however, laid down by Hale (2 Hale, P. C. (Dogherty's ed., 1800), 299), that if jurors state they are agreed, they may be examined by the polls to see if they really are so, and if not, fined; compare Bac. Abr. tit. Juries (G.), p. 578.

(*p*) This appears to be the effect of the cases above cited, and of the Juries Detention Act, 1897 (60 & 61 Vict. c. 18). Chitty, Criminal Practice, Vol. I., 527, draws a distinction between the conduct of jurors when at the bar, and when they have left it. But the court will have regard to all the circumstances before it puts the parties to the expense of a new trial (*R.* v. *Kinnear* (1819), 2 B. & Ald. 462; *Morris* v. *Vivian* (1842), 10 M. & W. 137; *Sabey* v. *Stephens* (1862), 7 L. T. 274 (where the court refused to disturb a verdict when, the day after it was given, the foreman wrote to the successful party on behalf of himself and his fellow jurors asking for a remittance).

(*q*) *Campbell* v. *Hackney Furnishing Co.* (1906), 22 T. L. R. 318. Or the judge may himself discharge the jury and begin the trial afresh (*R.* v. *Kirke* (1909), 43 I. L. T. 130). The mere fact that a juror is on intimate terms with one of the parties is no ground for setting aside a verdict (*Onions* v. *Naish* (1819), 7 Price, 203). There must be some positive and irregular expression of opinion (*Ramadge* v. *Ryan* (1832), 9 Bing. 333; *Allum* v. *Boultbee* (1854), 9 Exch. 738). On this principle the court will order a new trial, if the sum awarded for damages has evidently resulted from compromise (*Hall* v. *Poyser* (1845), 13 M. & W. 600; *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686, 693; *Burrows* v. *London General Omnibus Co.* (1894), 10 T. L. R. 298, C. A.).

(*r*) If there are several distinct issues to be tried in one action, the judge may, even without consent, accept the verdict on any issue on which the jury can agree, and discharge them upon the others, leaving the parties to take the undecided issues down to a new trial (*Marsh* v. *Isaacs* (1876), 45 L. J. (Q. B.) 505). He may also discharge them on any issue which he deems immaterial

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be withdrawn by consent of the parties (*s*), and the court may in its absolute discretion discharge the jury at any time before verdict given (*t*). But a jury ought not to be discharged at the instance of the prosecution for the purpose of obtaining evidence of which at the trial there has been a failure (*a*).

When jurors can separate.

627. Except upon trials for murder, treason, and treason felony, juries after being sworn may be permitted to separate (*b*) until they retire to consider their verdict (*c*), and at any time before giving a verdict they may be allowed the use of a fire when out of court, and reasonable refreshment to be provided at their own expense (*d*).

Juror's own knowledge of facts.

628. It is laid down that a jury may give a verdict without testimony or against testimony when they themselves have cognizance of the facts (*e*). One juror, however, should not state his personal knowledge of facts privately to his colleagues, but should declare them openly in court upon his juror's oath (*f*).

(*R.* v. *Johnson* (1839), Macl. & Rob. 1, H. L.; *Powell* v. *Sonnett* (1826), 3 Bing. 381, Ex. Ch.).

(*s*) *Kinlochs' Case* (1746), Fost. 16, 22, 27. When a jury has been discharged it will be assumed that the discharge was by consent unless it appears to the contrary on the record (*Scott* v. *Bennett* (1871), L. R. 5 H. L. 234). A civil action does not thereby come to an end, and upon breach of the terms upon which the juror has been withdrawn the court may proceed to the trial thereof with the same or a fresh jury (*Norburn* v. *Hilliam* (1870), L. R. 5 C. P. 129; *Thomas* v. *Exeter Flying Post Co.* (1887), 18 Q. B. D. 822).

(*t*) This the court generally does when satisfied that the jury will not agree on a verdict. As to criminal trials, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 370; *Morris* v. *Davies* (1828), 3 C. & P. 427; and see *R.* v. *Charlesworth* (1861), 1 B. & S. 460. The discharge of a jury, unable to agree after a trial for felony, was the subject of further consideration in *Winsor* v. *R.* (1866), L. R. 1 Q. B. 289, 309, Ex. Ch., where it was laid down that the discretion of the judge in ordering the discharge was not open to review.

(*a*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 370; *R.* v. *Charlesworth, supra.* The matter has, however, lately been before the Court of Criminal Appeal, which held the discretion of a chairman of sessions to be absolute, who, on the application of the Crown for an adjournment to secure the attendance of three additional witnesses, after seven had given their evidence for the prosecution, discharged the jury, and tried the case with a fresh one ten days later (*R.* v. *Lewis*, [1909] W. N. 128, C. C. A.).

(*b*) Juries Detention Act, 1897 (60 & 61 Vict. c. 18), s. 1. Even the rule that the jury must not separate during a trial for murder is subject to the qualification that upon an emergency, or where it is necessary, a juror may leave his fellows (*R.* v. *Crippen*, [1911] 1 K. B. 149, C. C. A.).

(*c*) After retiring to consider their verdict, the jury are never permitted to separate, and until 1870 there was no statutory provision for their being supplied with refreshments until verdict given. Medicine they might have under order of a doctor, but not sustenance (*R.* v. *Newton* (1849), 3 Car. & Kir. 85).

(*d*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23. It is customary, however, to provide jurors who are not allowed to separate with lodging and refreshment at the expense of the county. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 374.

(*e*) Duncomb, Trials per Pais, c. 14, citing Plowden's Commentaries 86.

(*f*) *Bennet* v. *Hartford Hundred* (1650), Sty. 233; *Fitz-James* v. *Moys* (1663), 1 Sid. 133; *R.* v. *Rosser* (1836), 7 C. & P. 648; *Manley* v. *Shaw* (1840), Car. & M. 361. Duncomb, Trials per Pais, c. 12, mentions a case of *Duke* v. *Ventris* (1656), in which a barrister, serving on the jury, had heard evidence in a case tried twenty years previously, which went to show that a deed, in

SUB-SECT. 9.—*Giving a Verdict and Discharge.*

SECT. 8. **Juries of Issue and Assessment.**

Verdicts may be either general or special.

629. Juries in both civil and criminal matters may find general or special verdicts. The former in criminal matters are findings of "guilty" or "not guilty" (*g*), and in civil causes are statements as to the party for which the juries find, with the amount of damages assessed (*h*), if such finding is for the plaintiff, or the sum awarded if the issue is one of assessment solely (*i*). Special verdicts are findings of specific facts (*k*), upon which it is the duty of the court to enter judgment according to law (*l*), or in criminal cases to direct the jury to return the general verdict warranted by their special findings (*m*).

Special verdict a privilege, not an obligation,

630. The finding of a special verdict is a privilege and not an obligation of juries (*n*), and if they refuse to find one, or to accept the direction of the judge as to what the general verdict founded

question in the case, was fraudulent. Demanding of the court whether he ought to inform the rest of the jury privately of this, or conceal it, or declare it in open court, he was ordered to come into court and state what he knew, not being sworn again, but only upon the oath taken as a juror. See further, note to *Bushell's Case* (1670), 6 State Tr. 999, 1012.

(*g*) A jury may find a prisoner "guilty" of part, and "not guilty" of the rest, of the matters alleged in the indictment, or that he did the act assigned in manner different (2 Hale, P. C., 8th ed., 301, 302).

(*h*) The jury are not entitled to ask what sum will carry costs (*Levi* v. *Milne* (1827), 4 Bing. 195; *Mears* v. *Griffin* (1840), 1 Man. & G. 796; *Chilvers* v. *Greaves* (1843), 5 Man. & G. 578; *Adams* v. *Midland Railway* (1861), 31 L. J. (EX.) 35), though some judges have thought fit to tell them (*per* POLLOCK, C.B., in *Kilmore* v. *Abdoolah* (1858), 27 L. J. (EX.) 307); nor, in giving verdict, to consider any rule as to costs (*Poole* v. *Whitcombe* (1862), 12 C. B. (N. S.) 770; *Russell* v. *Weniwescr* (1868), 16 W. R. 710); nor to be told if money has been paid into court by a defendant (R. S. C., Ord. 22, r. 22), whether with or without admission of liability (*Williams* v. *Goose*, [1897] 1 Q. B. 471, C. A.; *Jaques* v. *South Essex Waterworks Co.* (1904), 20 T. L. R. 563). Lord RUSSELL OF KILLOWEN, C.J., thought the rule a foolish one (*Klamborowski* v. *Cooke* (1897), 14 T. L. R. 88). See, further, title DAMAGES, Vol. X., pp. 302 *et seq.*

(*i*) It has been held that where a verdict has been found for a defendant upon an issue which bars the action, the jury cannot assess contingent damages for the plaintiff, with a view to judgment being entered for the plaintiff in the event of a Court of Appeal holding that judgment should have been entered *non obstante veredicto*, without the consent of the defendant (*Newton* v. *Harland* (1840), 1 Man. & G. 644).

(*k*) A special verdict must not consist of a mere statement of evidence (*Hubbard* v. *Johnstone* (1810), 3 Taunt. 177, 209, Ex. Ch.). It must contain express findings of fact upon which, and upon which alone, judgment can be founded (*Tancred* v. *Christy* (1843), 12 M. & W. 316, Ex. Ch.; *Fryer* v. *Roe* (1852), 12 C. B. 437). The Court of Exchequer Chamber in *R.* v. *Saddlers Co.* (*Wardens etc.*) (1861), 30 L. J. (Q. B.) 186, 200, Ex. Ch., complained of the prolixity of the old form of special verdict, and directed a shorter form to be adopted in future. The whole findings, however, must appear upon the record (*R.* v. *Aire and Calder Navigation* (*Undertakers*) (1778), 2 Term Rep. 660, 666).

(*l*) R. S. C., Ord. 36, r. 39.

(*m*) "This being the form observed in Crown cases for upwards of a century at least" (*R.* v. *Dudley and Stephens* (1884), 14 Q. B. D. 273, *per* Lord COLERIDGE, C.J., at p. 280; and see *R.* v. *Jameson* (1896), 12 T. L. R. 551, 593, 594). A jury cannot be required to find a special verdict in felony (*R.* v. *Allday* (1837), 8 C. & P. 136, *per* Lord ABINGER, C.B., at p. 140); and it is conceived that the principle applies equally to misdemeanour.

(*n*) *Devizes Corporation* v. *Clark* (1835), 3 Ad. & El. 506.

SECT. 8. Juries of Issue and Assessment.

thereon should be, it is conceived that the general verdict as delivered must stand (*o*), subject in non-criminal matters to judgment being entered by the court *non obstante veredicto* (*p*).

Verdicts, where and how given.

631. The verdict of a jury of issue must be given in open court (*q*), in the presence of them all (*r*), and in cases of treason and felony in the presence of the defendant (*s*). It must be unanimous, except that in civil causes the verdict of a majority may be taken by consent (*t*). It is forthwith entered on the record by the officer of the court, and the sealing and signing required of juries of presentment are dispensed with. The jury are then finally discharged (*a*).

Jury once discharged cannot be recalled to rectify error.

632. A jury once discharged after giving a verdict upon which judgment has been entered cannot be recalled to rectify the same, but there must be a new trial if the court considers that injustice has been done (*b*). A judge will decline to hear the reasons upon

(*o*) So that if they return a verdict of "not guilty" in spite of the judge's direction upon matters specially found by them, a prisoner must be discharged (*R.* v. *Allday* (1837), 8 C. & P. 136; *R.* v. *Jameson* (1896), 12 T. L. R. 551, 593, 594). Compare *Bushell's Case* (1670), 6 State Tr. 999; and the remarks of ERSKINE thereon (*R.* v. *St. Asaph's* (*Dean*) (1783), 21 State Tr. 847, at p. 925. If they insist on returning a verdict of guilty in spite of the direction of the court, the case should be withdrawn from them. See case before the Recorder of Leicester (1909), *Times*, 26th October; see further *Levi* v. *Milne* (1827), 4 Bing. 195, 200; 2 Hawk. P. C., 8th ed., c. 47, s. 12; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 373.

(*p*) R. S. C., Ord. 36, r. 39.

(*q*) At the present time, in civil business, verdicts are often returned after the judge has left the building, the jury are discharged by his direction by an officer of the court, and judgment is asked for on the following morning, or even at the next assize town.

(*r*) That they may all hear if it is rightly delivered by the foreman, for if it is delivered in the presence of them all their assent will be presumed (*Raphael* v. *Bank of England* (1855), 17 C. B. 161). Where three jurors were crowded out of court and were not prepared to assent to what the foreman said, a new trial was ordered (*R.* v. *Wooller* (1817), 2 Stark. 111); and it is a question upon which the court will exercise its discretion as to granting a new trial, whether the associate (in the absence of the judge) rightly interpreted the meaning of the jury when he entered the verdict (*Doe* d. *Lewis* v. *Baster* (1836), 5 Ad. & El. 129; *Bentley* v. *Fleming* (1845), 1 C. B. 479). An affidavit by a juror as to what took place in court upon the entering of the verdict will not be excluded by the rule in *Straker* v. *Graham* (1839), 4 M. & W. 721 (*Roberts* v. *Hughes* (1841), 7 M. & W. 399; *Raphael* v. *Bank of England*, *supra*; and see note (*c*), p. 259, *post*). It is the duty of the attorneys of the parties to be in court to hear the verdict (*Dauntley* v. *Hyde* (1841), 6 Jur. 133).

(*s*) But not necessarily, though usually, in the case of misdemeanours (*R.* v. *Ladsingham* (1670), T. Raym. 193).

(*t*) A verdict by a majority is not permitted in criminal matters.

(*a*) After discharge the court will not allow judgment to be entered for a larger sum than was originally declared, although the jury join in an affidavit stating that it was their intention to have given a larger sum (*Jackson* v. *Williamson* (1788), 2 Term Rep. 281; *Kilmore* v. *Abdoolah* (1858), 27 L. J. (EX.) 307).

(*b*) *Loveday's Case* (1608), 8 Co. Rep. 65 b; *Doe* d. *Lewis* v. *Baster*, *supra*. In *Cogan* v. *Ebden* (1757), 1 Burr. 383, it was suggested by Lord MANSFIELD, upon motion for a new trial upon the ground that the jury had not returned the verdict they intended, that the record might be amended, and he referred to cases where this had been done. But it is submitted that at the present time the only remedy would be a new trial where the jury have left the

SECT. 8. Juries of Issue and Assessment.

which a jury have based their verdict, and they must not be asked for them (*c*).

Jury once impanelled may try various issues in succession.

633. A jury once impanelled may try the issues joined between any number of persons in succession (*d*), and the place of any member of a jury excused by the court or effectively challenged by a party to the new issue may be taken by another whose name is drawn indiscriminately from the box, or in criminal matters called in the customary manner from the panel (*e*).

The jury is resworn on the joinder of each new issue (*f*).

A jury need not be resworn to try an issue of previous conviction, because such offence is charged in the same indictment and the prisoner is arraigned on the whole, though only given in charge on the subsequent offence (*g*). There can be no fresh challenge of the jurors (*h*).

SUB-SECT. 10.—*Special Juries.*

What issues are proper for special juries.

634. Trial by jury is *primâ facie* trial by a common jury, but in any cause or matter in the High Court in which either party is entitled to a jury the issues may be tried by a special jury upon

court before the mistake is discovered. Before verdict recorded, it was not unusual for juries to be directed to reconsider their verdict if it appeared to the court to be against the weight of evidence, "but" (see 2 Hawk. P. C., 8th ed., c. 47, s. 11) "this is by many thought hard."

(*c*) If they give them it is mere surplusage (*Plunket* v. *Kingsland (Lord)* (1750), 7 Bro. Parl. Cas. 404). Compare *Clark* v. *Stevenson* (1772), 2 Wm. Bl. 803; and see *Brown* v. *Bristol and Exeter Rail. Co.* (1861), 4 L. T. 830. It may be convenient here to briefly recapitulate the principles upon which evidence by or about jurors is or is not admissible. Statements or affidavits by any member of a jury as to their deliberations or intentions on the matter to be adjudicated upon are never receivable (*R.* v. *Woodfall* (1770), 5 Burr. 2661, 2667; *R.* v. *Almon* (1770), 5 Burr. 2686; *Vaise* v. *Delaval* (1785), 1 Term Rep. 11; *Jackson* v. *Williamson* (1788), 2 Term Rep. 281 (as to the amount of damages intended to be awarded); *R.* v. *Wooller* (1817), 2 Stark. 111; *Coster* v. *Merest* (1822), 3 Brod. & Bing. 272; *Straker* v. *Graham* (1839), 4 M. & W. 721, 724; *Bentley* v. *Fleming* (1845), 1 C. B. 479; *Raphael* v. *Bank of England* (1855), 17 C. B. 161; *Nesbitt* v. *Parrett* (1902), 18 T. L. R. 510, C. A.). *A fortiori* where the statement or affidavit is not that of a juror, but of someone to whom the juror has made a communication (*Aylett* v. *Jewel* (1779), 2 Wm. Bl. 1299; *Straker* v. *Graham, supra; Burgess* v. *Langley* (1843), 5 Man. & G. 722; *Davis* v. *Roper* (1855), 4 W. R. 9). On the other hand, the affidavits of jurors or bystanders may be received as to what passed in open court on the bringing in of a verdict (*Cogan* v. *Ebden* (1757), 1 Burr. 383; *R.* v. *Woodfall, supra; R.* v. *Almon, supra; Harvey* v. *Hewitt* (1840), 8 Dowl. 598; *Roberts* v. *Hughes* (1841), 7 M. & W. 399); of the circumstances under which a juror went into the box (*Bailey* v. *Macaulay* (1849), 13 Q. B. 815, 829); of his state of sobriety when in the jury-box or jury-room (*Ex parte Morris* (1907), 72 J. P. 5); and jurors are entitled to be heard in their own defence (*Standewick* v. *Hopkins* (1844), 2 Dow. & L. 502; *Jones* v. *Powell* (1856), 4 W. R. 252).

(*d*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 26. So a jury specially struck to assess compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), may by consent deal with any other inquiries (*ibid.*, s. 56).

(*e*) See p. 246, *ante.*

(*f*) This is unnecessary in a county court (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 102).

(*g*) *R.* v. *Shuttleworth* (1851), 2 Den. 351, C. C. R.; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 116; Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 9.

(*h*) *R.* v. *Key* (1851), 2 Den. 347.

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either party obtaining an order for this purpose under the order for directions (*i*), and a judge may in all other cases at any time direct that a cause or matter be so tried (*k*), upon such terms as to costs and otherwise as may be just (*l*).

How criminal issues should be tried.

635. The term cause or matter is not applicable to criminal cases, and special juries are not permitted upon indictments for treason or felony (*m*), but on indictments for misdemeanours which are in the King's Bench Division or have been moved thither by *certiorari* a special jury may be ordered (*n*), whether the trial be had at bar (*o*), or at *nisi prius* before a single judge (*p*).

Qualification of special jurors.

636. All persons whose names are in the jurors' book for any county in England or Wales, or for the county of the City of London, and who are of higher degrees than esquires; or are legally entitled to be called esquires (*q*); or are bankers or merchants (*r*); or are occupiers of private dwelling-houses rated or assessed to the poor rate or the inhabited house duty on a value of not less than £100 in towns containing according to the last census 20,000 inhabitants and upwards, or on a value of not less than £50 elsewhere (*s*); or are occupiers of premises, other than a farm, rated or assessed on a value of not less than £100; occupiers of farms

(*i*) Or giving the notices required by the rules, see R. S. C., Ord. 36, r. 7 (b), (c). R. S. C., Ord. 36, r. 7 (b), is now practically obsolete, since an order as to the mode of trial must be obtained, and that can only be varied by an order.

(*k*) The discretion of a master or judge exercised upon an application at chambers will not be lightly interfered with (*Linscott* v. *Jupp* (1891), 8 T. L. R. 130).

(*l*) R. S. C., Ord. 36, r. 7 (d). In practice a certificate for a special jury is never given until after the case has been tried and the judge has had the merits before him in detail. A special jury may be obtained upon a writ of inquiry as to damages (*Price* v. *Williams* (1836), 5 Dowl. 160). There is no provision for special juries as such in county courts (*Re Learoyd, Wilton & Co., Ex parte Armitage* (1881), 17 Ch. D. 13, 18, C. A.).

(*m*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 30; *R.* v. *Mayne* (1883), 32 W. R. 95.

(*n*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 30. That juries might be specially struck, except by consent, upon trials other than those at bar was first declared by stat. (1730) 3 Geo. 2, c. 25, s. 15.

(*o*) As *R.* v. *Castro* (1874), L. R. 9 Q. B. 350, and *R.* v. *Jameson*, [1896] 2 Q. B. 425.

(*p*) As *R.* v. *Whittaker Wright* (1904), *Times*, 12th—27th January. If tried on circuit they are not tried in the Crown court, but before the judge taking civil work.

(*q*) There is much dispute as to who are legally entitled to be called esquires. Ten classes are mentioned by the writer of the article on "Esquires" in the Encyclopædia Britannica, 11th ed. (1911).

(*r*) Merchants are to be distinguished from manufacturers (*Josselyn* v. *Parsons* (1872), L. R. 7 Exch. 127, *per* BRAMWELL, B., at p. 129); see also *Hamond* v. *Jethro* (1611), 2 Brownl. 97 (where it was held that an ordinary shopkeeper might be a merchant), and *Fairman* v. *Ives* (1819), 1 Chit. 85 (where it was held that the fact of persons being retail tradesmen did not negative the possibility of their being esquires and qualified as such to be special jurors). At a special sessions at the Guildhall to hear claims for exemption from jury service in the City of London, the meaning of the term "merchant" was discussed, and it was held that the members of a firm of colonial merchants paying £115 yearly rent were entitled to be summoned on the special jury ((1908), *Times*, 8th December).

(*s*) The census returns of specified places may be increased by the addition of adjoining areas (*Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446, C. A.).

rated or assessed on a value of not less than £300; are qualified and liable to serve on special juries (*t*).

Juries specially struck.

637. Special jurors are summoned to the courts in the same way as common jurors (*u*), but an order may in the discretion of the court be made for the special striking of a jury according to the old practice (*v*), and upon such order being obtained—

In London and Middlesex.

(i.) In London and Middlesex the parties attend before the under-sheriff or Secondary (*w*), who has in readiness the jurors' book and a list of the persons marked therein as special jurors arranged in alphabetical order with a number prefixed to each (*a*). These numbers have also been copied on to separate cards of uniform size and put into a box, whence, after being shaken, one is drawn out and compared with the name attached to the number on the list. If that name is objected to by either side, and the objection is upheld by the presiding officer—in this case the under-sheriff or Secondary himself—it is passed and another number drawn. Each name as it is approved is written on a panel until one containing forty-eight names is complete.

In the (improbable) event of forty-eight names not being procurable from the list of special jurors, recourse is had to the general list in the jurors' book. A copy of the panel when complete is handed to each of the parties who then, or on a subsequent attendance before the same presiding officer, reduce the primary nomination of forty-eight to twenty-four, by each striking off twelve names. The reduced panel of twenty-four is returned, attached to the order, to the associate's office at the High Court, where it is annexed to the record (*b*), and the persons named in it are summoned to attend in the ordinary way. Upon the trial the twenty-four names on the panel so returned are balloted for by being drawn from a box in the same manner as names returned on an ordinary panel.

At assizes.

(ii.) At assizes the parties attend before an officer of the court—who, if the jury is struck before the opening of the assize, is a master or the district registrar, if after the opening of the commission the clerk of assize—where a panel of first forty-eight and then twenty-four is struck in the manner above described. The under-sheriff (who is not in this case the presiding officer) attends with the jurors' book, an alphabetical list of special jurors, and cards with numbers for the ballot (*c*).

(*t*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 6.

(*u*) See p. 237, *ante*.

(*v*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 17.

(*w*) See note (*s*), p. 263, *post*.

(*a*) In the City of London, where there is a streets' list only, a number is prefixed to each special juror's name in the jurors' book, which thus serves as the alphabetical list without more.

(*b*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 32; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 110. If either or both of the parties do not attend on the second occasion for the reduction of the numbers, the presiding officer may reduce the panel in his or their stead (*Anon.* (1696), 1 Salk. 405).

(*c*) Juries Act, 1825 (6 Geo. 4, c. 50), ss. 32, 36; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 108. It is, however, seldom that a special jury would be specially struck in the country, and the officials of some of the circuits think that the striking would take place as in Middlesex before the under-

SECT. 8. **Juries of Issue and Assessment.**

(iii.) Juries for criminal issues which have been moved into the King's Bench Division, if required to be specially struck, are struck before the Master of the Crown Office, whether such issues are to be tried in London or Middlesex, or at the assizes (*d*).

For criminal issues.

Jurors specially struck are entitled to the same notice as jurors whose names are extracted in the ordinary way from the jurors' book.

Costs of special jury.

638. The costs of and occasioned by trial with a special jury, as also the costs of having one specially struck, are borne in the first instance by the party applying for and obtaining the order, but in the event of the judge certifying on the record (*e*) that the cause (*f*) was proper (*g*) to be so tried, the costs will be included in the general costs of the action (*h*). Application for such certificate is generally, and ought to be made immediately after verdict (*i*).

Trial by a good jury.

639. When an issue is directed to be tried by a good jury it is usual to summon a special jury (*k*).

sheriff. It would appear from the wording of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 108, 110, and of the Juries Act, 1870 (33 & 34 Vict. c. 77), ss. 14, 17, that the adjudication by justices, in petty sessions, of the qualifications of special jurors should be final, and that the proviso in the Juries Act, 1825 (6 Geo. 4, c. 50), s. 33, by which, with consent, a special jury might be struck according to the ancient mode, has in effect been repealed.

(*d*) This appears to be so according to Form 100 in the Crown Office Rules, 1906, though the wording of *ibid.*, r. 147, would lead one to suppose that the practice introduced by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 110, was intended to be followed. No instance can be found of a special jury from a distant county being struck before the Master of the Crown Office.

(*e*) So, where the judge had granted, but had not indorsed, the certificate before he left the assize town, it was held too late for him to do so (*Grace* v. *Clinch* (1843), 4 Q. B. 606; *Leech* v. *Lamb* (1855), 11 Exch. 437); and compare *Forsdike* v. *Stone* (1868), L. R. 3 C. P. 607.

(*f*) "Cause," as used in the Juries Act, 1825 (6 Geo. 4, c. 50), s. 34, is not confined to civil actions (*R.* v. *Pembridge (Inhabitants)* (1842), 3 Q. B. 901.

(*g*) Judges declined to certify in *Orme* v. *Crockford* (1824), 1 C. & P. 537 (where the plaintiff was non-suited); *Clements* v. *George* (1826), 11 Moore (C. P.), 510 (where the record was withdrawn); *Wemys* v. *Greenwood* (1826), 2 C. & P. 483 (where no facts were in dispute and the case turned solely on a point of law); *Humber Iron Co.* v. *Jones* (1865), 4 F. & F. 1047 (an action for calls). But a certificate was given on a similar action for calls where a difficult point was raised in a plea, which, however, the defendant did not appear to support (*London Bank of Scotland* v. *Marshall* (1865), 4 F. & F. 1046).

(*h*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 34. Where the judge certifies, the master must allow full costs (*Broadrick* v. *Clark* (1823), 12 Price, 154); and as regards allowances to jurors, the amount actually paid them (*Cursum* v. *Durham* (1816), 2 Chit. 154).

(*i*) This provision both in the present and in preceding Acts has been strictly construed. Lord ELLENBOROUGH, C.J., refused to certify the morning after the trial (*Waggett* v. *Shaw* (1812), 3 Camp. 316). "A reasonable time" was admitted in *Christie* v. *Richardson* (1842), 10 M. & W. 688, but Lord ELLENBOROUGH'S view has been more recently followed (*Webster* v. *Appleton* (1890), 62 L. T. 704; *Griffiths* v. *Griffiths* (1898), 14 T. L. R. 184; and see *Skipper and Skipper* v. *Bodkin* (1860), 2 Sw. & Tr. 1; *Dillon* v. *Caffrey* (1872), 6 I. R. Eq. 363). As to where the parties agreed that the costs, to whomsoever awarded, should include those of a special jury, or that the judge should certify on the determination of a special case, see *Geeves* v. *Gorton* (1846), 15 M. & W. 186; *Serrell* v. *Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.* (1851), 10 C. B. 910.

(*k*) *Vickery* v. *London, Brighton, etc. Rail. Co.* (1870), L. R. 5 C. P. 165, 166. A practice which prevailed before the passing of the Juries Act, 1825 (6 Geo. 4, c. 50), of summoning a "good jury" upon a writ of inquiry was continued under the

Special jurors on common juries.

640. No person is exempted from serving on a common jury by reason of his being marked as a special juror in a jurors' book, or being qualified to serve as a grand juror (*l*), and it is the duty of the sheriff or summoning officer to extract a panel of common jurors indiscriminately from the jurors' book (*m*).

SECT. 9.—*Juries Specially Constituted.*

SUB-SECT. 1.—*In the County Courts.*

County court juries.

641. The law relating to juries in the county courts is dealt with elsewhere (*n*).

SUB-SECT. 2.—*Under the Lands Clauses Consolidation Act*

Juries under Lands Clauses Consolidation Act.

642. The law relating to juries summoned under the Lands Clauses Consolidation Act, 1845 (*o*), is dealt with elsewhere.

SUB-SECT. 3.—*In the Mayor's Court, London.*

Trial by jury, the practice of the court.

643. Although by consent in writing the parties to any cause may leave the decision of any issue of fact to the court, yet trial by jury is a rule of procedure in the Mayor's Court, London (*p*), and there is no power therein for the judge to enter judgment contrary to the findings of the jury (*q*).

How jurors are summoned.

644. Jurors are summoned to the Mayor's Court, London, by the serjeant-at-mace (*r*) from the jurors' book, which is prepared and kept by the Secondary (*s*), of all persons within the City of London duly qualified and liable to serve (*t*).

Special juries.

645. Special juries are not summoned except upon order of the court obtained upon application of either party, when they are nominated and reduced before the Secondary (*u*).

rules made in pursuance of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) (see r. 46, Hilary Term, 1853), which were unrepealed by the Judicature Acts. The orders for the issues in lunacy in *Re Scott* (1884), 27 Ch. D. 116, C. A., and in *Re Farrell* (1910), *Times*, 16th November, were that they be had and made before good juries. In the latter case the number sworn was twenty-three.

(*l*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 19 (2).

(*m*) This rule is more or less generally observed in the counties, thanks to the attention frequently called to it by the bench (see remarks by BRAMWELL, B., recorded in Erle's Jury Laws, p. 109), and perforce in the City of London, where, owing to high rentals, special jurors largely outnumber common jurors.

(*n*) See title COUNTY COURTS, Vol. VIII., pp. 520 *et seq.*

(*o*) 8 & 9 Vict. c. 18. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 76, 86 *et seq.*

(*p*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) s. 1; and Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 51. The "*venire facias juratores*" is still attached to the record, and judgment when entered on the *postea* must, if trial has been had without a jury, recite that that has been done by consent; see forms used in the Mayor's Court, printed in Glyn and Jackson's Mayor's Court Practice, 2nd ed., p. 207. As to the Mayor's Court, see generally title MAYOR'S COURT (LONDON).

(*q*) *Roberts* v. *Bancroft* (1895), 14th March, C. A., unreported.

(*r*) Who executes the process of the court similarly to the sheriff in the High Court; see Order of Queen in Council, 20th November, 1863; *Re Holland, Ex parte Warren* (1885), 54 L. J. (Q. B.) 320, C. A.

(*s*) The permanent under-sheriff in the City of London; see p. 236, *ante*.

(*t*) *I.e.*, pursuant to the Juries Act, 1825 (6 Geo. 4, c. 50), s. 50; Act of Common Council, 22nd September, 1853.

(*u*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 110; Order of Queen in Council, *supra*; and see p. 261, *ante*.

SECT. 9. Juries Specially Constituted.

The practice of the court.

646. A view may be ordered, and generally the provisions of the Common Law Procedure Acts and the rules made thereunder have been made applicable to the court (*v*).

SUB-SECT. 4.—*In Local Courts under Private Acts or by Custom.*

Local courts.

647. The law relating to juries for the trial of issues in borough and local courts, established under private Acts or by custom (*w*), is referred to elsewhere (*x*).

SECT. 10.—*Payment of Jurors.*

No remuneration on criminal issues.

648. Jurors, in discharging the duties of their office, perform a public obligation, and, *primâ facie*, are entitled to no remuneration in connection therewith. This rule is invariable where issue is joined between the Crown and a person charged with a criminal offence, except where an indictment for misdemeanour has been moved by *certiorari* into the King's Bench Division, and is ordered to be tried by a special jury.

No fee has ever been paid where a jury has failed to agree upon a verdict and asked to be discharged (*a*).

Special juror's fee.

649. The usual fee of a special juror wherever serving is one guinea for each case in which he is sworn (*b*), with a further fee of one guinea where a view is ordered to be had (*c*).

Common jurors' fee.

650. Common jurors are accustomed to receive:

On each cause tried in London at the High Court, 1*s.* (*d*);

On each cause tried at *nisi prius* on circuit, 8*d.* (*e*);

Upon writs of inquiry held before the sheriffs of London, 4*d.* (*f*);

(*v*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 46, and Order of Queen in Council, p. 263, *ante*.

(*w*) As under the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 67.

(*x*) See title COURTS, Vol. IX., pp. 129, 135 *et seq.*

(*a*) The origin of recognition of jurors' services was the collation with which the winning party was accustomed to regale them after verdict found; see the history of remunerating jurors summarised in *Vickery* v. *London, Brighton, etc. Rail. Co.* (1870), L. R. 5 C. P. 165, *per* BOVILL, C.J., at p. 169. If it was given before verdict by the party which won, the verdict could not stand: *aliter* if by the loser. But it might be given by the winner after a privy verdict (*Harebottle* v. *Placock* (1604), Cro. Jac. 21). See further Duncomb's Trials per Pais, c. 12.

(*b*) *Vickery* v. *London, Brighton, etc. Rail. Co., supra.* The fee is earned even if the jury is discharged by consent as soon as sworn, although by statute it is entirely within the discretion of the judge whether any and what payment is made (Juries Act, 1825 (6 Geo. 4, c. 50), s. 35). The court has no power to order a larger payment even on a protracted trial, though pressure is frequently brought both by the presiding judge and the jurors themselves upon the parties to agree to make the payment of the guinea a daily one, and the aggregate costs in the cause.

(*c*) See p. 265, *post.*

(*d*) A survival of the fee customary on trials at bar.

(*e*) When they were brought from a distant county to a trial at bar in London they got £5 each; see *Vickery* v. *London, Brighton, etc. Rail. Co., supra*, and p. 260, *ante.*

(*f*) "The juror's groat." It is stated that under writs of extent and *elegit* (now rare) they get 1*s.* Customary payments also are made in other courts of local jurisdiction, all of which it is impossible here to enumerate. Thus in the courts leet of the three manors of Southwark held in October of each year it is stated that a sum of money is divided between the jurors; see, further, title COURTS, Vol. IX., p. 202.

SECT. 10. Payment of Jurors.

On each cause tried at the Mayor's Court, London, 2*d.*;
In county courts, 1*s.* for each case (*g*);
Upon inquiries to assess compensation under the Lands Clauses Consolidation Act, 1845 (*h*), 10*s.* 6*d.* (*i*);

Fees upon views.

At inquests held before coroners *virtute officii*, such fee as the local authority may, by published schedule, permit the coroner to pay (*j*).

651. Upon views, wherever held, there may be paid, in addition to reasonable travelling expenses and 5*s.* a day for refreshment—
(i.) To each special juryman *per diem*, one guinea;
(ii.) To each common juryman *per diem*, 5*s.* (*k*).

SECT. 11.—*Relief after Service.*

Generally.

652. No person is liable to serve as a juror in more than one court on the same day (*l*); or upon any jury or inquest (*m*), other than a grand jury in counties (*n*), more than once a year, unless all the jurors qualified and liable have been already summoned during the year (*o*); or in any court (other than a court of sessions of the peace for his own county) in the counties of Essex, Kent, and Surrey, for twelve months after service at the Central Criminal Court (*p*); or as a common juror in the High Court or Central Criminal Court, for two terms after previous service (*q*); or as a common juror at assizes in Wales and in the four counties of Hereford, Cambridge, Huntingdon, and Rutland, for a year, in the county of York for four years, and

(*g*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 101; County Court Rules, Ord. 22, r. 1.

(*h*) 8 & 9 Vict. c. 18.

(*i*) This is not statutory, but in many places (*e.g.*, the county of London) it is demanded by the sheriff from the parties prosecuting the inquiry and paid without demur.

(*j*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 25. This fee in the county of London is not to exceed 2*s.*, and is not to be paid unless the person claiming it has lost a day's work by his attendance. Under the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 22, all common jurors were to be paid 10*s.* for each case. The provision was, however, almost immediately repealed (stat. (1871) 34 & 35 Vict. c. 2), without prejudice to any claim to payment they might have had under the repealed provision.

(*k*) Rule 49, Hilary Term, 1853, which, as regards jurymen, is expressly excepted from the repeal effected by the R. S. C., 1883, App. O; see Chitty's Practice, 610.

(*l*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 19 (3).

(*m*) Including, it is submitted, a coroner's inquest. As to the construction put upon "juries or inquests," see *R.* v. *Dutton*, [1892] 1 Q. B. 486.

(*n*) The exemption, however, applies to grand jurors in boroughs (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (6)).

(*o*) *Ibid.*; Juries Act, 1870 (33 & 34 Vict. c. 77), s. 19 (1). The latter speaks of jurors not "in the jurors' book," but "on the list," a vague expression, which may, however, be applicable to the lists kept by the coroners' officers or supplied to the county courts.

(*p*) Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 4.

(*q*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 42. The statute says "any session of *nisi prius* or of gaol delivery." But see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13. It is a condition of claiming the relief referred to in this and the two following exemptions referred to in the text that the juror be furnished with the certificates which it is the duty of the sheriff or the clerk of the peace to deliver upon request (Juries Act, 1825 (6 Geo. 4, c. 50), ss. 40, 41), on payment of 1*s.* in each case.

SECT. 11. Relief after Service.

in any other county for two years, after previous service (*r*); or as a common juror at quarter sessions in Wales and the four counties of Hereford, Cambridge, Huntingdon, and Rutland for a year, and in other counties for two years, after previous service (*s*); or in county courts, more than twice a year, or within six months of having served in the High Court or at assizes (*a*); or at more than one inquiry under the Lands Clauses Consolidation Act, 1845 (*b*), in any year (*c*).

Sheriffs' record of jurors' service.

653. With a view to the fair distribution of service, it is incumbent upon sheriffs to keep in the jurors' books an alphabetical register of persons who have served as common jurors in the High Court or at assizes, and as grand or petty jurors at county sessions of the peace, with the times of their services, the necessary details as to service at sessions being furnished to them by the clerks of the peace (*d*).

Exemptions granted under special circumstances by judges.

654. It has become a practice among judges and recorders to direct that jurors who have served before them in cases which have occupied an exceptional length of time shall be excused from further service for a stated period, and even for life (*e*), and to order certificates of exemption to be delivered to them by the officer of the court. It is submitted that this is without authority, and that the certificates so issued are of no legal validity (*f*).

SECT. 12.—*Offences in connection with Juries, and Penalties attaching thereto.*

Immunity of jurors while exercising their office.

655. No juror, properly impanelled (*g*), is accountable for, nor will any action lie against him in respect of, anything said or done by him in the discharge of his office (*h*).

(*r*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 42.
(*s*) *Ibid.*
(*a*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 102.
(*b*) 8 & 9 Vict. c. 18.
(*c*) *Ibid.*, s. 57.
(*d*) Juries Act, 1825 (6 Geo. 4, c. 50), ss. 40, 41.
(*e*) As by BIGHAM, J., in *Tootal, Broadhurst, Lee & Co.* v. *London and Lancashire Fire Insurance Co.* (1908), *Times*, 21st May.
(*f*) Lord RUSSELL OF KILLOWEN, C.J., in *R.* v. *Jameson* (1896), 12 T. L. R. 551, 580, considered that he had the power to do this, but he referred to no authority and rather assumed that there was precedent. The practice is said to have grown up since the Tichborne trials, and to cause great inconvenience to summoning officers to whose knowledge the issue of these certificates is not brought. See remarks of CHANNELL, J., in the *Times*, 22nd June, 1910. DARLING, J., said in 1907, that the proper course for an exempted juror was to send his certificate to the associate of the court (*Times*, 2nd March); and Judge LUMLEY SMITH recently stated in the City of London Court that although a certificate of exemption (for ten years after service at the Old Bailey) would be recognised in his court, it was the business of the person summoned to exhibit his certificate to the summoning officer (*Times*, 26th July, 1910).
(*g*) The privilege would not extend to a person not returned by the sheriff who by confederacy with the clerk of the court procured himself to be called and sworn on a jury with intent to serve some malicious purpose (*Scarlet's Case* (1612), 12 Co. Rep. 98).
(*h*) *Bushell's Case* (1670), 6 State Tr. 999; *R.* v. *Skinner* (1772), Lofft, 55; and see Hallam's Constitutional History, ch. 13. The subject was discussed in *Floyd* v. *Barker* (1607), 12 Co. Rep. 23, where a grand juror had been

SECT. 12. Offences in connection with Juries.

656. It is contempt of court to use or threaten violence, or even to use threatening or abusive language in or near the courts to a juror, and such an offence will be dealt with summarily upon complaint made (*i*).

Threatening jurors.

657. Any juror intentionally personating any person by answering to his name when called, or guilty of any of the acts of misconduct before mentioned (*j*), or being member of a grand jury who has disclosed to a person indicted the evidence against him (*k*), is guilty of a misdemeanour.

Offences by jurors.

Non-appearance or withdrawal without leave.

658. Any person liable to serve on a jury for the trial of issues in the High Court of Justice or at assizes, on grand and petty juries at courts of sessions of the peace, and at inquiries held pursuant to the Lands Clauses Consolidation Act, 1845 (*l*), whether as specially summoned or as *tales*-man, and not answering to his name when called, or withdrawing himself from court without leave after appearance, is liable to such fine as the court in its discretion may impose upon him, which fine, in the case of a viewer, is not to be less than £10 (*m*).

Similar provisions apply to attendance at the Mayor's Court, London (*n*), and in county courts (*o*), and to inquiries or inquests taken before sheriffs, coroners, or commissioners (*p*) (other than those already mentioned), except that the fine they are empowered to impose must not exceed £5.

In like manner jurors summoned to serve in inferior courts (whether in the City of London or elsewhere) are liable to be fined for default sums varying from 20*s.* to 40*s.* (*q*).

indicted for conspiracy. A juror cannot be indicted for breaking his oath as juror (1 Hawk. P. C., 8th ed., c. 27, s. 5).

The rule above expressed falls under the general principle that no action will lie for words written or spoken in the course of any judicial proceeding (see *Henderson* v. *Broomhead* (1859), 4 H. & N. 569, Ex. Ch., *per* CROMPTON, J., at p. 579). The principle has been discussed at great length in the numerous cases relating to privilege of judges, inferior as well as superior, *e.g.*, *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220 (county court judges); *Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A. (magistrates); *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A. (counsel); *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A. (witnesses).

(*i*) 1 Hawk. P. C., 8th ed., c. 6, s. 3; Duncomb, Trials per Pais, Vol. I., c. 13; and see further, as to embracery, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 489.

(*j*) See p. 254, *ante*. See also title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 296.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 346, note (*h*); and p. 242, *ante*.

(*l*) 8 & 9 Vict. c. 18.

(*m*) Juries Act, 1825 (6 Geo. 4, c. 50), ss. 38, 51; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (7); Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 44. Special jurors summoned to try a cause out of the county in which it arose may be fined (*Layburn* v. *Crisp* (1838), 8 C. & P. 397).

(*n*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 49.

(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 102.

(*p*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 53; Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 19; and compare Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 27.

(*q*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 54.

SECT. 12.
Offences in connection with Juries.

Lands Clauses Consolidation Act, 1845.

659. By a provision peculiar to the Lands Clauses Consolidation Act, 1845 (*a*), the sheriff or other officer presiding at an inquiry may impose upon any defaulting juror (in addition to the discretionary fine which may be imposed in the High Court) a fine of £10, to be applied, so far as it will extend, in satisfaction of the general costs (*a*).

Exceptions.

660. No person is liable to any penalty for non-attendance on any jury (*b*), unless the summons requiring him to attend is duly served six days at least before the day on which he is required (*c*).

No fine imposed for non-attendance on a juror may be estreated for fourteen days, nor until the person fined has been informed by the officer of the court by letter of the imposition thereof, and has had opportunity of forwarding an affidavit of the cause of his non-attendance with a view to the fine being remitted (*d*).

Defaults of sheriffs and other officers.

661. Sheriffs and summoning officers (*e*) may be fined, in the discretion of the court (*f*), if they wilfully return any man for service (except on a grand jury at county assizes) whose name is not in the jurors' book then properly in use (*g*); or if they wilfully return for service on a jury (other than a grand jury at county assizes or a special jury) the name of any persons who by reason of previous service are exempt (*h*); or if they take reward for excusing service (*i*); or if they fail to give the persons liable to serve the proper notices for their attendance (*k*): or, as regards summoning officers, if they summon any man whose name is not specified in the mandate or warrant signed by the sheriff (*l*).

Sheriffs or their deputies may be sued for a penalty of £50, if without proper cause they alter the list of jurors contained in the jurors' book; or if they fail to provide the cards previously mentioned; or if they fail to prepare and keep for inspection copies of the panels; or if they fail to register the service of jurors, and to deliver certificates thereof when required; or if they neglect to hand over to their successors the jurors' books for the preceding

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 44.

(*b*) Except a coroner's jury; see p. 239, *ante*, and title CORONERS, Vol. VIII., pp. 259 *et seq.*

(*c*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 20. Grand jurors at borough sessions are entitled to seven days' notice (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (2)).

(*d*) Juries Act, 1862 (25 & 26 Vict. c. 107), s. 12. The person summoned may send an affidavit or excuse on the day on which he should have attended; or he may himself appear and urge an excuse which the court may in its discretion accept. But counsel will not be heard on his behalf, at all events without an affidavit of facts (*Carne* v. *Nicoll* (1834), 3 Dowl. 115).

(*e*) *Semble*, not those irregularly appointed. Penal enactments must be strictly construed (*Williams* v. *Thomas* (1849), 4 Exch. 479).

(*f*) Including a court of quarter sessions (Juries Act, 1825 (6 Geo. 4, c. 50), s. 13).

(*g*) *Ibid.*, s. 39.

(*h*) *Ibid.*, s. 42.

(*i*) *Ibid.*, s. 43; *R.* v. *Whitaker* (1778), 2 Cowp. 752.

(*k*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 43.

(*l*) *Ibid.*

four years (*m*); or if they fail to discharge the obligations imposed upon them by the Lands Clauses Consolidation Act, 1845 (*n*).

SECT. 12. **Offences in connection with Juries.**

Defaults of officers of the court.

662. Clerks of assize and of the peace, associates, and other officers of the court, who wilfully record the appearance of a juror who has not in fact appeared, may be fined in the discretion of the court (*o*).

How payment of fines is enforced.

663. Fines imposed by any court (including inferior courts but not including sheriffs' and coroners' courts) are levied and applied in the same way as other fines imposed by the same court (*p*), and sheriffs or coroners imposing fines make out and sign certificates containing particulars of the person fined and the amount of the fine, which they transmit to the clerk of the peace for the county in which the person resides before the holding of the next quarter sessions, when the fines are levied and applied as if there imposed (*q*).

Defaults of clerks of the peace.

664. Clerks of the peace who fail to discharge the duties cast upon them in regard to the issuing of precepts and providing of forms; the preparation of jurors' books, the correction of them upon notification from a justice that an overseer has been convicted of wrongfully omitting or inserting a name (*r*), and the handing of them over to the sheriffs; the delivery of certificates of exemption to those who shall have served on juries at quarter sessions, and the transmitting of lists of such to the sheriff; and clerks of petty sessions who fail to give notice of the special sessions to the overseers and other persons concerned (*s*), are, in the same manner as sheriffs, liable to be sued for a penalty of £50 (*t*).

Defaults of overseers.

665. Overseers who neglect to make out lists upon receipt of the precept and prescribed forms from the clerk of the peace (*a*); or omit from them names which should be inserted and insert names which should be omitted, whether for reward or not (*b*); or wrongly describe the persons therein included; or fail to publish or refuse inspection of the lists or copies as prescribed; or neglect to attend the special sessions, or when there refuse to produce the lists, answer questions upon oath, or give inspection of or permit extracts to be taken from the poor rate, are, upon summary conviction before a justice, to be fined a sum not exceeding £10 nor less than 40*s*. (*c*).

(*m*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 46.
(*n*) 8 & 9 Vict. c. 18, s. 44.
(*o*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 39.
(*p*) *Ibid.*, ss. 54, 55. On refusal to pay, the judge or officer of the court signs a warrant under which a distress is levied, and, if necessary, the goods and chattels of the defaulter are sold.
(*q*) *Ibid.*, s. 53; Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 19 (4).
(*r*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 45.
(*s*) No penalty is provided if they fail (in accordance with the Juries Act, 1862 (25 & 26 Vict. c. 107), s. 9) to forward the lists to the clerks of the peace.
(*t*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 46.
(*a*) See p. 233, *ante*.
(*b*) The Juries Act, 1870 (33 & 34 Vict. c. 77), s. 13, reduces the penalty to be imposed upon summary conviction for this offence to a sum not exceeding 40*s*.
(*c*) Juries Act 1825 (6 Geo. 4, c. 50), s. 45.

JURISDICTION.

See ADMIRALTY; BANKRUPTCY AND INSOLVENCY; CONFLICT OF LAWS; COUNTY COURTS; COURTS; CRIMINAL LAW AND PROCEDURE; DEPENDENCIES AND COLONIES; EXECUTION; EXECUTORS AND ADMINISTRATORS; EXTRADITION AND FUGITIVE OFFENDERS: HUSBAND AND WIFE; MAGISTRATES; MAYOR'S COURT (LONDON); SHIPPING AND NAVIGATION.

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See COMPULSORY PURCHASE OF LAND AND COMPENSATION; CONSTITUTIONAL LAW; CORONERS; COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; JURIES.

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See INTERPLEADER; TRESPASS.

JUSTICES OF THE PEACE.

See COURTS; CRIMINAL LAW AND PROCEDURE; MAGISTRATES; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

JUSTIFIABLE HOMICIDE.

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See CRIMINAL LAW AND PROCEDURE; EDUCATION; INFANTS AND CHILDREN; PRISONS.

KEEPING HOUSE.

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See CONSTITUTIONAL LAW; ECCLESIASTICAL LAW; PARLIAMENT.

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KING'S BENCH DIVISION.

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KING'S CHAMPION.

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KING'S CORONER.

See CORONERS.

KING'S COUNSEL.

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KING'S EVIDENCE.

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See WORK AND LABOUR.

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See EQUITY; LIMITATION OF ACTIONS.

LADING, BILL OF.

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See FISHERIES; WATERS ND WATERCOURSES.

LAMMAS LANDS.

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LANCASTER.

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LAND.

See DESCENT AND DISTRIBUTION; LAND IMPROVEMENT; LAND TAX; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

LAND AGENTS.

See AGENCY; SALE OF LAND; VALUERS AND APPRAISERS.

LAND CHARGES.

See LAND IMPROVEMENT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

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LAND IMPROVEMENT.

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Part I.—In General.

Power of limited owner to improve settled land.

666. Apart from statute, a tenant for life of, or any other owner having a limited interest in, land has, in the absence of some express provision in the instrument under which his estate or interest arises, no claim against the inheritance for the cost of improvements made by him (*a*). On the principle that the erection of a building is substantially the same thing as the purchase of land (*b*), money liable to be applied in the purchase of land, whether under a public Act of Parliament (*c*) or under a private Act or a settlement, can be applied in the erection of new buildings on settled land, but not in improvements or repairs of existing buildings (*d*).

(*a*) *Bostock* v. *Blakeney* (1789), 2 Bro. C. C. 653; *Caldecott* v. *Brown* (1842), 2 Hare, 144; *Mathias* v. *Mathias* (1858), 3 Sm. & G. 552; *Rowley* v. *Ginnever*, [1897] 2 Ch. 503.

(*b*) *Re Newman's Settled Estates* (1874), 9 Ch. App. 681, *per* JAMES, L.J., at p. 683.

(*c*) *E.g.*, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69, or the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 34.

(*d*) *Re Leigh's Estate* (1871), 6 Ch. App. 887; *Brunskill* v. *Caird* (1873), L. R. 16 Eq. 493; *Re Newman's Settled Estates, supra; Drake* v. *Trefusis* (1875), 10 Ch. App. 364. This last-mentioned case has been consistently followed (*Re Venour's Settled Estates, Venour* v. *Sellon* (1876), 2 Ch. D. 522; *Re Speer's Trusts* (1876), 3 Ch. D. 262; *Donaldson* v. *Donaldson* (1876), 3 Ch. D. 743; *Jesse* v.

Salvage jurisdiction of the court.

667. When a trust estate is brought within the jurisdiction of the High Court, either in an action or by an originating summons (*e*), the High Court has jurisdiction to expend money liable to be laid out in the purchase of land in repairs necessary for the preservation of the trust property, or to raise money for this purpose by sale or mortgage of the settled property (*f*). This jurisdiction will, however, be exercised jealously, and only in cases which amount to actual salvage (*g*). If the court is satisfied that the necessity of the case amounts to actual salvage, an inquiry will be directed as to the repairs actually necessary to be done (*h*).

Statutory powers to improve settled land.

668. In these circumstances a long series of statutes has enabled landowners (*i*), including limited owners, to charge upon the inheritance, or raise out of money representing the *corpus* of settled land, the expenses of improvements which increase the permanent value of such land.

Statutes of two classes.

These enactments are mainly of two classes: first, the successive statutes, beginning with the Public Money Drainage Act, 1846 (*k*), now practically represented by a series, beginning in 1849, of private Acts, constituting various improvement companies which advance money and execute improvements, and by the public Improvement of Land Act, 1864 (*l*), and the Acts amending or extending it; and secondly, certain provisions contained in the Settled Land Act, 1882 (*m*), and other Acts amending or extending that statute.

Lloyd (1883), 48 L. T. 656; *Conway* v. *Fenton* (1888), 40 Ch. D. 512, *per* KEKEWICH, J., at p. 515; *Vine* v. *Raleigh*, [1891] 2 Ch. 13, C. A.), and if any cases (*e.g.*, *Re Leadbitter* (1882), 30 W. R. 378; *Re Johnson's Settlements* (1869), L. R. 8 Eq. 348) are inconsistent with the principles therein laid down they cannot be treated as having authority.

(*e*) *Conway* v. *Fenton*, *supra*; *Re Hurst*, *Hurst* v. *Hurst* (1891), 29 L. R. Ir. 219.

(*f*) *Conway* v. *Fenton*, *supra*; *Re Waldegrave*, *Waldegrave* (*Earl*) v. *Selborne* (*Earl*) (1899), 81 L. T. 632.

(*g*) *Re De Teissier's Settled Estates*, *Re De Teissier's Trusts*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153; *Re Hurst*, *Hurst* v. *Hurst*, *supra*; *Re De Tabley* (*Lord*), *Leighton* v. *Leighton* (1896), 75 L. T. 328; *Re Hawker's Settled Estates* (1897), 66 L. J. (CH.) 341; *Re Montagu*, *Derbishire* v. *Montagu*, [1897] 1 Ch. 685; *Re Willis*, *Willis* v. *Willis*, [1902] 1 Ch. 15, C. A.; *Re Legh's Settled Estate*, [1902] 2 Ch. 274.

(*h*) *Re Jackson*, *Jackson* v. *Talbot* (1882), 21 Ch. D. 786, in which case KAY, J., followed an unreported case of *Glover* v. *Barlow* (1833), 21 Ch. D. 788, n.; *Frith* v. *Cameron* (1871), L. R. 12 Eq. 169; *Re Hurst*, *Hurst* v. *Hurst*, *supra*; *Re Hawker's Settled Estates*, *supra*; *Re Waldegrave*, *Waldegrave* (*Earl*) v. *Selborne* (*Earl*), *supra*. The court must be satisfied in each case that there is a necessity amounting to actual salvage, and neither *Re Household*, *Household* v. *Household* (1884), 27 Ch. D. 553, nor *Conway* v. *Fenton*, *supra*, nor *Neill* v. *Neill*, [1904], 1 I. R. 513, can be relied on as establishing any general principle on which the court will act.

(*i*) For improvements effected by public bodies, see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS. As to drainage improvements on common and waste lands on inclosure under the Inclosure Acts 1836 (6 & 7 Will. 4, c. 115), ss. 38, 39; 1845 (8 & 9 Vict. c. 118), ss. 34, 61; 1852 (15 & 16 Vict. c. 79), s. 2, see title COMMONS, Vol. IV., pp. 560 *et seq.*

(*k*) 9 & 10 Vict. c. 101; see p. 303, *post*.

(*l*) 27 & 28 Vict. c. 114; see pp. 280 *et seq.*, *post*.

(*m*) 45 & 46 Vict. c. 38.

PART I. In General.

Object of earliest Acts of first class.

669. The earliest improvement Acts of the first class (*n*) were passed with the object of facilitating works of agricultural drainage and works for the conversion of waste or pasture into tillage; and for those purposes they enabled landowners (*o*) to procure advances of public money to a limited amount on the security of the lands to be improved.

Land improvement companies.

670. The whole of the advances authorised by these improvement Acts having been applied for and appropriated, it was thought expedient that in the future the requisite advances should be made by private individuals, and an Act (*p*) was accordingly passed to enable landowners (*o*) to charge by way of terminable rentcharge, upon the inheritance of the lands improved, money borrowed from other persons or advanced by themselves for the drainage of their lands (*q*). Almost simultaneously several companies were incorporated by private Acts of Parliament for the purpose of executing improvements of land and making advances to landowners (*o*) for the expenses of improvements on the security of terminable rentcharges arising out of the lands improved (*r*), and in 1864 the law relating to the improvement of land was amended and consolidated by the Improvement of Land Act, 1864 (*s*), which may be considered the type of Acts of this class.

Improvement of Land Act, 1864.

General scheme of Acts of first class.

671. The general scheme of all enactments of the first class already referred to (*t*) is to enable landowners, who apply money, whether borrowed or provided out of their own resources, in the making of improvements on their land, to cause the lands to be charged with such moneys by way of an annual rentcharge, which rentcharge includes both capital and interest, and is payable by the owner for the time being of the land.

Definition of "landowner."

672. For the purposes of the enactments of the first class (*t*) the "landowner" is (in effect) defined as the person who is in actual

(*n*) The Public Money Drainage Acts, 1846 (9 & 10 Vict. c. 101); 1847 (10 & 11 Vict. c. 11); 1848 (11 & 12 Vict. c. 119); 1850 (13 & 14 Vict. c. 31); 1856 (19 & 20 Vict. c. 9). For the explanation of "first class," see p. 277, *ante*.

(*o*) For the meaning of "landowner" in the Public Money Drainage Acts and the later Acts, see the text, *infra*, and note (*f*), p. 303, *post*.

(*p*) Private Money Drainage Act, 1849 (12 & 13 Vict. c. 100) (repealed and replaced by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 1).

(*q*) For rentcharges in general, see title RENTCHARGES AND ANNUITIES.

(*r*) The principal companies for the improvement of land and the private Acts incorporating them are as follows:—The General Land Drainage and Improvement Company (General Land Drainage and Improvement Co.'s Act, 1849 (12 & 13 Vict. c. xci.)); the Lands Improvement Company (Lands Improvement Co's. Act, 1853 (16 & 17 Vict. c. cliv.)); amended by the Lands Improvement Co.'s Amendment Act, 1855 (18 & 19 Vict. c. lxxxiv.); Lands Improvement Co.'s Amendment Act, 1859 (22 & 23 Vict. c. lxxxii.); and Lands Improvement Co.'s Amendment Act, 1863 (26 & 27 Vict. c. cxl.)); the Scottish Drainage and Improvement Company (Scottish Drainage and Improvement Co.'s Act, 1856 (19 & 20 Vict. c. lxx.), amended by Scottish Drainage and Improvement Co.'s Amendment Act, 1860 (23 & 24 Vict. c. clxx.)); the Land Loan and Enfranchisement Company (Land Loan and Enfranchisement Co.'s Acts, 1860 (23 & 24 Vict. cc. clxix., cxciv.)).

(*s*) 27 & 28 Vict. c. 114.

(*t*) See p. 277, *ante*.

possession or receipt of the rents and profits (except lessees at a rack-rent or for short terms of years) without regard to the real amount of interest of such person (*u*); so that it is not necessary for those purposes to inquire into his title to the land, and, provided he is the "landowner," as so defined, the rentcharge is valid, notwithstanding that his title is defective or that he has no title (*v*).

Title of "landowner."

It will be observed that, as the "landowner" for the time being is bound to keep down the rentcharge, the result is that if the person who originated the terminable charge continues to be the "landowner" during the whole period of its existence, he will, although he be a limited owner, bear the whole cost of an improvement effected under enactments of this first class.

673. Under enactments of the second class, namely, those contained in the Settled Land Acts, 1882—1890 (*w*), which are designed to confer powers on limited owners with respect to settled lands (*x*), the cost of the improvements is raised out of capital moneys arising under the Settled Land Acts (*w*) and there is no charge on the lands nor any liability to repayment or replacement of the moneys expended. The limited owner, therefore, bears only so much of the cost as is represented by loss of the income which would have arisen from the capital money expended in the improvement.

Settled Land Acts.

Improvement out of capital money.

The Settled Land Acts (*w*) also greatly extended the list of authorised improvements, which had previously been of a purely agricultural character, and probably it is to their provisions that the majority of landowners have recourse at the present day in carrying out improvements; but very large amounts are still borrowed through improvement companies or advanced by landowners on the

Effect of Settled Land Acts.

(*u*) See Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 8, and pp. 293, 294, *post*, and see Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), s. 49, and pp. 303, 304, *post*.

(*v*) The landowner must, however, be a person capable of contracting for the execution of improvements on the land; thus a charge on the lands of a limited company, whose borrowings for the purpose of the improvements were in excess of the powers conferred on them by Act of Parliament, was invalid (*Wenlock* (*Baroness*) v. *River Dee Co.* (1888), 38 Ch. D. 534, C. A.).

(*w*) The Settled Land Acts, 1882 (45 & 46 Vict. c. 38); 1884 (47 & 48 Vict. c. 18); 1887 (50 & 51 Vict. c. 30); 1889 (52 & 53 Vict. c. 36); 1890 (53 & 54 Vict. c. 69), referred to throughout this title as "the Settled Land Acts." For the explanation of "second class," see p. 277, *ante*.

(*x*) For the purposes of the present title capital money arising under the Settled Land Acts may be defined as either money liable to be invested in land which is to be settled or money arising from the sale of settled land or of some permanent element thereof or of chattels settled to devolve with land. For the various modes in which capital money may arise, see title SETTLEMENTS. When lands are settled by different instruments on the same trusts, capital money arising under one deed may be applied in the improvement of lands settled by another (*Re Mundy's Settled Estates*, [1891] 1 Ch. 399, C. A.; *Re Byng's Settled Estates*, [1892] 2 Ch. 219; *Re Stamford's* (*Lord*) *Settled Estates* (1890), 43 Ch. D. 84; compare *Donaldson* v. *Donaldson* (1876), 3 Ch. D. 743; *Re Clitheroe's Settled Estates* (1869), 20 L. T. 6). So, too, capital money arising from the sale of settled land in Ireland is applicable for the improvement of English property settled by the same settlement (*Re Eyre Coote*, *Coote* v. *Cadogan* (1899), 81 L. T. 535), and money liable to be laid out in the purchase of settled land in England is available for improvements on land in Scotland comprised in the same settlement (*Re Gurney's Marriage Settlement*, *Sullivan* v. *Gurney*, [1907] 2 Ch. 496).

PART I. In General.

security of terminable charges (*y*), the principal heads of improvements being drainage, farm buildings and labourers' cottages, mansion houses, roads, and water supply.

Part II.—Improvements Authorised.

SECT. 1.—*Under the Improvement of Land Act*, 1864, *and Amending Acts.*

Improvements authorised by Improvement of Land Acts.

674. Improvements which may be carried out under the Improvement of Land Act, 1864 (*z*), were originally confined to improvements of an agricultural nature therein specified and proved to the satisfaction of the Board of Agriculture and Fisheries to add to the permanent value of the lands to be charged to an extent equal to the expense thereof (*a*). This list has been extended by subsequent Acts to—

Sewage.

(i.) The making of works for the supply of sewage to lands for agricultural purposes (*b*);

Mansion house.

(ii.) The erection of a mansion house and such other usual and necessary buildings, out-houses, and offices as are commonly appur-

(*y*) See p. 278, *ante*.

(*z*) 27 & 28 Vict. c. 114.

(*a*) *Ibid.*, s. 9. These improvements were: The drainage of land and the straitening (*sic*), widening, deepening, or otherwise improving the drains, streams and water-courses of any land; the irrigation and warping of land; the embanking and weiring of land from the sea or tidal waters, or from lakes, rivers or streams in a permanent manner; the inclosing of lands and the straitening (*sic*) of fences and redivision of fields; the reclamation of land, including all operations necessary thereto; the making of permanent farm roads and permanent tramways and railways and navigable canals for all purposes connected with the improvement of the estate; the clearing of land; the erection of labourers' cottages, farmhouses, and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farmhouses, and other buildings for farm purposes already erected, so as such improvement or additions be of a permanent nature; planting for shelter; the construction or erection of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, water-courses, bridges, weirs, sluices, flood-gates or hatches, which will increase the value of any land for agricultural purposes; the construction or improvement of jetties or landing places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep and other agricultural stock and produce, and of lime, manure and other articles, and things for agricultural purposes; provided that the Commissioners (now the Board of Agriculture and Fisheries) (see note (*g*), p. 281, *post*) shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof; and the execution of all such works as in the judgment of the Commissioners (now the Board of Agriculture and Fisheries) may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof. All the improvements above specified appear to be covered by the list of improvements (see p. 283, *post*) authorised by the Settled Land Acts (for a list of these Acts, see note (*w*), p. 279, *ante*), and the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30, extends the enumeration of improvements in the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 9, so as to comprise all improvements authorised by the Settled Land Acts.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 31, 343, which repealed and re-enacted the Sewage Utilization Act, 1865 (28 & 29 Vict. c. 75); and see title SEWERS AND DRAINS.

SECT. 1. Under the Improvement of Land Act, 1864 etc.

tenant thereto and held and enjoyed therewith; the completion of any mansion house and such appurtenances; the improvement of and addition to any mansion house and such appurtenances already erected; and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate (*c*). The sum to be charged on any estate under settlement must not exceed two years' rental after deducting public charges and interest on debts, and other incumbrances and annuities affecting or which may affect the inheritance after the death of the limited owner, or, if other estates settled to the same uses are also subject to any of the said charges, incumbrances and annuities, a proportionate part thereof (*d*). The charge, which does not take priority of any incumbrance affecting the land charged at the time when the charge is created (*e*), may be upon the whole of the landowner's "estate," that is, not only on the particular land upon which the improvement is executed, but also on any other lands, in the same neighbourhood, settled to the same uses (*f*). The improvement, if suitable, may be allowed by the Board of Agriculture and Fisheries (*g*), even though no increase of the permanent value of the lands in excess of the yearly charge is thereby effected (*h*). In calculating the increase of permanent value resulting from the outlay, the effect on the value of the estate of any expenditure by the landowner on the improvement in addition to the sum to be charged is to be taken into consideration (*i*).

The sum to be charged.

(iii.) The construction of reservoirs or other works of a permanent nature (*k*) for the supply of water to persons residing or engaged in

Water supply.

(*c*) Limited Owners Residences Act (1870) Amendment Act, 1871 (34 & 35 Vict. c. 84), s. 3, which (see *ibid.*, s. 2) repealed the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), ss. 3, 6. The provisions as to fire insurance contained in the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), apply to buildings erected under these Acts (Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 5), s. 8).

(*d*) Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), s. 4.

(*e*) *Ibid.*, s. 9; *Provident Clerks' Mutual Life Assurance Association* v. *Law Life Assurance Society*, [1897] W. N. 73, in which case mortgages created by trustees of a term of 2,000 years were held to have priority over a charge created under the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56).

(*f*) See the definition of "estate" in the Limited Owners Residences Act (1870) Amendment Act, 1871 (34 & 35 Vict. c. 84), s. 3. This definition appears to have been overlooked in *Re Dunn's Settled Estate*, [1877] W. N. 39. For form of particulars to be furnished to the Board of Agriculture and Fisheries for a charge under this Act, see Encyclopædia of Forms and Precedents, Vol. VII. p. 32.

(*g*) The powers under the Public Money Drainage Acts and the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), now vested in the Board of Agriculture and Fisheries, were originally vested in the Inclosure Commissioners for England and Wales. For the successive stages by which the powers of these Commissioners devolved upon the Board of Agriculture and Fisheries, see title COMMONS, Vol. IV., p. 535. The Board of Agriculture and Fisheries, having succeeded to all the powers and duties of these Commissioners in respect of improvements under the Acts dealt with in this title, is alone referred to in the text.

(*h*) Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), s. 7.

(*i*) *Ibid.*, s. 5.

(*k*) These works include wells, pumps, reservoirs, cisterns, ponds, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, machinery, and things for

SECT. 1. Under the Improvement of Land Act, 1864 etc.

labour on the lands on which the works are situate, or on any other lands settled to the same uses, or for the more convenient or profitable user of such lands, or for the supply of water to any sanitary or other local authority or water company, or to any manufacturer or other person. Except where the improvement will effect a supply of water for the use of persons residing or engaged in labour on the estate, it must be shown that the works will for any purpose (*l*) effect a permanent yearly increase in the value of the lands, or will be permanently productive of a yearly revenue to the owner of such lands exceeding the yearly amount proposed to be charged (*m*). Any agreement for the supply of water to a local authority, or to a manufacturer or other person, must be approved by the Board of Agriculture and Fisheries, and no premium may be reserved thereby by the land-owner (*n*).

Contributions to district councils.

675. Contributions made by a landowner towards the expenses incurred by a district council for the purpose of supplying water to any of his lands may (*o*), with the sanction of the Board of Agriculture and Fisheries, be charged on the land in the same manner and with the like effect as in the case of a charge under the Improvement of Land Act, 1864 (*p*). Where the contribution is by agreement to be payable by half-yearly instalments the charge may be made in favour of the district council, to secure the payment to them of the contribution (*q*). The charge must not be made for any term exceeding twenty-five years (*r*); but, if the supply be beneficial to residents or labourers on the estate, the charge may be sanctioned even though it be not shown that the supply will effect an increase in the value of the land (*s*). The requirements of the Improvement of Land Act, 1864 (*p*), with respect to matters and proceedings previous to the execution of a charge (*t*), may be dispensed with in cases where the annual amount payable under the proposed

supplying or used in supplying water (Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), s. 10). The execution of such works is an improvement within the Act or articles of association of any improvement company (*ibid.*, s. 7). As to subscriptions for construction of waterworks by a water company, see p. 300, *post*. As to water supply generally, see title WATER SUPPLY.

(*l*) Not merely for agricultural purposes, as in the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 9 (10); see note (*a*), p. 280, *ante*.

(*m*) Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), s. 5.

(*n*) *Ibid.*, s. 6. The Act safeguards water rights (*ibid.*, s. 9), as to which see titles EASEMENTS AND PROFITS A PRENDRE, Vol. XI., pp. 310 *et seq.*, 337; WATERS AND WATERCOURSES; and also (Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), s. 4) incorporates the provisions of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), with respect to the security of reservoirs, as to which see title WATER SUPPLY. As to the procedure, see p. 294, *post*.

(*o*) District Councils (Water Supply Facilities) Act, 1897 (60 & 61 Vict. c. 44), s. 1.

(*p*) 27 & 28 Vict. c. 114.

(*q*) *Ibid.*, s. 2.

(*r*) *Ibid.*, s. 3.

(*s*) *Ibid.*, s. 4.

(*t*) See pp. 294, 297, *post*.

charge does not exceed the rate or rent payable for water supply at the date of its execution (*u*).

SECT. 1. Under the Improvement of Land Act, 1864 etc.

Extent of power to charge settled land.

676. All improvements on which capital money arising under the Settled Land Acts (*w*) may be expended (*x*) may now be treated as improvements authorised by the Improvement of Land Act, 1864 (*y*), and their cost may be secured by way of terminable charges in accordance with the prescribed procedure (*a*). Except by the adoption of this procedure, there is no jurisdiction to charge the inheritance of settled land with the cost of improvements authorised by the Settled Land Acts (*b*).

SECT. 2.—*Under the Acts of Private Improvement Companies.*

Improvements authorised for land improvement companies.

677. Each of the improvement companies already referred to (*c*) was originally restricted in its operations, whether as to execution of improvements or the advance of money for their execution, to the particular improvements specified in its Acts. But now by statute (*d*), these companies are authorised, by resolution passed by three-fourths of the shareholders present at an extraordinary meeting specially summoned for the purpose, to adopt, as improvements authorised by their own Acts, all or any of the improvements which are authorised by the Improvement of Land Act, 1864 (*y*), or by the enactments amending and extending the scope of that statute (*e*). The principal improvements specified in these private Acts are agricultural drainage, irrigation, embanking, inclosing, and reclaiming, the making of farm roads, farm buildings and mills and waterworks for farm purposes, and planting.

SECT. 3.—*Under the Settled Land Acts*, 1882—1890.

SUB-SECT. 1.—*Nature of Improvements.*

Improvements under Settled Land Acts.

678. The Settled Land Acts (*w*) contain lists of the improvements authorised by them (*f*), and form a complete code within which every improvement, however beneficial, must fall, if it is to

(*u*) District Councils (Water Supply Facilities) Act, 1897 (60 & 61 Vict. c. 44), s. 5.
(*w*) See note (*w*), p. 279, *ante*.
(*x*) As to these improvements, see note (*f*), *infra*.
(*y*) 27 & 28 Vict. c. 114.
(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30; see pp. 294, 297, *post*.
(*b*) *Standing* v. *Gray*, [1903] 1 I. R. 49; and see note (*w*), p. 279, *ante*.
(*c*) See note (*r*), p. 278, *ante*.
(*d*) Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 9 (1).
(*e*) *Ibid.*, s. 1 (3). These Acts are specified on pp. 280 *et seq.*, *ante*.
(*f*) The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (i.)—(xx.), specifies the following improvements:—
(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:
(ii.) Irrigation; warping:
(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

SECT. 3. Under the Settled Land Acts, 1882—1890.

be paid for out of capital money under their provisions (*g*), and they act as a guide to the courts in the exercise of their general jurisdiction to sanction expenditure out of capital on repairs, which jurisdiction, if exercised at all where the Settled Land Acts (*h*) do not apply, will be confined strictly to cases of salvage (*i*).

Interpretation of statutory improvements.

679. The Settled Land Act, 1882 (*j*), includes, with considerable additions, all the agricultural improvements enumerated in the

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water (see *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541):
(v.) Groynes; sea walls; defences against water:
(vi.) Inclosing; straightening of fences; re-division of fields:
(vii.) Reclamation; dry warping:
(viii.) Farm roads; private roads; roads or streets in villages or towns:
(ix.) Clearing; trenching; planting:
(x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not:
(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:
(xii.) Saw mills, scutch mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:
(xiv.) Tramways; railways; canals; docks:
(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:
(xvi.) Markets and market places:
(xvii.) Streets, roads, paths, squares, gardens or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land:
(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid:
(xix.) Trial pits for mines and other preliminary works necessary or proper in connection with development of mines:
(xx.) Reconstruction, enlargement, or improvement of any of those works.
To these the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, added:—
(i.) Bridges:
(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let:
(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof:
(iv.) The rebuilding of the principal mansion house on the settled land; provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land. As to the procedure for obtaining approval to expenditure under these Acts, see pp. 289 *et seq.*, *post.*

(*g*) *Re Willis*, *Willis* v. *Willis*, [1902] 1 Ch. 15, C. A., *per* ROMER, L.J., at p. 23; *Re Blagrave's Settled Estates*, [1903] 1 Ch. 560, C. A., *per* COZENS-HARDY, L.J., at p. 564; *Re Gerard's* (*Lord*) *Settled Estate*, [1893] 3 Ch. 252, C. A.
(*h*) See note (*w*), p. 279, *ante.*
(*i*) *Re De Teissier's Settled Estates*, *Re De Teissier's Trusts*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153; *Re Willis*, *Willis* v. *Willis*, *supra.* For the jurisdiction of the court in cases of salvage, see p. 277, *ante.*
(*j*) 45 & 46 Vict. c. 38.

SECT. 3. Under the Settled Land Acts, 1882—1890.

Improvement of Land Act, 1864 (*k*); and the fact that an improvement has been sanctioned under the latter Act, as coming within a provision substantially identical with a provision of the Settled Land Act, 1882 (*l*), is good evidence that it is an improvement within the Settled Land Act, 1882 (*m*). The list has been interpreted by the courts with some liberality (*n*); but, except where it has been expressly extended by the Settled Land Acts (*o*) to other objects (*p*), it will be confined to works incidental to the use of the land itself as agricultural land (*q*).

Streets, roads, and open spaces.

680. The expenses of making streets, roads, or other open spaces, whether for the use of the public or individuals, or for dedication to the public in connection with the conversion of land into building land, may be paid out of capital money under the Settled Land Act, 1882 (*r*), or they may be raised by mortgage or charge on land, or out of moneys liable to be laid out in the purchase of land or the income of such moneys, or out of accumulations of income under the provisions of the Settled Estates Act, 1877 (*s*).

(*k*) 27 & 28 Vict. c. 114. See *Re Newton's Settled Estates*, [1890] W. N. 24, C. A. For the improvements specified in the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 9, see note (*a*), p. 280, *ante*. Bridges, which were an improvement under the last-mentioned Act, are now authorised by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (i.); see note (*f*), pp. 283, 284, *ante*,

(*l*) 45 & 46 Vict. c. 38.

(*m*) *Re Verney's Settled Estates*, [1898] 1 Ch. 508.

(*n*) Thus, the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (vi.), includes new fences partly in place of old fences and partly to divide a park for grazing purposes (*Re Verney's Settled Estates*, *supra*), and also the re-building of a garden wall so as to inclose more ground (*Re Dunraven's* (*Earl*) *Settled Estates*, [1907] 2 Ch. 417). So, too, new farm buildings (*Re Lisburne's* (*Earl*) *Settled Estates*, [1901] W. N. 91), and re-roofing farm buildings with galvanised iron instead of thatch (*Re Verney's Settled Estates*, *supra*), have been allowed under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xi.); but neither sub-section authorises expenditure on the reconstruction of unmortared stone walls that divide fields (*Re Marlborough's* (*Duke*) *Settlement* (1892), 8 T. L. R. 201). For what has been included in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (i.), under drainage and in *ibid.* (xiii.), under supply of water for domestic purposes, see note (*l*), p. 287, *post*.

(*o*) See note (*w*), p. 279, *ante*.

(*p*) See the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xiii.), (xiv.), (xv.); note (*f*), pp. 283, 284, *ante*; and see note (*l*), p. 287, *post*.

(*q*) *Re Harrington's* (*Earl*) *Settled Estates* (1906), 75 L. J. (CH.) 460, C. A. For example, an engine-house to supply electric light (*Re Leconfield's* (*Lord*) *Settled Estates*, [1907] 2 Ch. 340), or mills for commercial purposes (*Re Harrington's* (*Earl*) *Settled Estates*, *supra*), are not improvements within the Acts. The costs of an engine-house and accumulating room were allowed in *Re Blagrave's Settled Estates* (1902), 87 L. T. 62; but having regard to the observations of the Court of Appeal in the same case (*Re Blagrave's Settled Estates*, [1903] 1 Ch. 560, 564, C. A.), and the other later decisions, the decision in the court below cannot now be regarded as an authority.

(*r*) 45 & 46 Vict. c. 38, s. 25 (xvii.), (xviii.); see note (*f*), pp. 283, 284, *ante*. A cricket ground is an improvement within the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xvii.); but a pavilion is not a work in connection with it within *ibid.*, s. 25 (xviii.) (*Re Orwell Park Estate* (1904), 48 Sol. Jo. 193); compare *Re De La Warr's* (*Earl*) *Settled Estates* (1911), 27 T. L. R. 534 (where an expenditure of capital moneys upon the construction of a golf course and club-house in connection with the course was allowed).

(*s*) 40 & 41 Vict. c. 18, s. 21. For the procedure under that Act, see title

SECT. 3. **Under the Settled Land Acts, 1882—1890.**

Preliminary works.

681. Preliminary works in connection with the development of mines are improvements within the Settled Land Acts (*s*), as are their reconstruction, enlargement, and improvement at a later date, when they are no longer required for preliminary workings, but have become permanent (*t*).

Dwellings for working classes.

682. Cottages for labourers, farm servants, and artisans were among the original improvements authorised by the Settled Land Act, 1882 (*u*); and by subsequent Acts (*a*) the list has been extended to include the provision of dwellings immediately (*b*) available for the working classes (which expression includes all classes of persons who earn their livelihood by wages or salaries (*c*)), either by building new buildings or by means of the reconstruction, enlargement, or improvement of existing buildings, provided that such provision (*d*) is not in the opinion of the court injurious to the estate, or is agreed to by the tenant for life and the trustees of the settlement.

Alterations to enable settled land to be let.

683. If it is intended not to occupy but to let buildings on settled land (*e*), such structural (*f*) additions or alterations of a

SETTLEMENTS. As to the dedication of land for open spaces, either under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), or under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16, see title OPEN SPACES AND RECREATION GROUNDS.

(*s*) See note (*f*), pp. 283, 284, *ante;* see also note (*w*), p. 279, *ante.*

(*t*) See the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xix.), (xx.), and note (*f*), pp. 283, 284, *ante; Re Mundy's Settled Estates*, [1891] 1 Ch. 399, C. A. As to mines generally, see title MINES, MINERALS, AND QUARRIES.

(*u*) 45 & 46 Vict. c. 38, s. 25 (x.); see note (*f*), pp. 283, 284, *ante.* Gardeners are labourers within this provision (*Re Lisburne's (Earl) Settled Estates*, [1901] W. N. 91).

(*a*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 7 (1), replacing the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (1) (b); see title PUBLIC HEALTH and LOCAL ADMINISTRATION.

(*b*) Dwellings, otherwise suitable, but which are in fact occupied by persons who are not members of the working classes, were held not to be within the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70) (*Re Calverley's Settled Estates*, [1904] 1 Ch. 150).

(*c*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18. An estate agent is not a member of the working classes within this definition (*Re Gerard's (Lord) Settled Estate*, [1893] 3 Ch. 252, C. A., disapproving *Re Houghton Estate* (1885), 30 Ch. D. 102, on this point; *Re Overstone's (Lord) Settled Estates* (1907), 123 L. T. Jo. 322).

(*d*) It was held under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (1) (b), that the proviso in that Act that buildings should not be injurious to the estate only applied to new buildings and not to additions and improvements to existing buildings (*Re Calverley's Settled Estates, supra*); but this decision does not seem to apply to the different language of the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 7. The provision by a tenant for life of dwellings for the working classes on settled land, at his own expense, with the previous approval in writing of the trustees, is not to be deemed an injury to any interest in reversion or remainder in that land (*ibid.*, s. 7 (2)).

(*e*) *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier* v. *De Teissier*, [1893] 1 Ch. 153, approved in *Re Gerard's (Lord) Settled Estate, supra; Stanford* v. *Roberts*, [1901] 1 Ch. 440. Alterations in property already let are authorised if the tenant gives notice that he will quit unless they are made (*Re Calverley's Settled Estates, supra*).

(*f*) *Re Blagrave's Settled Estates*, [1903] 1 Ch. 560, C. A., approving *Re Clarke's Settlement*, [1902] 2 Ch. 327.

permanent nature (*g*) to or in existing (*h*) buildings as a reasonable and prudent owner of property, if he were absolutely entitled, would make for the purpose of enabling him to let the property (*i*), are improvements (*j*) within the Settled Land Acts (*k*).

Rebuilding mansion house.

684. The expense of rebuilding (*l*) the principal mansion house (*m*) on settled land in a style and on a site more or less corresponding with the original (*n*) may be paid for out of capital money (*o*) to the extent of one-half of the total annual rental of the whole settled estate (*p*).

(*g*) *Re Tucker's Settled Estates*, [1895] 2 Ch. 468, C. A. Whether the character of the additions and alterations is such as to bring the case within the Settled Land Acts is a question of fact for the court to decide. The court has refused to allow the payment out of capital moneys of repairs incidental to the ordinary use and occupation of the property, such as alterations in drainage (*Re Tucker's Settled Estates, supra*), or of fixtures attached to a building which merely add to its amenities, such as electric plant (*Re Blagrave's Settled Estates*, [1903] 1 Ch. 560, C. A., approving *Re Clarke's Settlement*, [1902] 2 Ch. 327, and overruling *Re Freake's Settlement, Kinnaird* v. *Freake*, [1902] 1 Ch. 97), or a heating apparatus (*Re Gaskell's Settled Estates*, [1894] 1 Ch. 485), or of an alteration in the shafting of a mill (*Re Harrington's (Earl) Settled Estates* (1906), 75 L. J. (CH.) 460, C. A.). On the other hand, structural drainage works (*Re Thomas, Weatherall* v. *Thomas*, [1900] 1 Ch. 319; *Re Leconfield's (Lord) Settled Estates*, [1907] 2 Ch. 340; compare *Standing* v. *Gray*, [1903] 1 I. R. 49), the replacing of a roof or a change in the main entrance of a house (*Re Gaskell's Settled Estates, supra*), the erection of a wash-house and privy (*Re Calverley's Settled Estates*, [1904] 1 Ch. 150), the substitution of solid floors of concrete for ordinary floor boards in order to keep out dry rot (*Stanford* v. *Roberts, supra*), have been held to be improvements within the Settled Land Acts.

(*h*) The erection of new buildings in the place of old is not an addition or alteration (*Re Leveson-Gower's Settled Estate*, [1905] 2 Ch. 95).

(*i*) *Stanford* v. *Roberts, supra.*

(*j*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (ii.); see note (*f*), pp. 283, 284, *ante.*

(*k*) See note (*w*), p. 279, *ante.*

(*l*) Repairs and alterations, however extensive, do not amount to a rebuilding (*Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier* v. *De Teissier*, [1893] 1 Ch. 153; *Re De Tabley (Lord), Leighton* v. *Leighton*, [1896] W. N. 162; *Re Wright's Settled Estates* (1900), 83 L. T. 159). It is, however, a question of fact in each case as to what amounts to a rebuilding (*Re Walker's Settled Estate*, [1894] 1 Ch. 189; *Re Kensington Settled Estates* (1905), 21 T. L. R. 351; *Re Dunham Massey Settled Estates* (1906), 22 T. L. R. 595; *Re Legh's Settled Estate*, [1902] 2 Ch. 274). The improvement of the architectural amenities of a mansion house does not come within the provision (*Re Gerard's (Lord) Settled Estate*, [1893] 3 Ch. 252, C. A.). The complete reconstruction of the drainage system of a mansion house, as distinguished from improvements in the existing system (*Re Gerard's (Lord) Settled Estate, supra*, disapproving *Re Houghton Estate* (1885), 30 Ch. D. 102), has been allowed under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (i.) (*Re Dunraven's (Earl) Settled Estates*, [1907] 2 Ch. 417). The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xiii.), has been held to authorise a new water supply (*Re Kensington Settled Estates, supra*), or a very large addition to an existing water supply (*Re Houghton Estate, supra; Re Bulwer Lytton's Will, Knebworth Settled Estates* (1888), 38 Ch. D. 20, C. A.), including a supply of water for the extinguishment of fire with complete equipment, such as hydrants and hose (*Re Dunraven's (Earl) Settled Estates, supra*).

(*m*) This means the actual house and outbuildings connected with it, not merely physically, but by occupation, enjoyment, and propinquity (*Re Gerard's (Lord), Settled Estate, supra*, at p. 261). It does not include a laundry 250 yards distant (*Re Dunraven's (Earl) Settled Estates, supra*).

(*n*) *Re Walker's Settled Estate, supra; Re Kensington Settled Estates, supra.*

(*o*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (iv.).

(*p*) *Re Gerard's (Lord) Settled Estate, supra.* The annual rental includes the income of invested capital moneys (*Re De Teissier's Settled Estates, Re De*

SECT. 3. Under the Settled Land Acts, 1882—1890.

If buildings are taken by a local or public authority or under compulsory powers, the amount received for the buildings taken and the site thereof may be expended in the erection of buildings in substitution (*q*).

Improvement of improvements.

685. The reconstruction, enlargement, or improvement of any work that is an improvement within the Settled Land Acts (*r*), however and whenever made (*s*), is an improvement within the Acts (*t*).

Repayment for agricultural improvements.

686. Capital money arising under the Settled Land Acts (*r*) may be applied in payment of any money expended by a landlord under or in pursuance of the Agricultural Holdings Act, 1908 (*u*), or any enactment thereby repealed, or under custom or agreement or otherwise (*a*), in or about the execution of certain specified improvements (*b*); or in discharge of any charge created on a holding under the Agricultural Holdings Act, 1908 (*u*), or any enactment thereby repealed (*c*).

Teissier's Trusts, De Teissier v. *De Teissier*, [1893] 1 Ch. 153); and of farms usually let but actually unoccupied at the moment (*Re Walker's Settled Estate*, [1894] 1 Ch. 189), without allowance for the cost of repairs (*Re Kensington Settled Estates* (1905), 21 T. L. R. 351), but it does not include any allowance as a rental value of a mansion and park in the occupation of the tenant for life or of a farm held and farmed by him (*Re Walker's Settled Estate, supra*, at p. 193).

(*q*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (iii.); see note (*f*), pp. 283, 284, *ante*.

(*r*) See note (*w*), p. 279, *ante*.

(*s*) *Re Dunraven's (Earl) Settled Estates*, [1907] 2 Ch. 417; compare *Re Mundy's Settled Estates*, [1891] 1 Ch. 399, C. A.; *Re Calverley's Settled Estates*, [1904] 1 Ch. 150.

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xx.); see note (*f*), pp. 283, 284, *ante*.

(*u*) 8 Edw. 7, c. 28, s. 20, which is a re-enactment of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 29, as amended by the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), the two latter Acts being repealed by the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), which is a consolidating Act. As to the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 29, see title AGRICULTURE, Vol. I., p. 267.

(*a*) The words "under custom or agreement or otherwise" did not occur in the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which was confined to moneys expended in pursuance of that Act, but were inserted by the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 3 (3). Silos, which are an improvement within the Agricultural Holdings Acts, erected by a tenant for life on land in his own occupation, were held not to be an improvement within the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (*Re Broadwater Estate* (1885), 54 L. J. (CH.) 1104, C. A.). The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), was not cited to the court on that occasion, and it is difficult to see how it could have applied, but it might possibly be held that the wider words of the later Agricultural Holdings Acts, 1900 (63 & 64 Vict. c. 50), and 1908 (8 Edw. 7, c. 28), make improvements under those Acts improvements under the Settled Land Acts (see note (*w*), p. 279, *ante*).

(*b*) The improvements are specified in the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), Sched. I., Parts I. and II., which are identical with the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), Sched. I., Parts I. and II., as to which see title AGRICULTURE, Vol. I., pp. 260, 261, notes (*c*), (*f*).

(*c*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 20 (2). As to the power of the landlord on paying compensation to obtain a charge, see the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 15—19, which replace the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), ss. 29, 30, 31, 32, as amended by the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 3, and see title AGRICULTURE, Vol. I., p. 266.

SUB-SECT. 2.—*Execution of Improvements.*

SECT. 3. Under the Settled Land Acts, 1882—1890.

687. A tenant for life may himself execute any authorised improvement, and enter into any contract relating to the execution thereof, with power to vary or rescind the same (*d*). He may also concur with any other person interested in executing, or contributing to the costs of, an authorised improvement (*e*).

Execution of improvements.

Part III.—Procedure under the Settled Land Acts, 1882—1890.

SECT. 1.—*Submission and Approval of Scheme.*

688. A tenant for life (*f*), who is desirous of applying capital money in payment for an authorised improvement, may submit a scheme for its execution, which must show the proposed expenditure (*g*).

Submission of scheme.

If the capital money is in the hands of the trustees of the settlement, the scheme must be submitted for approval to the trustees, who are bound to satisfy themselves that the improvement proposed is an improvement authorised by the Settled Land Acts (*h*) and is for the benefit of land comprised in the settlement, and that the scheme for the execution of the improvement is a proper one for carrying out that improvement. They should also be satisfied that, in preparing and submitting the scheme for their approval, the tenant for life was acting under competent skilled advice in reference to the execution of that improvement, and that he has regard to the interests of all parties entitled under the settlement (*i*). Failure to assure themselves on these points will expose them to liability for approving an improvident scheme (*j*), but they are not concerned with the general policy of the tenant for life as to the improvements that he may propose (*k*). If the tenant for life

Approval by trustees.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (1), (v.). For the contractual powers of a tenant for life generally, see title SETTLEMENTS.

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 27. This has been held to authorise the investment of capital money in a water company formed to supply water to a building estate (*Re Orwell Park Estate*, [1894] W. N. 135).

(*f*) As to who is a tenant for life or a person having the powers of a tenant for life under the Settled Land Acts, see title SETTLEMENTS. Trustees of the settlement in this connection are the trustees for the purposes of the Settled Land Acts (see note (*w*), p. 279, *ante*), for whom see title SETTLEMENTS.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26 (1). Unless the approval is expressly made conditional on the expenditure shown in the scheme not being exceeded, extra expenditure necessarily incurred in carrying out the scheme may be paid for out of capital money (*Re Bulwer Lytton's Will, Knebworth Settled Estates* (1888), 38 Ch. D. 20, C. A.); see also *Re Egmont's (Earl) Settled Estates*, [1908] W. N. 176; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15, and p. 291, *post*. For forms of submission of scheme by tenant for life to the trustees of the settlement and approval by them, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 717, 719.

(*h*) See note (*w*), p. 279, *ante*.

(*i*) *Re Egmont's (Earl) Settled Estates, Lefroy* v. *Egmont (Earl)*, [1906] 2 Ch. 151.

(*j*) *Re Norfolk's (Duke) Parliamentary Estates, Norfolk (Duke)* v. *Herries (Lord)*, [1900] 1 Ch. 461, 468.

(*k*) *Re Egmont's (Earl) Settled Estates, Lefroy* v. *Egmont (Earl)*, *supra*. If the trustees are satisfied as to the particular scheme submitted to them, they need not consider, for instance, the number of previous schemes or the amount of

SECT. 1. Submission and Approval of Scheme.

is an infant, the trustees have power to prepare and approve their own scheme (*l*).

Approval by court.

689. If the money is in court, or an application is made to the court (*m*) in the event of the refusal of the trustees to approve a scheme (*n*), the scheme must be submitted for approval by the court, which will, of course, have to be satisfied on the same points as in the case of approval by the trustees (*o*).

Approval of scheme where no existing capital money.

The fact that there is no capital money available for carrying out a scheme does not prevent the approval of a scheme either by the trustees or by the court (*p*), or the decision of the legal question whether the proposed works are improvements within the meaning of the Settled Land Acts (*q*).

SECT. 2.—*Payment out of Capital Money.*

Payment by trustees out of capital money.

690. If the capital money to be expended is in the hands of the trustees, then, on a certificate either of the Board of Agriculture and Fisheries (*r*), or of a competent engineer or able practical surveyor, nominated by the trustees and approved by the Board or the court (*s*), of the proper execution of any work or operation comprised in an improvement shown in a duly approved scheme and of the amount properly payable in respect of the work done, or on an order of the court (*t*), it may be applied by the trustees in payment of such amount (*u*).

capital money already, or liable to be, expended thereunder, or the general connection between the improvements mentioned in the scheme proposed for their approval and improvements contained in schemes already sanctioned (*Re Egmont's (Earl) Settled Estates, Lefroy* v. *Egmont (Earl)*, [1906] 2 Ch. 151).

(*l*) *Re Grey's Court Estate*, [1901] W. N. 60.

(*m*) "Court" means the High Court of Justice (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (ix.)).

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 44. All applications to the court should be by summons (*ibid.*, s. 46 (3), and Settled Land Act Rules, 1882, r. 2 (Stat. R. & O. Rev., Vol. XII., Supreme Court, England, p. 743), though in cases where a petition is more advantageous the costs of a petition may be allowed (*Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541).

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26 (1).

(*p*) *Re Norfolk's (Duke) Parliamentary Estates, Norfolk (Duke)* v. *Herries (Lord)*, [1900] 1 Ch. 461.

(*q*) *Re Calverley's Settled Estates*, [1904] 1 Ch. 150, 153. For a list of the Settled Land Acts, see note (*w*), p. 279, *ante*.

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26 (2) (i.).

(*s*) *Ibid.*, s. 26 (2) (ii.). The certificate does not vouch for the propriety of the improvements, but is a conclusive authority and discharge to the trustees for any payment made by them in pursuance thereof; see *ibid.*, s. 26 (2) (i.). As to the court, see note (*m*), *supra*. For forms of application to the Board of Agriculture and Fisheries for approval, and approval of engineer or surveyor, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 26, 27.

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26 (2) (iii.). On an application under this provision, the court has not merely to be satisfied of the facts that the scheme has been approved by the trustees and the money spent, but it has a discretion to refuse to make the order unless satisfied as to the propriety of the scheme; and for this purpose the merits of the scheme as a whole will be considered just as if the money were in court and the scheme were before the court for approval (*Re Keck's Settlement*, [1904] 2 Ch. 22; compare *Clarke* v. *Thornton* (1887), 35 Ch. D. 307, 313, 314). For forms of application for certificate and certificate of due execution of works and amount expended, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 27 *et seq.*

(*u*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26 (2).

SECT. 2. Payment out of Capital Money.

Payment out of funds in court.

691. If the capital money to be expended is in court, then, after approval of the scheme, on such evidence of the execution of the work as the court thinks sufficient, payment will be directed for the whole or part of any work or operation comprised in the improvement (*v*). In no case, however, will the court make an order which is prospective in that it authorises payment to be made at a future time either for work not yet done or out of money not yet come to the hands of the trustees (*a*).

Past improvements.

692. The court may (*b*) authorise the application of capital money in or towards payment for an authorised improvement notwithstanding that no scheme was submitted before the execution of the work (*c*), or even that the tenant for life was not competent to submit a scheme (*d*). This jurisdiction of the court extends to reimbursing a tenant for life for past expenditure on improvements; but whenever the court is asked to exercise this power after the execution of the work, the claim is closely scrutinised (*e*). Although a power in or direction to trustees to effect repairs and improvements out of income does not deprive a tenant for life of his right (*f*) to avail himself of the provisions of the Settled Land Acts (*g*), yet when the court is asked to exercise its discretion, a provision by the settlor that the expense of executing improvements shall fall on income is a ground for refusing to comply with the

(*v*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26 (3). The evidence may consist of a report or certificate of the Board of Agriculture and Fisheries or of a competent engineer or able practical surveyor, approved by the court (*ibid.*); see p. 290, *ante*.

(*a*) *Re Millard's Settled Estates*, [1893] 3 Ch. 116, C. A.; and see *Re Bristol's (Marquis) Settled Estates*, [1893] 3 Ch. 161, 165. *Bonâ fide* expenditure by the tenant for life for the benefit of all parties interested for the purposes of a scheme approved without money in hand will be recouped him on his furnishing proper evidence of the execution of the work (*Re Norfolk's (Duke) Parliamentary Estates, Norfolk (Duke)* v. *Herries (Lord)*, [1900] 1 Ch. 461).

(*b*) Since the passing of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15. Previously there was no such jurisdiction in the court (*Re Hotchkin's Settled Estates* (1887), 35 Ch. D. 41, C. A.), and even now the discretion will not be exercised in favour of the tenant for life when the improvements were executed before the passing of the Settled Land Act, 1882 (45 & 46 Vict. c. 38) (*Re Ormrod's Settled Estate*, [1892] 2 Ch. 318), nor does it extend to sums paid by a tenant for life in respect of instalments of improvement rentcharges (*Re Dalison's Settled Estate*, [1892] 3 Ch. 522; *Re Bristol's (Marquis) Settled Estates, supra*); and see p. 292, *post*. But sums expended on improvements authorised by the settlement, but not by the Settled Land Acts (see note (*w*), p. 279, *ante*), may be recouped, although the settlement was executed before the passing of the Settled Land Act, 1890 (53 & 54 Vict. c. 69) (*Re Egmont's (Earl) Settled Estates, Egmont* v. *Lefroy* (1900), 16 T. L. R. 360).

(*c*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15.

(*d*) *Re Wormald's Settled Estate, Wormald* v. *Ollivant*, [1908] W. N. 214.

(*e*) *Re Tucker's Settled Estates*, [1895] 2 Ch. 468, C. A. Delay in executing the improvements is a ground for refusal (*Re Allen's Settled Estates* (1909), 126 L. T. Jo. 282).

(*f*) *Clarke* v. *Thornton* (1887), 35 Ch. D. 307; *Re Stamford's (Lord) Estate* (1887), 56 L. T. 484; *secus*, if there is a trust coming before the trust for the tenant for life and providing for payment of improvements out of income (*Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711). If a tenant for life resorts to a fund created by the settlement for the purposes of improvement, he is bound to comply with any condition imposed by the settlement for the repayment of such fund (*Re Sudbury and Poynton Estates, Vernon* v. *Vernon*, [1893] 3 Ch. 74.)

(*g*) See note (*w*), p. 279, *ante*.

SECT. 2. Payment out of Capital Money.

demands of the tenant for life (*h*). If the expenditure has been incurred by the trustees, or by the tenant for life with their knowledge and approval, the court will allow it to be recouped out of capital money (*i*). Prospective orders directing repayment for work already done, out of capital money to arise thereafter, will not be made (*j*).

Duty of trustees.

If the trustees of the settlement do not oppose an application for recoupment by the tenant for life, it is their duty to remain neutral, and the court will not hear counsel on their behalf in support of the application (*k*).

Payment of improvement charges.

693. Charges created under any Act of Parliament in respect of an improvement authorised by the Settled Lands Acts (*l*) may be redeemed out of capital money (*m*), but there must be evidence that the improvements in respect of which the rentcharge was created were improvements within the meaning of the Settled Land Acts (*n*). It is immaterial that the improvements were executed and the rentcharge created before the 23rd August, 1887 (*o*), but a tenant for life is not entitled to be recouped for past payments made by him in respect of rentcharges so created (*p*) unless he has insisted on his rights before making the payments (*q*). Capital money may be applied either in payment of the instalments of the rentcharge, representing both capital and interest (*r*), or in redemption of the rentcharges, together with the payment of any bonus that may be demanded by the lenders in consideration of their consenting to redemption (*s*), and the fact that the improved portion of the estate has been sold and the rentcharge transferred to other portions is no objection to such application (*t*). But a payment made by a tenant for life to induce the original holders of charges to consent to a transfer of the charges whereby the interest is reduced cannot be repaid to him out of capital money (*a*).

(*h*) *Cardigan (Countess)* v. *Curzon-Howe* (1893), 9 T. L. R. 244; *Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711.

(*i*) *Re Thomas, Wetherall* v. *Thomas*, [1900] 1 Ch. 319; *Re Lisburne's (Earl) Settled Estates*, [1901] W. N. 91. As to the cost of sanitary works executed under the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*j*) See note (*a*), p. 291, *ante*; *Re Bristol's (Marquis) Settled Estates*, [1893] 3 Ch. 161.

(*k*) *Re Hotchkin's Settled Estates* (1887), 35 Ch. D. 41, C. A., *per* NORTH, J., at p. 43.

(*l*) See note (*w*), p. 279, *ante*.

(*m*) Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30), s. 1. This Act removed the difficulties created by the decision in *Re Knatchbull's Settled Estate* (1884), 27 Ch. D. 349; affirmed (1885), 29 Ch. D. 588, C. A.

(*n*) *Re Newton's Settled Estates* (1889), 61 L. T. 787. For the term "Settled Land Acts," see note (*w*), p. 279, *ante*. For the authorised improvements, see note (*f*), pp. 283, 284, *ante*.

(*o*) The date of the passing of the Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30); *Re Howard's Settled Estates*, [1892] 2 Ch. 233.

(*p*) *Re Howard's Settled Estates, supra*; *Re Dalison's Settled Estate*, [1892] 3 Ch. 522; and see note (*b*), p. 291, *ante*.

(*q*) *Re Bristol's (Marquis) Settled Estates*, [1893] 3 Ch. 161, 165.

(*r*) *Re Egmont's (Lord) Settled Estates* (1890), 45 Ch. D. 395, C. A., disapproving *Re Sudeley's (Lord) Settled Estates* (1887), 37 Ch. D. 123.

(*s*) *Re Egmont's (Lord) Settled Estates, supra*.

(*t*) *Re Howard's Settled Estates, supra*.

(*a*) *Re Verney's Settled Estates*, [1898] 1 Ch. 508.

SECT. 3.—*Maintenance, Repair, and Insurance of Improvements.*

SECT. 3. Maintenance, Repair, and Insurance of Improvements.

Maintenance, repair, and insurance.

694. Improvements must be maintained and repaired and, if they include a building or work in its nature insurable against damage by fire, insured at the expense of the tenant for life, and each of his successors in title having under the settlement a limited interest only in the settled land, for such period (if any) and in such amount (if any) as the Board of Agriculture and Fisheries by certificate in any case prescribes (*b*). The tenant for life and each of such successors in title is also bound from time to time, if required by the Board on, or without, the suggestion of any person having under the settlement any estate or interest in the settled land, to report to the Board the state of every improvement and the fact and particulars of any fire insurance (*c*). Failure to comply with these requirements gives any person having any estate or interest in the settled land, in possession, remainder, or reversion, under the settlement, a right to an action for damages against the tenant for life or his estate after his death (*d*). The tenant for life and each of his successors in title, having under the settlement a limited interest only in the settled land, in executing, repairing or maintaining authorised improvements, is protected against liability for waste in respect of any acts, works, or user of the land for such purposes (*e*).

Part IV.—Procedure under Other Acts.

SECT. 1.—*Under the Improvement of Land Act*, 1864.

SUB-SECT. 1.—*Application by Landowner.*

Who may apply.

695. An application to the Board of Agriculture and Fisheries for the purpose of obtaining a charge for improvements under the Improvement of Land Act, 1864 (*f*), or the Acts amending or extending the same (*g*), may be made by any landowner.

The "landowner" for the purposes of the Improvement of Land Act, 1864 (*f*), is defined as the person who is in the actual

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 28 (1). Insurance moneys must be applied in replacing the damaged buildings (compare *Re Quicke's Trusts, Poltimore* v. *Quicke*, [1908] 1 Ch. 887). The certificate may be varied from time to time, but not so as to increase the liability of the tenant for life or any of his successors in title (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 28 (4)). For the form of certificate and other documents requisite for obtaining it, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 26 *et seq.* For the obligations of a tenant for life generally in respect of repairs and insurance, see title SETTLEMENTS.

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 28 (3).

(*d*) *Ibid.*, s. 28 (5).

(*e*) *Ibid.*, s. 29. For the meaning of the words "timber and other trees not planted or left standing for shelter or ornament," in *ibid.*, s. 29, see *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664.

(*f*) 27 & 28 Vict. c. 114, s. 11. For a form of application, see Encyclopædia of Forms and Precedents, Vol. VII., p. 29.

(*g*) For the Acts amending and extending the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), see pp. 280 *et seq.*, *ante*.

SECT. 1. Under the Improvement of Land Act, 1864.

Definition of landowner.

possession or receipt of the rents or profits of any land, whether of freehold, copyhold, customary, or other tenure, except where such person is a tenant for life or lives, holding under a lease for life or lives not renewable, or is a tenant for years, holding under a lease or an agreement for a lease for a term of years not renewable, whereof less than twenty-five years are unexpired at the time of making the application, "without regard to the real amount of the interest of any person so excepted (*h*)"; and in a case where the person in the actual possession or receipt of the rents or profits of any land falls within the above exceptions, the person who for the time being is in the actual receipt of the rent payable by the person so excepted is, unless he also falls within the above exceptions, jointly with the person who is liable to the payment thereof, deemed to be the "landowner" (*i*). In the case of persons under a disability, such as married women, infants, or lunatics, the application may be made by their husbands, guardians, committees, or trustees (*k*). Joint applications may be made by several landowners (*l*).

Form of application.

The application must be made in the prescribed form, but until the proposed improvements have been sanctioned by the Board of Agriculture and Fisheries it may be withdrawn or altered (*m*).

SUB-SECT. 2.—*Investigation.*

Report of inspection to the Board.

696. If the application is entertained the Board of Agriculture and Fisheries may appoint an inspector, who is to report (except where the proposed outlay is to be made in respect of planting only) whether the proposed improvements will effect a permanent

(*h*) It is evident that the reference to the person so excepted is erroneous, and that the person referred to should be the person in actual possession etc. Compare the wording of the definitions in the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 12, and the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 16, which apparently were the basis of the definition. The object of the definition is to obviate the necessity of inquiring into the title of the landowner, and the effect is to preclude any question as to the validity of the charge so far as regards any defect in the title of the applicant; see p. 279, *ante*. As to the principle in its application to exchanges or partitions under the Inclosure Acts, see *Jacomb* v. *Turner*, [1892] 1 Q. B. 47.

(*i*) *I.e.*, for the purposes of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 8. "Landowner" includes a corporation (*ibid.*), as does the word "person" (*ibid.*, s. 10). As to charges created by incumbents, see title ECCLESIASTICAL LAW, Vol. XI., p. 759.

(*k*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 24.

(*l*) *Ibid.*, s. 12. Adjoining lands or easements, or conveniences thereover, may be acquired, for the purposes of the execution of improvements, from persons enabled to sell or dispose of any such adjoining lands etc., under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), as to whom see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 57; and the amount of the purchase-money may be added to the charge, and works may be executed on such adjoining lands for the purposes of drainage or warping improvements under the provisions of the Land Drainage Act, 1847 (10 & 11 Vict. c. 38), and the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), Part. III. (Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 32, 33, 49); and see p. 303, *post*.

(*m*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 11. The forms may be issued by the Board of Agriculture and Fisheries from time to time (*ibid.*, s. 13). For forms of application, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 29 *et seq.*

increase of the yearly value of the land exceeding the yearly amount proposed to be charged thereon in respect of the improvements applied for (*n*). The Board may require the applicant to give security for the expenses of such investigation (*o*), and may also require any alterations in the proposed improvements that it may think expedient (*p*).

Interference with rivers and canals.

697. If in the opinion of the Board of Agriculture and Fisheries any proposed improvement will interfere with any navigable river or canal, the landowner must give notice in writing to the body having the management or control of such river or canal (*q*), and, in the event of such body dissenting, an order of the court must be obtained authorising the Board to proceed with the improvement (*r*).

Delivery of specifications of improvements.

698. Before the commencement of any sanctioned improvements detailed specifications and, in the case of buildings, and in any other case if required, detailed plans or drawings, must be delivered to and approved by the Board of Agriculture and Fisheries (*s*). The Board has also power to inspect the improvements while in progress (*a*).

SUB-SECT. 3.—*Provisional Orders.*

Provisional order for improvement charge.

699. The Board of Agriculture and Fisheries, if satisfied as to the permanent value of the proposed improvements, may sanction the improvements by an order (*b*) called a provisional order (*c*). The provisional order must name the landowner to whom it is issued,

(*n*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 15. For a form of approval of an inspector compare the form for use under the Settled Land Act, 1882 (45 & 46 Vict. c. 381), Encyclopædia of Forms and Precedents, Vol. VII., p. 27. As to improvements under the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), and the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), see pp. 281, 282, *ante*,

(*o*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 14.

(*p*) *Ibid.*, s. 16.

(*q*) *Ibid.*, s. 19. As to rivers and canals generally, see titles RAILWAYS AND CANALS; WATERS AND WATERCOURSES.

(*r*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 21, and compare *ibid.*, s. 47. The costs of such application, which is made by summons, are in the discretion of the judge, and if he so directs may be deemed to be part of the expenses of the application for the proposed improvements (*ibid.*, s. 23). The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 17, 18, which provided for the giving of notices to remaindermen and mortgagees and forbade the matter to proceed, in the event of their dissenting, until an order of the court was obtained, were repealed by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 64 (now itself repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22)), and thus the provisions of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 22, dealing with service on dissenting parties out of the jurisdiction, are practically rendered obsolete.

(*s*) *Ibid.*, ss. 30, 31. For form of statutory declaration as to title, see Encyclopædia of Forms and Precedents, Vol., VII., p. 34.

(*a*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 48.

(*b*) *Ibid.*, s. 25. For cases where the improvement may be sanctioned, even though it does not effect a permanent increase in the value of the lands, see p. 281, *ante* (erection of a residence), and p. 282 , *ante* (waterworks).

(*c*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 27. The form of order is set out in Sched. A, *ibid.* (see Encyclopædia of Forms and Precedents, Vol. VII., p. 36). If the assignee is a land improvement company, expenditure under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), may be charged under the company's private Act (*ibid.*, s. 53).

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express the greatest sum to be charged and the rate of interest and term of years for the repayment thereof (the former not to exceed 5 per cent. per annum and the latter not to exceed twenty-five years, or, in the case of charges created since 1899, forty years (*d*)), specify the lands on which such repayment is to be charged (*e*), and express or refer to some document expressing the general scheme of the improvement to be executed (*f*).

Effect of provisional order.

The order creates in favour of the landowner named therein a title to an absolute charge, on the completion of the improvements, which he may assign to a third party, either absolutely or by way of security (*g*). Modifications of or alterations in any matter contained in the order may be sanctioned by the Board of Agriculture and Fisheries with the consent of every person interested, provided that no modification or alteration increases the sum to be charged or extends or curtails the term of repayment (*h*).

A provisional order is a complete protection from impeachment of waste (*i*), but is subject to any rights of the Crown and of various public bodies and companies (*k*).

SUB-SECT. 4.—*Absolute Orders.*

Absolute order for improvement charge.

700. After the improvements sanctioned have been duly executed to the satisfaction of the Board of Agriculture and Fisheries, the Board executes under its seal a charge upon the fee simple of the lands comprised in the provisional order for the sum by the same order expressed to be chargeable in respect of such improvements (*l*) with interest thereon (*m*). Such charge is called an absolute order (*n*), and the execution of an absolute order is

(*d*) Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 1 (1). The term of repayment, however, may be extended, on application between seven and ten years from the date of the absolute order, in the case of the planting of woods and trees, even where the charge was created before 1899 (*ibid.*, s. 1 (4)).

(*e*) The lands charged may include not only the lands improved, but any other lands shown by statutory declaration to be held for the same estates and interests free from incumbrances or subject to the same incumbrances (Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 1 (2)); and see *General Land Drainage and Improvement Co.* v. *United Counties Bank, Ltd.* (1910), 103 L. T. 418.

(*f*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 26.

(*g*) *Ibid.*, s. 27. For forms of assignment see Encyclopædia of Forms and Precedents, Vol. VII., p. 38.

(*h*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 29. For form of modifying order, see Encyclopædia of Forms and Precedents, Vol. I., p. 555, Vol. VII., p. 39.

(*i*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 34; and as to waste, see generally, titles EQUITY, Vol. XIII., pp. 49, 50, 90; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*k*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 35—47.

(*l*) The expenses of the application to the Board and of contracts relating to the execution of the improvements or the advance of money relating to their execution, may be included in the charge (Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 50); for a form of application to do this, see Encyclopædia of Forms and Precedents, Vol. VII., p. 40.

(*m*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 49. The charges are in the form in Sched. B (*ibid.*) (see *ibid.*, s. 52). See also Encyclopædia of Forms and Precedents, Vol. VII., p. 41.

(*n*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 51.

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conclusive evidence of the charge (*o*), but not of the capacity of the landowner to contract (*p*). Copies of absolute orders are kept by the Board, and any copy authenticated by the Board's seal is evidence of the contents of the absolute order (*q*). In the event of the death or determination of interest of any landowner, between the date of the provisional order and the completion of the improvements, if his successor completes the work, absolute orders will be made in favour of both the predecessor, or his representatives, and the successor in proportion to the amounts expended. If the successor does not proceed with the works within three months, his predecessor, or his representatives, may complete the works and entitle themselves to the absolute order (*r*).

SUB-SECT. 5.—*Effect, Registration, and Enforcement of Charges.*

Effect of charge created by absolute order.

701. The charge created by an absolute order is by way of rentcharge payable by half-yearly instalments, which include both principal and interest, for the term of years fixed by the provisional order (*s*). It has priority over all existing and future incumbrances affecting the land charged, whether created under the powers of any Act of Parliament or otherwise, except quit rents, Crown rents, chief rents, and other charges incident to tenure, tithe rentcharge, charges created under any Acts authorising advances of public money for the improvement of land, and charges created under the Improvement of Land Act, 1864 (*t*), or other Acts authorising the charging of lands with the expenses of improvements (*u*). The existence of the charge does not, however, preclude a trustee authorised to invest in the purchase or mortgage of land from investing in the purchase or mortgage of the land thereby charged unless he is expressly forbidden so to do by the terms of his trust (*a*). Such a charge itself is for the purposes of trust investment a real security, and as regards the holder is deemed personal property (*b*).

Registration of charge.

702. Originally memorials of every absolute order creating a charge had to be registered in the Land Registry, but this provision has been repealed (*c*). Charges on registered land are,

(*o*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 55.
(*p*) *Wenlock* (*Baroness*) v. *River Dee Co.* (1888), 38 Ch. D. 534, C. A.
(*q*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 51.
(*r*) *Ibid.*, s. 28.
(*s*) *Ibid.*, s. 51. As to the terms of years, see p. 296, *ante*. Terminable rentcharges of this nature can only be redeemed before the expiration of the term by agreement (*Re Knatchbull's Settled Estate* (1885), 29 Ch. D. 588, 592, 595, C. A.; *Re Egmont's* (*Lord*) *Settled Estates* (1890), 45 Ch. D. 395, 400, C. A.).
(*t*) 27 & 28 Vict. c. 114.
(*u*) *Ibid.*, s. 59. As to rentcharges created under the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), and Limited Owners Residences Act (1870) Amendment Act, 1871 (34 & 35 Vict. c. 84), see pp. 281, 282, *ante*. As to rentcharges under the private Acts of land improvement companies, see p. 301, *post*; *Pollock* v. *Lands Improvement Co.* (1888), 37 Ch. D. 661.
(*a*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 61.
(*b*) *Ibid.*, s. 60. As to investment of trust property, see title TRUSTS AND TRUSTEES.
(*c*) Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 5 (1), which in consequence of the passing of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), providing for registration (*ibid.*, s. 10), repeals the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 56. Entries

SECT. 1.
Under the Improvement of Land Act, 1864.

however, capable of registration under the Land Transfer Acts (*d*). If priority over charges of earlier date is claimed by virtue of the provisions of the Improvement of Land Act, 1864 (*e*), the claim must be made in writing, and an entry that such priority is claimed is made in the register. Disputes as to such claims are settled by the registrar (*f*).

Enforcement of charge.

703. Each instalment of a charge with interest on arrears (*g*) is recoverable by distress or entry, or creation of a term of years, like other annual sums charged on land (*h*). If these statutory remedies are unavailing a sale or mortgage for the purpose of raising the charge may be ordered by the High Court (*i*) under its equitable jurisdiction (*j*), but there is no remedy against the landowner personally (*k*). Charges are assignable (*l*), and must be kept down by the tenant for life as between him and the remainderman (*m*). If the charge is paid by a tenant or occupier at a rent, he may, except when he has joined in the application or duly consented to be charged, deduct the amount from the rent payable to the landowner (*n*).

SUB-SECT. 6.—*Apportionment and Release of Charges.*

Apportionment and release of charges.

704. Charges created under the Improvement of Land Act, 1864 (*o*), or any other Act authorising the creation of improvement

or searches in any register kept under the last-mentioned section can now only be made under an order of the court (Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 5 (2)).

(*d*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87); Land Transfer Act, 1897 (60 & 61 Vict. c. 65) ; Land Transfer Rules, 1903, r. 170 (Stat. R. & O. Rev., Vol. VII., Land (Registration) England, pp. 33 *et seq.*) ; and see title REAL PROPERTY AND CHATTELS REAL.

(*e*) 27 & 28 Vict. c. 114.

(*f*) Land Transfer Rules, 1903, rr. 172, 173.

(*g*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 64. The arrears are not to bear interest for a longer period than six months, but interest at the rate of 5 per cent for any period not exceeding six months is recoverable in the same manner as the sum in arrear. If at the expiration of six months from the time of a payment falling into arrear there shall not be upon the land charged a sufficient distress to answer the payment, interest for six months and the costs of the distress, the arrears continue to bear interest at the rate of 5 per cent. per annum until payment (*ibid.*).

(*h*) Improvement of Land Act, 1899 (62 & 63 Vict. c. 66), s. 3, substituting the remedies provided by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44 (as to which see title RENTCHARGES AND ANNUITIES), for the original provision in the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 63, that charges under the Act should be recoverable as tithe rentcharges; compare title ECCLESIASTICAL LAW, Vol. XI., pp. 748 *et seq.*

(*i*) Compare note (*m*), p. 290, *ante*.

(*j*) *Scottish Widows' Fund* v. *Craig* (1882), 20 Ch. D. 208.

(*k*) *Scottish Drainage and Improvement Co.* v. *Campbell* (1889), 14 App. Cas. 139. This was a case of a Scotch land improvement company, but the decision would seem to be applicable to all charges, whether created under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), or under the private Act of an English improvement company.

(*l*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 65; for a form, see Encyclopædia of Forms and Precedents, Vol. VII., p. 42.

(*m*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 66.

(*n*) *Ibid.*, s. 67.

(*o*) 27 & 28 Vict. c. 114.

charges by the Board of Agriculture and Fisheries, may be apportioned among the lands charged, or part of the land may be released, but no apportioned charge can be less than 20*s.* for each half-yearly payment (*p*). The apportioned charge is recoverable out of the lands charged by the order of apportionment (*q*). An apportionment or release is made by order under seal of the Board, and the order may comprise all or any number of rentcharges existing by virtue of previous absolute orders (*r*), any copy authenticated by the seal of the Board being conclusive evidence of the contents of the order for apportionment or release (*s*).

SUB-SECT. 7.—*Maintenance and Repair of Improvements.*

Maintenance and repair of improvements.

705. During the continuance of a charge, the person bound to make the periodical payments of such charge is liable to maintain the works in respect of which the charge is made (*t*), and he may, if necessary, enter on adjoining lands for that purpose (*u*). If required, he must certify to the Board of Agriculture and Fisheries the state of the improvements (*t*). He is also bound to keep insured against fire all improvements susceptible of damage by fire (*v*). If he fails to insure, the person entitled to the charge may effect the insurance at the expense of the person liable to insure (*u*), while if he neglects to maintain improvements, in addition to his liability to an action by a remainderman for damage (*t*), the Board may inspect the improvements, and cause the necessary works to be executed, the expense being recoverable as if it had been part of the charge (*a*). If an improvement consisting of an embankment or work constructed across any tidal water or navigable river is abandoned or falls into decay so as to become a nuisance, the nuisance may be abated by the Admiralty or the Board of Trade at the cost of the landowner (*b*). If, however, the maintenance of any improvements becomes unnecessary, the person bound to make the periodical payment may be relieved from liability for maintenance on a certificate of the Board of Agriculture and Fisheries (*c*).

SUB-SECT. 8.—*Public Improvements etc.*

Charge for public improvements.

706. The cost of drainage or other works of public improvement assessed on lands may, on the application of the landowner, be

(*p*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 68.
(*q*) *Ibid.*, s. 70.
(*r*) *Ibid.*, s. 71. For statutory form of order exempting lands from rentcharge under the Act, see Encyclopædia of Forms and Precedents, Vol. II., p. 23.
(*s*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 69. The form of order is set out in Scheds. D and E (*ibid.*); see Encyclopædia of Forms and Precedents, Vol. II., p. 21. The provisions as to registration of these apportionment orders (see Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 69) have been repealed as to lands in England and Wales (Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 5).
(*t*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 72.
(*u*) *Ibid.*, s. 73.
(*v*) *Ibid.*, s. 74.
(*a*) *Ibid.*, s. 75.
(*b*) *Ibid.*, s. 77.
(*c*) *Ibid.*, s. 76.

SECT. 1. Under the Improvement of Land Act, 1864.

charged on the lands as if they had been improvements under the Improvement of Land Act, 1864 (*d*).

Charge for subscription to railway, canal, or waterworks companies.

707. If a railway or canal (*e*), or waterworks (*f*) is to be made upon or near the lands of any landowner, and he is desirous to subscribe to the shares or stock of the railway or canal company, and to charge the lands with the amount of such subscription or with subscriptions for the construction of waterworks by a water company (*f*), the Board of Agriculture and Fisheries, on the application of the landowner, may, after being satisfied that the railway or canal (*e*) or waterworks (*f*) will effect a permanent increase in the value of the land to be charged, by provisional and absolute orders, charge the land with the amount of the subscription, as if it were an ordinary improvement charge (*e*). The amount may be borrowed from any land improvement company, and the charge assigned to such company by way of security (*g*). The share certificates must be deposited with the Board, and notice of the deposit given to the railway or canal company (*h*) or water company (*f*). During the whole term of the charge, the person for the time being bound to make the periodical payments of the charge is entitled to the shares (*i*), and, if not the registered holder, may at any time have them transferred into his own name (*k*), but except for this purpose the shares may not be transferred or disposed of by the registered holder during the term of the charge (*l*). On certificate, however, by the Board of the repayment of a proportionate amount of the principal money, a corresponding number of shares may be released and transferred to the person making such repayment, if he is not already the registered holder (*m*). If the shares are not claimed within two years after the expiration of the charge, they belong to the person bound to make the last periodical payment (*n*).

SECT. 2.—*Under the Acts of Private Improvement Companies.*

Private Improvement Companies Acts.

708. The foregoing description of the procedure under the Improvement of Land Act, 1864 (*o*), is substantially applicable to the private Acts of the various improvement companies (*p*). All these Acts are practically in the same form, and contain substantially

(*d*) 27 & 28 Vict. c. 114, ss. 57, 58. As to public drainage works and improvement, see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS.

(*e*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 78, 79, 80, 82, 83. The order is in the form in Sched. B (*ibid.*, s. 83). For similar charges where a landowner has contributed to the works of a light railway, see Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 19 (2), (3).

(*f*) Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), s. 8. As to waterworks companies generally, see title WATER SUPPLY.

(*g*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 80, 81.

(*h*) *Ibid.*, ss. 82, 84.

(*i*) *Ibid.*, s. 85.

(*k*) *Ibid.*, s. 86.

(*l*) *Ibid.*, s. 87.

(*m*) *Ibid.*, s. 88. For form of certificate, see Encyclopædia of Forms and Precedents, Vol. VII., p. 43.

(*n*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 89.

(*o*) 27 & 28 Vict. c. 114.

(*p*) For the principal improvement companies, see note (*r*), p. 278, *ante*.

identical provisions as regards the definition of the persons who, as "landowners," may obtain advances (*q*); as to the proceedings leading up to a provisional order, and ultimately to an absolute order of the Board of Agriculture and Fisheries, charging the land with a rentcharge payable for a term of years; and as to the priority of the rentcharge (*r*), and the remedies for recovering it, and other minor matters.

SECT. 3.—*Under the Land Drainage Acts.*

Procedure under Land Drainage Acts.

709. A limited owner of lands may petition the Chancery Division of the High Court of Justice for leave to make permanent improvements (*s*). The court can refer the matter to a master for inquiries (*t*), and, if his report is favourable, can confirm the report and authorise the improvements. The master thereupon can certify that any person expending money on the improvements in question will become entitled to a charge on the lands (*u*). On indorsement of the certificate that the moneys have been expended the inheritance becomes charged with the amount (*v*). The principal is repayable by annual instalments spread over a period varying from twelve to twenty-five years according to the nature of the improvements, and bears interest at the rate of 5 per cent. (*a*). The limited owner in possession is bound to pay the interest and instalments (*b*) and to maintain the improvements (*c*).

Power to enter on lands for drainage.

710. Persons interested in land who are desirous of improving it by draining or warping, but are unable to execute the works by reason of the disability of any persons whose lands would require

(*q*) See p. 278, *ante*.

(*r*) These Acts (see note (*r*), p. 278, *ante*) generally provide that a charge shall have priority over every other charge, whether existing at the time or made afterwards, except quit rents or chief rents incident to tenure or tithe commutation rentcharges, and any charges created or to be created under any Act authorising advances of public money for drainage. Where two land improvement companies obtained charges under their respective Acts, each of which conferred priority in the above terms, the charges were held to rank in order of date (*Pollock* v. *Lands Improvement Co.* (1888), 37 Ch. D. 661). The provisions for notice by advertisement of applications for provisional orders have been repealed (Improvement of Land Act, 1899 (62 & 63 Vict. c. 66), s. 4), and consequently an improvement company's charge overrides incumbrances prior in date, although there has been no investigation of title (*General Land Drainage and Improvement Co.* v. *United Counties Bank, Ltd.* (1910), 103 L. T. 418).

(*s*) Land Drainage Act, 1845 (8 & 9 Vict. c. 56), s. 3. This Act is still in force, but since the passing of the Settled Land Acts (see note (*w*), p. 279, *ante*) it is practically obsolete. A scheme for drainage for agricultural purposes could be sanctioned by the court under this Act, though there was no jurisdiction to do so under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18) (*Re Poynder's Settled Estates, Dickson-Poynder* v. *Cook* (1881), 50 L. J. (CH.) 753). If the land was not in hand, the consent in writing of the occupier was required (Land Drainage Act, 1845 (8 & 9 Vict. c. 56), s. 13). As to drainage improvements under the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), see title AGRICULTURE, Vol. I., pp. 260 *et seq.*

(*t*) Land Drainage Act, 1845 (8 & 9 Vict. c. 56), s. 4.

(*u*) *Ibid.*, s. 5.

(*v*) *Ibid.*, s. 6.

(*a*) *Ibid.*, ss. 8, 9.

(*b*) *Ibid.*, s. 10.

(*c*) *Ibid.*, s. 11.

SECT. 3. Under the Land Drainage Acts.

Memorial.

to be entered upon, may memorialise the Board of Agriculture and Fisheries for authority to effect the same (*d*). The memorial must be deposited for public inspection (*d*) and notices of the deposit published, and served on persons whose land is likely to be affected by the proposed works, requiring all parties interested to transmit their objections in writing to the Board on or before a day named in the notice, which day must not be sooner than six weeks from publication and service (*e*). The Board, if of opinion that the works can be effected without material detriment, or with only such detriment as may be adequately compensated, to the lands affected, may, after a public inquiry (*f*), in the event of objections, by order under its seal authorise the execution of the proposed works as allowed by it (*g*), and the persons authorised under such order may, subject to a provision safeguarding streams supplying ornamental waters (*h*), enter upon any lands described or shown in the plan annexed thereto, but, except in cases where the proprietors of such lands consent, only after the compensation for damage has been agreed and paid in the manner provided by the Lands Clauses Consolidation Act, 1845 (*i*), and may also acquire, in accordance with the same provisions, land, not being park or pleasure ground and not exceeding three acres, as a site for an engine house (*k*).

Inquiry.

Power to enter and scour channels of watercourses.

711. Where, by reason of the neglect of an occupier of lands to maintain or join in maintaining the banks, or to cleanse and scour or join in cleansing and scouring the channels, of drains, streams, or watercourses (*l*) in or bounding his lands, injury is caused to any other land (*m*), the proprietor or occupier of such other land may, after giving the prescribed notice, execute the necessary works and recover the expenses or contribution thereto from the party in default (*n*), but except in the case of boundary drains, streams, and watercourses, the warrant of two justices is required to authorise

(*d*) Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 4. For definitions, see *ibid.*, s. 20. As to drains generally, see title SEWERS AND DRAINS; and as to drainage improvements under the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), see title AGRICULTURE, Vol. I., pp. 260 *et seq.*

(*e*) Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 5.

(*f*) *Ibid.*, s. 7. Security for payment of the costs of the inquiry may be required by the Board (*ibid.*, s. 6).

(*g*) *Ibid.*, s. 8. Copies of the orders must be deposited among the county records and be open to inspection (*ibid.*, s. 13).

(*h*) *Ibid.*, s. 12.

(*i*) *Ibid.*, ss. 9, 11. For the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) (which are incorporated with the Land Drainage Act, 1847 (10 & 11 Vict. c. 38)), see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*k*) Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 10.

(*l*) Including underground drains (*Bowes* v. *Watson* (1879), 42 L. T. 27). As to watercourses generally, see title WATERS AND WATERCOURSES.

(*m*) Land is not used in its widest possible sense, so as to cover the case of injury to a mill occasioned by the penned back water submerging the mill wheel to a depth sufficient to reduce its power (*Finch* v. *Bannister*, [1908] 1 K. B. 485; affirmed, [1908] 2 K. B. 441, C. A.). Whether the provision applies only to land in an agricultural condition, *quære* (see *ibid.*, *per* Lord ALVERSTONE, C.J., at p. 446).

(*n*) Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 14.

an entry on the lands of the defaulter (*o*). The rights of Commissioners of Sewers and of the Admiralty are also safeguarded (*p*).

SECT. 3. Under the Land Drainage Acts.

Power to make and maintain new drains in land of adjoining owner.

712. A person who for the purposes of improvement of his own land is desirous of making new drains through, or improving existing drains in, the land of an adjoining owner may apply by writing for leave to make such new drains or improvements in drains (*q*). If the adjoining owner assents under seal, his assent is recorded and binds all parties having any estate or interest in the land, subject, in the case of an owner having a limited interest, to the approval of the proposed arrangement by two surveyors and to the application of the compensation money in the manner provided by the Lands Clauses Consolidation Act, 1845 (*r*), with regard to such cases, and subject also to the rights to compensation of any occupier other than the owner (*s*). If the adjoining owner dissents, then the questions whether the proposed works will cause injury and whether any injury caused admits of compensation by money must be determined by two or more justices at petty sessions, unless the adjoining owner requires arbitration; and the improvements can only be proceeded with on their finding either that no injury is caused or that it admits of compensation by money, and, in the latter alternative, on payment of the compensation, which, in the case of persons under a disability, is to be paid in accordance with the provisions of the Lands Clauses Consolidation Act, 1845 (*t*), applicable to such cases (*u*). Subject to the rights of the adjoining owner to divert drains (*a*), the applicant and his successors in title are entitled to enter on the lands through which the drains are made to maintain them (*b*), and a penalty is imposed for obstructing or injuring the drains (*c*). If the proposed drain will divert the natural outfall of any stream, notice must be duly given to all owners of lands abutting thereon, and in the event of any of them giving notice that he apprehends injury from the proposed drain he is to be deemed a dissenting owner (*d*).

SECT. 4.—*Under the Public Money Drainage Acts* (*e*).

Procedure.

713. The landowner (*f*) must apply to the Board of Agriculture and Fisheries for the loan stating particulars of the land proposed

(*o*) Land Drainage Act, 1847 (10 & 11 Vict. c. 38), s. 15.
(*p*) *Ibid.*, ss. 18, 19.
(*q*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), ss. 72, 73. Proceeding under an irregular notice may be restrained by injunction (*Hedley* v. *Bates* (1880), 13 Ch. D. 498). Costs incurred by an adjoining owner in respect of the application must be borne by the applicant (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 82).
(*r*) 8 & 9 Vict. c. 18. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 60.
(*s*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), ss. 74, 75.
(*t*) 8 & 9 Vict. c. 18. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 60 *et seq.*
(*u*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), ss. 76—78.
(*a*) *Ibid.*, s. 80.
(*b*) *Ibid.*, s. 79.
(*c*) *Ibid.*, s. 81.
(*d*) *Ibid.*, s. 83.
(*e*) As already stated (see p. 278, *ante*), the whole of the advances authorised by these Acts have been appropriated, and consequently the Acts, though still unrepealed, are obsolete for all practical purposes.
(*f*) Defined by the Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101),

SECT. 4. Under Public Money Drainage Acts.

to be drained, the proposed manner of effecting the drainage (*g*), the estimated expense of effecting, and the estimated increase of value to be produced by such drainage (*h*). The Board may require security for the expenses of the investigation (*i*). If the Board thinks fit to entertain the application, there must be an inspection and report on the land and the proposed works (*j*), and in the event of the Board being of opinion that an advance would be expedient it may, with the sanction of the Treasury, issue a provisional certificate (*k*). But before the issue of the provisional certificate notice of the application must be given by advertisement, and in the event of dissent by any person having any estate in or charge upon the land, no provisional certificate is to be issued until the dissent has been withdrawn or an order obtained from the High Court authorising the advance (*l*). The Board may cause the works to be inspected from time to time (*m*), and when satisfied of the execution of the works referred to in the provisional certificate (or any modification thereof that may have been authorised (*n*)), may issue a certificate for the advance, which may then be made by the Treasury (*o*). Upon the issue of the advance the land is to be charged with payment to the Crown of a rentcharge at the rate of £6 10*s*. per cent. payable for twenty-two years (*p*). The rentcharge is collected by the land tax collectors (*q*), and is recoverable as if it were tithe rentcharge (*r*), and has priority over all charges except

Provisional certificate.

Advance.

s. 49, by reference to the Tithe Act, 1836 (6 & 7 Will 4, c. 71), s. 12, as every person in actual possession or receipt of the rents and profits of lands except tenants at rack-rent or holding for less than a fourteen years' term. If the landowner is under a legal disability, his or her guardian, trustee, committee, or attorney may act (Public Money Drainage Act, 1850 (13 & 14 Vict. c. 31), s. 6), and if there be none, the Board may appoint a substitute (Public Money Drainage Act, 1856 (19 & 20 Vict. c. 9), s. 11).

(*g*) Drainage includes the expense of securing outfalls through other lands, of making open drains and watercourses, and of fencing, trenching, and clearing the surface of the land to be drained for the purpose of converting the same into arable or tillage land (Public Money Drainage Act, 1847 (10 & 11 Vict. c. 11), s. 1). The works must be capable of completion within five years (*ibid.*, s. 7).

(*h*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), s. 14. The applications may be varied, and several applications may be consolidated (Public Money Drainage Act, 1847 (10 & 11 Vict. c. 11), ss. 3, 4, 5). The specification of the lands in subsequent applications may be by reference (Public Money Drainage Act, 1848 (11 & 12 Vict. c. 119), s. 1).

(*i*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), s. 15.

(*j*) *Ibid.*, s. 16. Plans may be dispensed with and deviations allowed in certain cases (Public Money Drainage Act, 1847 (10 & 11 Vict. c. 11), s. 2; Public Money Drainage Act, 1856 (19 & 20 Vict. c. 9), s. 9).

(*k*) Public Money Drainage Act, 1856 (19 & 20 Vict. c. 9), s. 1. The advance must not exceed £5,000 (Public Money Drainage Act, 1850 (13 & 14 Vict. c. 31), s. 5).

(*l*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), ss. 18—20, 22—24.

(*m*) *Ibid.*, s. 25.

(*n*) Public Money Drainage Act, 1850 (13 & 14 Vict. c. 31), s. 4.

(*o*) Public Money Drainage Act, 1856 (19 & 20 Vict. c. 9), ss. 2, 3. If no advance is actually made the certificate may be cancelled (Public Money Drainage Act, 1848 (11 & 12 Vict. c. 119), s. 2).

(*p*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), s. 34.

(*q*) *Ibid.*, s. 42. As to the collection of land tax, see title LAND TAX, p. 317, *post*.

(*r*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), s. 35. That is,

tithe rentcharge and quit rents or chief rents incident to tenure (*s*). It is redeemable by the landowner at any time before the expiration of twenty years from the commencement thereof (*t*), and is apportionable (*a*). Limited owners are bound to keep down the charges and to maintain the works (*b*).

by distress or by delivery of the lands charged in lieu of arrears (Tithe Acts, 1836 (6 & 7 Will. 4, c. 71), ss. 81, 82; 1891 (54 & 55 Vict. c. 8), ss. 2 *et seq.*); see title ECCLESIASTICAL LAW, Vol. XI., p. 749.

(*s*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), s. 35.

(*t*) *Ibid.*, s. 45.

(*a*) *Ibid.*, s. 44; Public Money Drainage Act, 1856 (19 & 20 Vict. c. 9), s. 8.

(*b*) Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101), ss. 38, 39. Tenants paying the charges may deduct them from the rent, unless they have themselves joined in the application (*ibid.*, s. 40).

LAND REGISTRY.

See REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

LAND REVENUE RECORDS AND ENROLMENTS.

See CONSTITUTIONAL LAW.

LAND SOCIETY.

See BUILDING SOCIETIES; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES; LOAN SOCIETIES.

LAND TAX.

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SECT. 1. Incidence.

SECT. 1.—*Incidence.*

SUB-SECT. 1.—*Property Charged.*

Property charged.

714. Land tax (*a*) is charged on all manors (*b*), messuages, lands and tenements, and also on all quarries, mines of coal, tin and lead, copper, mundic, iron and other mines, iron mills, furnaces and other iron works, salt springs and salt works, all alum mines and works, all parks, chaces, warrens, woods, underwoods, coppices, and all fishings, tithes, tolls, annuities, and all other yearly profits, and all hereditaments of what nature or kind soever, without exemption of any privileged place or person (*c*).

Hereditaments.

Thus, a hereditament which is held by any person, whether above or below the surface, is liable to assessment, irrespective of the use to which it is applied, and even though the surface of the land is put to such use as to be exempt (*d*). An easement,

(*a*) Land tax was first imposed for one year only in 1692, when an assessment was directed of 4*s.* in the pound upon all real estate assessed on the *bonâ fide* rack-rent, and on offices (except naval and military), and on personal estate of 24*s.* per £100 (stat. (1692) 4 Will. & Mar. c. 1). In 1698 this was altered to an annual grant of a fixed sum called "an aid by a land tax" and the proportions to be contributed by the various local areas were specified (stat. (1698) 9 Will. 3, c. 10). A similar Act was passed in every subsequent year down to and including 1797, after which year the tax was made perpetual as regards land by the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60). So far as offices and personal estate were concerned, the tax continued to be an annual one down to the year 1833, when it was abolished (stat. (1833) 3 & 4 Will. 4, c. 12). The tax was never levied in Ireland, but was extended to Scotland at the union. Under the annual Acts the fixed proportion for the several divisions into which the whole country was divided up was to be levied by assessing the personalty and salaries in each separate parish or district at 4*s.* in the pound, and by assessing the land by an equal pound rate, so that the produce of the rate on the land when added to the produce of the other rate of 4*s.* in the pound should make up the fixed proportion for the division. In these circumstances it resulted that the amount to be raised from the land varied according to the amount produced by the other annual rate. For a long time after the land tax had been made perpetual there was a question as to whether the quotas to be paid by the various parishes and districts within a division could be varied so as to equalise the rate throughout the division, but it was finally determined that, under the provisions of the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), s. 74 (re-enacted by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 180), the quota payable by each parish was made permanent at its then proportion to the other parishes in the division (*R.* v. *Land Tax Commissioners* (1853), 2 E. & B. 694).

(*b*) The lord of a manor is assessable for quit-rents, but not in respect of fines and other casual profits of uncertain amount (*Grant* v. *Astle* (1781), 2 Doug. (K. B.) 722); and compare title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 237. The first reason given by the court for the decision in *Grant* v. *Astle*, *supra*, was the annual nature of the tax, which no longer applies, but its final reason, the usage of almost a century, has gathered weight with time.

(*c*) Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 4, 24. The words in the text are in their nature extensive, and are to have their natural and ordinary meaning given to them; they will not be cut down so as to exempt from taxation property which comes within the description of the more general words, because it is not specifically mentioned (*Metropolitan Rail. Co.* v. *Fowler*, [1893] A. C. 416, *per* Lord HERSCHELL, L.C., at p. 421). In the present title, unless the context otherwise requires, the word "lands" is used to include all the different kinds of property subject to land tax.

(*d*) *Metropolitan Rail. Co.* v. *Fowler*, *supra* (railway tunnel under a highway); *Westminster Corporation* v. *Johnson*, *Same* v. *Fuller*, [1904] 2 K. B. 737, C. A.,

however, is neither land nor a hereditament, and is not liable to assessment (*e*). SECT. 1. Incidence.

715. Tolls along an ordinary turnpike road in which no private interest or profit existed were always exempt from land tax (*f*), but tolls in the nature of private property are a separate franchise assessable to the land tax as a hereditament (*g*), even though they belong to companies, the shares in which are declared to be personal property by Act of Parliament (*h*). The redemption of the land tax in respect of the land on which the abuttals of a bridge are built will not exonerate the tolls (*i*), but if the bridge is by Act of Parliament exempted from all rates and taxes, the tolls also are exonerated (*k*). Tolls.

716. Persons having shares in the New River Company or in the Thames, Marylebone, or Hampstead waterworks, or in fire insurance companies, are liable for land tax in respect of the profits (*l*). Shares.

SUB-SECT. 2.—*Personal Liability.*

(i.) *In General.*

717. The land tax is to be rated and charged upon the persons "having or holding" lands (*m*), and the persons liable in the first instance are the several occupiers of the lands chargeable (*n*). Payments by occupier.

If the occupier of any house or tenement is a person entitled to diplomatic immunity, the tax must be paid by the landlord or owner (*o*).

718. If lands are charged with or subject to any fee-farm rents, rents-service, or other rents, payments, sums of money or annuities issuing out of, or payable therefor, such rents or annuities must bear their proportion of the tax (*p*), and the owner of the lands or Annuitants.

reversing Wright, J., [1904] 1 K. B. 19 (public lavatory under a road); *Central London Railway* v. *City of London Land Tax Commissioners*, [1911] 1 Ch. 467 (railway under a road).

(*e*) *Chelsea Waterworks Co.* v. *Bowley* (1851), 17 Q. B. 358, where it was decided that the plaintiff company was not liable to assessment in respect of its pipes.

(*f*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 122 (repealed by Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63); *Vauxhall Bridge Co.* v. *Sawyer* (1851), 6 Exch. 504, 509.

(*g*) *Vauxhall Bridge Co.* v. *Sawyer, supra* (tolls of a bridge); *Charing Cross Bridge Co.* v. *Mitchell* (1855), 4 E. & B. 549. Tolls charged for passengers and goods by a railway company under its statutory powers are not a separate franchise (*Central London Railway* v. *City of London Land Tax Commissioners, supra*).

(*h*) *Vauxhall Bridge Co.* v. *Sawyer, supra; Charing Cross Bridge Co.* v. *Mitchell, supra.*

(*i*) *Charing Cross Bridge Co.* v. *Mitchell, supra; Waterloo Bridge Co.* v. *Cull* (1858), 1 E. & E. 213.

(*k*) *Triton* v. *Nicholls* (1856), 5 W. R. 24.

(*l*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 57; and see Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 9; and as to water companies generally, see title WATER SUPPLY. Companies are taxed in their corporate capacity (*Royal-Exchange Assurance Co.* v. *Vaughan* (1757), 1 Burr. 155).

(*m*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 4.

(*n*) *R.* v. *Mitcham (Inhabitants)* (1787), Cald. Mag. Cas. 276. For the law of landlord and tenant, see title LANDLORD AND TENANT, pp. 331 *et seq.*, *post.*

(*o*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 46.

(*p*) *Ibid.*, ss. 5, 24. The rent should be taxed at the same rate as the land

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his tenant (*q*) may deduct such proper proportion. The owner of the charge is bound to allow such deduction on receipt of the residue of the charge (*r*), unless the terms of the charge or the agreement of the parties provide otherwise (*s*).

If the party entitled to make the deduction omits to do so, the payment cannot be recovered subsequently from the owner of the charge (*t*).

Crown rents and apportionment.

719. In the case of fee-farm rents payable to the Crown or to persons claiming under the Crown, the person paying the rent is entitled to a deduction of 4*s.* in the pound in respect of the land tax, and he does not lose this right by redeeming the tax (*a*).

Apportionment.

720. Land tax is not apportionable as between the representatives of a deceased tenant for life and the remainderman (*b*).

(ii.) *Exemptions.*

Crown lands.

721. Lands in the occupation of the Crown or its immediate servants for public purposes are exempt from land tax (*c*). This exemption depends on occupation, not on ownership, and Crown lands (*d*) in the occupation of private individuals are not exempt (*e*).

Poor persons.

722. Poor persons, whose lands, tenements, or hereditaments are not of the full yearly value of 20*s.* in the whole, are exempt (*f*).

Landowner exempt from income tax.

723. A landowner who is allowed a total exemption from income tax by reason of his income not exceeding £160 per annum is also exempt from land tax, and one-half of the land tax is remitted to a landowner who is entitled to an abatement of income tax by reason of his income not exceeding £400 per annum (*g*).

out of which it issues (*King* v. *Weston* (1709), 2 Eq. Cas. Abr. 62; *Brockman* v. *Honeywood* (1716), 1 P. Wms. 328; *Adair* v. *New River Co.* (1805), 11 Ves. 429).

(*q*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 24

(*r*) *Ibid.*, s. 5,

(*s*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 35; *Robinson* v. *Stephens* (1709), 2 Salk. 616; *Bradbury* v. *Wright* (1781), 2 Doug. (K. B.) 624; and see *Blandford* (*Marchioness*) v. *Marlborough* (*Dowager Duchess*) (1743), 2 Atk. 542.

(*t*) *Atwood* v. *Lamprey* (1719), 3 P. Wms. 127, n.; *Nicholls* v. *Leeson* (1747), 3 Atk. 573.

(*a*) Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 30, 31; *Moody* v. *Wells* (*Dean and Chapter*) (1856), 1 H. & N. 40. As to tenants of Crown lands, see also p. 322, *post*, and title CONSTITUTIONAL LAW, Vol. VII., pp. 179, 180, 237.

(*b*) *Sutton* v. *Chaplin* (1804), 10 Ves. 66. As to apportionment generally, see titles REAL PROPERTY AND CHATTELS REAL; RENTCHARGES AND ANNUITIES; SETTLEMENTS; WILLS.

(*c*) *A.-G.* v. *Hill* (1836), 2 M. & W. 160; *Colchester* v. *Kewney* (1866), L. R. 1 Exch. 368; affirmed, *sub nom. Colchester* (*Lord*) v. *Kewney* (1867), L. R. 2 Exch. 253, Ex. Ch.

(*d*) Land purchased out of a fund subscribed by private individuals for a particular purpose, though it is vested in trustees for the commissioners appointed by the Crown to administer the fund, is not Crown property (*Colchester* (*Lord*) v. *Kewney*, *supra*).

(*e*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 141, which provides for the exoneration of Crown lands on redemption of the land tax (*Colchester* (*Lord*) v. *Kewney*, *supra*). Lands chargeable with land tax do not acquire exemption on purchase by the Crown for public purposes, though there might be difficulty in enforcing payment against the Crown (*Colchester* v. *Kewney*, *supra*, *per* CHANNELL, B., at p. 380); and see the text and note (*a*), *supra*.

(*f*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 80.

(*g*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 12.

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Colleges and hospitals.

724. Colleges or halls in either of the two universities of Oxford or Cambridge, and the Colleges of Windsor, Eton, Winchester and Westminster, and the corporation of the governors of the charity for the relief of the poor widows and children of clergymen, and the College of Bromley, and any hospital (*h*) in England, Wales, or Berwick-upon-Tweed, are exempt (*i*) in respect of the sites of the said colleges, halls or hospitals, or any buildings within their walls or limits (*k*). The exemption extends also to houses or lands which, on or before the 25th March, 1693 (*l*), belonged to the sites of any college or hall in England, Wales, or Berwick-upon-Tweed, or to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas and Bethlehem Hospitals, or to the corporation for the relief of the poor widows and children of clergymen, or the College of Bromley, and also all lands, tenements, or hereditaments, revenues or rents belonging to any other hospitals or almshouses in England, Wales, or Berwick-upon-Tweed, which were in existence at the date of the tax being made perpetual (*m*). The exemption is absolute as regards colleges and halls, the named hospitals and the College of Bromley (*n*), but in the case of lands belonging to the corporation for the relief of the poor widows and children of clergymen and to any unspecified hospital or almshouse, it only extends to the rents and revenues to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses (*o*). In the cases of these unspecified hospitals and almshouses, if their lands are let at less than a rack-rent, the tenant is treated as owner

(*h*) Hospital is used in its popular sense, and any institution which in a popular, though not in a strictly legal, sense could be called a hospital may claim exemption (*Colchester* v. *Kewney* (1866), L. R. 1 Exch. 368, 377).

(*i*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 25. These exemptions arose under the annual Act, but were made perpetual (Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), s. 1). See also title EDUCATION, Vol. XII., p. 98.

(*k*) Lands and buildings which were not a portion of the ancient site of a college or hospital, and, therefore, not originally exempt, are protected under the Land Tax Act, 1797 (38 Geo. 3, c, 5), s. 25, if they were taken into, or became part of, such college or hospital between the date of the passing of the first Land Tax Act and the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60) (*Harrison* v. *Bulcock* (1788), 1 Hy. Bl. 68; *All Souls College, Oxford* v. *Costar* (1804), 3 Bos. & P. 635). The exemption, however, was held not to extend to lands purchased by a college, soon after the passing of the first Land Tax Act, under a private Act of Parliament, which provided that the college should pay all taxes which the lands in question then were, or should thereafter be, subject to (*All Souls College, Oxford* v. *Costar, supra*). It seems to follow from the decision in *Boehm* v. *Wood* (1823), Turn. & R. 332, 333 (see p. 329, *post*), that allotments in respect of exempt lands of colleges and hospitals are also exempt.

(*l*) The date appointed for the first quarterly payment of the tax. The expression has been construed to mean "lands which during the currency of the first assessment belonged to the sites" etc. (*St. Thomas', St. Bartholomew's, and Bridewell Hospitals* v. *Hudgell*, [1901] 1 K. B. 364, *per* WILLS, J., at p. 377).

(*m*) *Colchester* v. *Kewney, supra;* affirmed, *sub nom. Colchester (Lord)* v. *Kewney* (1867), L. R. 2 Exch. 253, Ex. Ch.; Land Tax Act, 1797 (38 Geo. 3, c. 9), ss. 25, 29.

(*n*) *St. Thomas', St. Bartholomew's, and Bridewell Hospitals* v. *Hudgell, supra.* The exception in the Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 27, in the case of tenants bound by their leases to pay taxes, only applied to contracts made when the Act was passed and not to future arrangements (*ibid.*).

(*o*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 25.

SECT. 1. Incidence.

to the extent of the surplus value over and above what goes to the charity (*p*).

Determination of questions.

The question whether lands belonging at any time to any of the exempted institutions are exempt from the tax is to be determined by reference to the first assessment (*q*).

725. All questions as to the *quantum* of the charge in the case of lands belonging to unspecified hospitals or almshouses, or whether lands belonging to hospitals were assessed in the fourth year of William and Mary, are to be determined by the Land Tax Commissioners, whose decision is final (*r*).

Effect of subsequent dealings.

726. Land tax is perpetually payable out of the land subject thereto at the date when it was made perpetual regardless of subsequent dealings (*s*).

Land originally subject to the tax is not exempted when its use is changed to a purpose which would have brought it within the exemption (*t*), and the exemption given to the sites of hospitals etc. remains unaffected by their application to other uses (*u*).

Statutory exemptions.

727. Lands which are by statute vested in their owners free from all taxes are exempt from land tax, though the exonerating statute was passed prior to 1798 (*a*). An exemption from parochial rates and assessments is not sufficient (*b*).

The extraordinary tithe rentcharge payable in respect of hop-grounds, orchards, fruit plantations, and market gardens is exempt from land tax (*c*).

By a series of statutes for the gratuitous exoneration of lands belonging to small livings or other charitable institutions of which the total annual income did not exceed £150, exemption can be claimed on the ground of a living being under £150, if it was actually exonerated before 1820 (*d*).

(*p*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 26; *St. Thomas', St. Bartholomew's, and Bridewell Hospitals* v. *Hudgell*, [1901] 1 K. B. 364, 377.

(*q*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 29; *St. Thomas', St. Bartholomew's, and Bridewell Hospitals* v. *Hudgell*, *supra*.

(*r*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 28; *Harrison* v. *Bulcock* (1788), 1 Hy. Bl. 69, 72. As to the Land Tax Commissioners, see p. 313, *post*.

(*s*) An exchange of lands under statutory powers does not shift the liability for land tax from the land taken in exchange (*Cooch* v. *Walden* (1877), 46 L. J. (CH.) 639).

(*t*) *Colchester* (*Lord*) v. *Kewney* (1867), L. R. 2 Exch. 253, Ex. Ch.

(*u*) *Cox* v. *Rabbits* (1878), 3 App. Cas. 473.

(*a*) *Williams* v. *Pritchard* (1790), 4 Term Rep. 2; and see *Perchard* v. *Heywood* (1800), 8 Term Rep. 468, 473; *Sion College* v. *London Corporation*, [1901] 1 K. B. 617, 621, C. A.

(*b*) *Waterloo Bridge Co.* v. *Cull* (1858), 1 E. & E. 213.

(*c*) *Carr* v. *Fowle*, [1893] 1 Q. B. 251. See title ECCLESIASTICAL LAW, Vol. XII., p. 746.

(*d*) The Acts in question were statutes (1806) 46 Geo. 3, c. 133; (1809) 49 Geo. 3, c. 67; (1810) 50 Geo. 3, c. 58; the Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123); the Land Tax Redemption Act, 1814 (54 Geo. 3, c. 173); and the Land Tax Redemption Act, 1817 (57 Geo. 3, c. 100). A list of the number of small livings exonerated in each year under these Acts is given in Bourdin's Exposition of the Land Tax, p. 92.

SECT. 2.—*Commissioners.*

SUB-SECT. 1.—*Qualification.*

Qualification.

728. The assessment of land tax is entrusted to the Land Tax Commissioners appointed under the authority of Parliament for executing the Acts granting a land tax (*e*). They require no qualification by estate, either landed or personal (*f*), but in the case of cities, boroughs, Cinque Ports, or towns corporate, a Commissioner must be qualified by inhabitancy, and he is liable to a penalty for acting without such qualification (*g*), unless, being a county Commissioner, he acts for a city or borough where there are not sufficient Commissioners (*h*).

No person who has held the office of inspector or surveyor of assessed taxes may act as Commissioner (*i*).

SUB-SECT. 2.—*Appointment.*

Powers of appointment.

729. The Commissioners are appointed by special Acts of Parliament, known as the "Names Acts," whenever occasion arises. By the last of such Acts it is provided that the persons named in the schedule signed by and deposited with the clerk of the House of Commons (being, where so required, duly qualified by inhabitancy) shall be Commissioners within the respective counties, shires, and places in the schedule respectively mentioned (*k*).

In addition, all justices of the peace for any county, shire, riding, division, or district (*l*), are entitled to act as Commissioners (*m*), and the mayor of any city or borough may act for his city or borough (*n*).

Protection of servants.

730. For all acts done in execution of their office the Commissioners, their assessors, and collectors, are only liable for the penalties inflicted by the Acts (*o*), and are entitled to the protection given to public authorities (*p*).

SUB-SECT. 3.—*Proceedings.*

Meeting of Commissioners.

731. The Commissioners must meet together from time to time at the usual place of meeting in their respective divisions, or any place adjoining (*q*). The first general meeting for each year

(*e*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5. In this title the word "Commissioners" is used to indicate the Land Tax Commissioners as distinct from Commissioners for the Redemption of the Land Tax.

(*f*) Land Tax Commissioners Act, 1906 (6 Edw. 7, c. 52), s. 2. The property qualification is abolished, even though the appointment was made under a previous Act (*ibid.*).

(*g*) Land Tax Commissioners Act, 1798 (38 Geo. 3, c. 48), s. 1.

(*h*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 86.

(*i*) Land Tax Commissioners Act, 1827 (7 & 8 Geo. 4, c. 75), s. 6.

(*k*) Land Tax Commissioners Act, 1906 (6 Edw. 7, c. 52), s. 1. A print of such schedule in the *London Gazette* is admissible as evidence (*ibid.*).

(*l*) District includes borough (Land Tax Commissioners Act, 1906 (6 Edw. 7, c. 52), s. 3).

(*m*) Land Tax Commissioners Act, 1827 (7 & 8 Geo. 4, c. 75), s. 1.

(*n*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 87.

(*o*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 19.

(*p*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*q*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 7; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 26 (1), (2). It may be observed that the powers contained in the Land Tax Acts are saved in cases not expressly provided for by the

SECT. 2. Commissioners.

must be held before the 10th April (*r*), but failure to do so does not invalidate any appointment or act of the Commissioners (*s*). Two Commissioners constitute a quorum (*t*).

Clerk to Commissioners.

732. At the first general meeting for each year the Commissioners must appoint a clerk (*u*). The appointment is for a year, subject to removal from office, only for just cause, by the majority at a meeting of the Commissioners duly summoned (*v*). A vacancy occurring in the course of any year is to be filled by the Commissioners electing a person to act as clerk for the remainder of the year (*w*). The remuneration of the clerk is a fixed sum, not less than the amount which would have been paid to him by way of poundage for the year commencing 6th April, 1890 (*x*).

Ascertainment of quotas of divisions.

733. The Commissioners must ascertain and set down in writing the proportion to be charged on the respective divisions towards making up the whole sum charged on the county (*y*), and may subdivide themselves so that three or more may be appointed for each division; but such an appointment is not to restrain a Commissioner from acting in any other part of the county or place for which he is appointed (*z*).

Creation of new divisions.

734. Except in the case of places for which separate and distinct quotas of land tax are provided by the Land Tax Acts (*a*), the Commissioners may at a general meeting, subject to the approval of the Treasury, create new divisions and transfer the jurisdiction of any parish, together with the land tax payable by it, to such new division or any other division of the same county (*b*). The Commissioners for any division may unite two or more parishes so that they shall be considered as one for the purposes of the Land Tax Acts (*a*), but not so as to alter the quota chargeable on any parish (*c*).

SECT. 3.—*Assessment.*

Assessors.

735. For the purpose of assessment the Commissioners must issue a precept requiring the inhabitants of each division, or some of them, to appear before them, under a penalty of not less than

Taxes Management Act, 1880 (*ibid*, s. 9). "Division" means and includes any hundred, rape, lathe, stewartry, or district, or any place of separate jurisdiction under the Land Tax Acts (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5). The Commissioners may also meet outside their divisions, with the consent of the Board of Inland Revenue (Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 12).

(*r*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 41 (1), (5).

(*s*) *Ibid.*, s. 29.

(*t*) *Ibid.*, s. 5.

(*u*) *Ibid.*, s. 41 (1), (5).

(*v*) *Ibid.*, s. 41 (1).

(*w*) *Ibid.*, s. 41 (6).

(*x*) Taxes (Regulation of Remuneration) Amendment Act, 1892 (55 & 56 Vict. c. 25), s. 1 (1).

(*y*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 7.

(*z*) *Ibid.*

(*a*) These are any Act, or part of any Act, relating in any way to the assessment or redemption of the land tax (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5 (1)).

(*b*) *Ibid.*, s. 36.

(*c*) *Ibid.*, s. 37. If the union proves inconvenient, it may be dissolved by the Treasury on a resolution of the Commissioners (*ibid.*, s. 3 (5)).

40*s.* nor more than £5 for refusal. Out of such inhabitants the Commissioners must appoint at least two as assessors for each separate parish or place within the division (*d*).

Offences.

Any person refusing to serve, or guilty of neglect of, or fraud or abuse in, executing his duties, is liable to a penalty not exceeding £40 (*e*), but no person can be compelled to serve outside the limits of the city, borough, or town corporate in which he dwells (*f*). In places extra parochial and parishes where two able and sufficient persons cannot be found, the Commissioners may appoint persons living near such places to act (*g*).

Place of assessment.

736. The assessors assess the full sum payable by each parish on the lands in such parish (*h*). All lands are to be assessed in the places where they lie (*i*) and are usually assessed in (*k*). Lands formerly waste or common, which have been assessed, since inclosure, in parishes other than those in which they lie, are assessed in the parishes in which they have usually been so assessed (*l*).

Special provision is made as to the place of assessment of certain lands and subjects, such as shares in the New River Company (*m*).

Assessment by two bodies.

737. In the event of lands being assessed by two distinct bodies of Commissioners, each claiming a right to rate the property, the King's Bench Division of the High Court may call upon the Commissioners to appear and may give relief (*n*).

Mode of assessment.

738. The assessment is made for the year commencing on 25th March and ending on the next 24th March (*o*). Each land tax

(*d*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 8. The acts of a person duly appointed assessor and collector are valid, though he be not qualified by inhabitancy (*Waterloo Bridge Co.* v. *Cull* (1858), 1 E. & E. 213).

(*e*) Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 8, 19. The fine is imposed by the Commissioners, who can levy it by distress or imprisonment, and it can only be remitted by them (*ibid.*).

(*f*) Land Tax Act, 1797 (38 Geo, 3, c. 5), s. 45.

(*g*) *Ibid.*, s. 47. Assessors are assessed by the Commissioners in respect of any tax to which they are themselves liable (*ibid.*, s. 44). They receive, as remuneration, such sum, out of the surplus land tax for any year, as the Commissioners certify to be reasonable and the Board of Inland Revenue approves (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 114 (10)).

(*h*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 8; Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 180.

(*i*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 53, which applies to the rating of a person for land, while *ibid.*, s. 36 (see next note), applies to places where any doubt exists as to their locality (*Margetts* v. *Morley* (1832), 1 L. J. (K. B.) 112).

(*k*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 36. If lands have been assessed for a long time in a parish in which they do not lie, a mandamus will lie against the Commissioners to uphold the usage and set aside a transfer of such lands to their proper parish (*R.* v. *Land Tax Commissioners* (1877), 36 L. T. 374).

(*l*) Land Tax Act, 1834 (4 & 5 Will. 4, c. 60), s. 2; as to the assessment of detached parishes, see Land Tax Act, 1842 (5 & 6 Vict. c. 37), ss. 3—6.

(*m*) Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 37, 38, 57, 58, 70, 71, 74, 75, 77, 78, 79, 114, 124; Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 16. The entire land tax payable in respect of New River property as it existed in 1798 is assessed in London (Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 57; *New River Co.* v. *Land Tax Commissioners for Hertford* (1857), 2 H. & N. 129); but after-acquired property of the company remains taxable as it was before it came into its hands (*New River Co.* v. *Land Tax Commissioners for Hertford*, *supra*). As to the liability of New River shares to assessment, see p. 309, *ante*.

(*n*) Land Tax Redemption Act, 1838 (1 & 2 Vict. c. 58), ss. 2—4; *Re Glatton Land-Tax* (1840), 6 M. & W. 689.

(*o*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 48 (1).

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parish is separately charged with the quota fixed upon it in the year 1798 so long as any part of the tax remains payable (*r*), but the amount assessed in any year in respect of the unredeemed quota is not to exceed the amount which would be produced by a rate of 1*s.* in the pound on the annual value (*s*) of the land in the parish subject to land tax, and any excess over that amount is remitted for the year (*t*). No assessment is to be made at a less rate than 1*d.* in the pound on the annual value, except where such assessment would produce a net sum exceeding the amount required for the redemption of the whole of the unredeemed quota, in which case the assessment is to be at a rate which will produce such net sum, and is to be applied as surplus land tax (*a*).

Delivery of assessment.

When the assessment is complete, one copy is delivered by the assessors to the Commissioners (*b*), who have two duplicate copies prepared by their clerk, one of which is transmitted to the Commissioners of Inland Revenue and the other, duly signed and sealed, is delivered to the collectors (*c*). An account of the totals is prepared by the clerk and transmitted to the collector of inland revenue (*d*).

Overcharges.

If lands are overcharged, the Commissioners may abate the assessment and cause the money so abated to be reassessed and levied as they think reasonable within the whole division (*e*).

Additional first assessment.

Any assessment not made or against which any appeal is pending when the first assessments are signed and allowed, are added

(*r*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 180, 182; *R.* v. *Land Tax Commissioners* (1853), 2 E. & B. 694. In the event of the Commissioners failing to assess any division or parish for its full quota, they may be compelled to do so by the court (*Re Land Tax Commissioners for Westminster* (1747), Park. 74; *A.-G.* v. *Land-Tax Commissioners* (1823), 12 Price, 647; and see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 112); but the court will not interfere with their discretion as to the mode of apportioning such quota (*Re Holborn Land Tax Assessment* (1850), 5 Exch. 548).

(*s*) This, under the provisions of the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 35, means the annual value by determination of the General Commissioners of Income Tax for the purpose of Sched. A of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), or if there is no such determination, then as determined by them for the purposes of Part VI. of the Finance Act, 1896 (59 & 60 Vict. c. 28). As to the meaning of annual value under these Acts, see title INCOME TAX, Vol. XIV., p. 636; and as to what, if any, deductions may be allowed in calculating such annual value for the cost of collection of manorial rents or tithe commutation rentcharges etc., see *Stevens* v. *Bishop* (1888), 20 Q. B. D. 442, C. A. and *Norfolk* (*Duke*) v. *Lamarque* (1890), 24 Q. B. D. 485. Before the Finance Act, 1896 (59 & 60 Vict. c. 28), the poor rate valuation was generally adopted as the basis for assessment (see *R.* v. *Land Tax Commissioners* (1894), 58 J. P. 446). But it was the duty of the Commissioners to have regard to the fluctuations of the value of property within the division, though no mandamus would lie against them to make an equal assessment (*R.* v. *Land Tax Commissioners* (1851), 16 Q. B. 381). The Commissioners, surveyors, or assessors, or any person authorised by them, may for the purposes of the assessment inspect all parish books (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 39).

(*t*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 31.

(*a*) *Ibid.*, s. 32 (2), (3). As to surplus land tax, see p. 321, *post*.

(*b*) As to the forms of assessment, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 15.

(*c*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 8; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 70, 83.

(*d*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 61.

(*e*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 84.

to such first assessments by being included in a separate form of assessment (*f*).

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Disputes as to the assessment or levying of land tax are determined by the Commissioners, whose decision is final (*g*), but no Commissioner may, under a penalty of £50, take part in the decision of any controversy in which he is personally interested (*h*).

Commissioners to determine questions.

SECT. 4.—*Appeals.*

739. When the duplicate assessment is delivered to the collectors, the Commissioners must give them notice when and where appeals against the assessment are to be heard, the time being at least thirty days from the date of the delivery of the duplicates to the collectors (*i*). The collectors within ten days after receipt of the duplicate must give notice of the time and place so appointed by writing fixed on the doors of the parish church or chapel of ease of every parish. Persons intending to appeal must give notice in writing to one or more of the assessors, who may, if they think proper, attend before the Commissioners to justify the assessment (*k*). The decision of the Commissioners is final (*l*), and even if erroneous cannot be disturbed by the courts (*m*).

Appeals.

SECT. 5.—*Collection.*

740. Collectors are appointed by the Commissioners (or in case of default on their part by the Commissioners of Inland Revenue), preferentially out of the residents of the parish in respect of which the appointments are made (*n*). If the person nominated declines to act he must, under penalty, give notice of his refusal within fourteen days after the notification to him of his appointment (*o*). The Commissioners of Inland Revenue may require security to be given (*p*), and, in default, may appoint a collector for the parish in respect of which the default has occurred (*a*). Security may also be required from collectors by the Commissioners or by any two of the inhabitants of the parish for which the collector is appointed (*b*). The security is given by bond (*c*), which is exempt from stamp duty (*d*). The giving of security relieves a parish from any liability for the default of a collector (*e*).

Appointment of collectors.

Security.

(*f*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 84.
(*g*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 23.
(*h*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 35.
(*i*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 8. As to the service and affixing of notices, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 16.
(*k*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 8.
(*l*) *Ibid.*
(*m*) *R.* v. *Land Tax Commissioners* (1894), 58 J. P. 446.
(*n*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 73 (1), (2), (6), (7), (8). Parishes may be grouped and treated as one for purposes of collection (*ibid.*, s. 72).
(*o*) *Ibid.*, s. 73 (3), (4), (5).
(*p*) *Ibid.*, s. 74
(*a*) *Ibid.*, s. 75.
(*b*) *Ibid.*, s. 77 (1), (2).
(*c*) *Ibid.*, ss. 76, 77 (3).
(*d*) *Ibid.*, s. 78. As to stamp duties generally, see title REVENUE.
(*e*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 79.

SECT. 5. Collection.

Duties of collectors.

741. A collector must pay over and account, if necessary on oath, to the proper officer, for all sums received by him (*f*), and he must deliver schedules of arrears (*g*), which remain with the Income Tax Commissioners, and, if the arrears are not recovered within forty days, may be certified to the High Court and be ground of process (*h*). On clearing his account he must deliver up all duplicates of assessment and books of receipts and counterfoils furnished for his use (*i*). He must also make a return on oath of arrears which he cannot recover, and for which he may claim credit in reduction of the amount of surplus land tax upon the assessment charged against him in the Commissioners' duplicate (*k*).

Liabilities of collectors.

742. The Commissioners may, and, if required by a surveyor of taxes, must (*l*), examine any collector on oath as to the state of his accounts and collection (*m*). Any dereliction of duty on the part of a collector renders him liable to pecuniary penalties (*n*). In the event of delay in the payment of the tax through his neglect, he may be dismissed (*o*), while, if he make default in payment of moneys received by him, the Commissioners may seize and sell his property (*p*), or bring an action against the sureties on his bond (*q*). In addition, so long as a collector is not proceeded against twice for the same offence, he remains liable to any criminal indictment that may lie against him, and for this purpose he is deemed to be employed in the service of the Crown (*r*).

Remuneration of collectors.

The remuneration of a collector is the sum paid to the collector by way of poundage for the year commencing 6th April, 1890 (*a*).

Time for payment.

743. The land tax is payable on the 1st January in every year, except where an assessment has been signed or allowed on or after that day, in which case it is payable on the day after the assessment has been signed and allowed by the Commissioners (*b*).

Demand.

744. The collectors, on receipt of the duplicate of the assessment

(*f*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 100, 101, 102, 104. The moneys so received are paid into the Exchequer (*ibid.*, s. 14).

(*g*) *Ibid.*, ss. 103 (b), 107.

(*h*) *Ibid.*, ss. 105, 106, 111.

(*i*) *Ibid.*, s. 110.

(*k*) *Ibid.*, s. 114 (11), (12).

(*l*) The surveyor may report any failure of duty on the part of a collector to the Commissioners (*ibid.*, s. 115). As to the appointment of surveyor, see *ibid.*, s. 17.

(*m*) *Ibid.*, s. 116.

(*n*) *Ibid.*, s. 121. As to the recovery of penalties, see p. 320, *post*.

(*o*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 117.

(*p*) *Ibid.*, s. 118.

(*q*) *Ibid.*, s. 119. In the event of the Commissioners failing in such an action, the costs are defrayed by an assessment upon the inhabitants of the parish in relation to which the bond was given (*ibid.*, s. 120).

(*r*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 14.

(*a*) Taxes (Regulation of Remuneration) Amendment Act, 1892 (55 & 56 Vict. c. 25), s. 1. The Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 114 (10), which allowed the collector to retain surplus land tax if it did not amount to £5, is repealed by the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 11.

(*b*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 82 (1), (3).

and the warrants for collecting the same (*c*), demand the tax when it becomes payable from the persons charged, or at their last place of abode, or on the premises charged, as the case may require (*d*).

Recovery.

745. If a person refuses to pay (*e*), the collector may raise the sum required by distress and sale (*f*). If no sufficient distress can be levied, the Commissioners may commit the defaulter to prison (*g*). The goods of a defaulter cannot be seized under any process of law, except at the suit of the landlord for rent, unless the party making the seizure pays all arrears in full, or, if more than one year's arrears are claimed, makes payment of one year's arrears (*h*).

Unoccupied lands.

746. If the assessment cannot be collected through the lands being unoccupied, the deficiency must be made good by a re-assessment of the parish (*i*). In such cases, however, the collectors may at any time afterwards enter and distrain, and distribute the money raised by such distress proportionately among the parties who contributed to the tax of the unoccupied lands (*k*).

Woodlands.

If woodlands are assessed and no distress can be had, the collectors may enter and cut and sell sufficient of the wood (timber trees excepted (*l*)) to pay the assessment and the charges incident thereto (*m*).

Tithes, tolls etc.

If default is made for six days after demand in payment of the assessment charged on any tithes, tolls, profits of markets, fairs or fisheries, or any other annual profits, not distrainable, the collectors may be authorised by warrant under the hands and seals of any two of the Commissioners to seize and sell so much of the said tithes, tolls or other profits as may be sufficient to raise the sum assessed and all charges occasioned by non-payment thereof (*n*).

Action for illegal distress.

747. No action for illegal distress will lie so long as the issuing of the warrant and the levying of the distress are regular, provided that the Commissioners had jurisdiction to make the assessment, in which case the only appeal is to them, and their determination on appeal is final (*o*). An assessment, however, in respect of land which is not subject to land tax is illegal and may be treated as null and void, and an action for trespass will lie for any distress made in respect of such assessment (*p*).

(*c*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 83 (1), (2).

(*d*) *Ibid.*, s. 85 (1).

(*e*) As to refusal to pay, see title DISTRESS, Vol. XI., p. 211. A reasonable time should be allowed to elapse between demand and distress (*Gibbs* v. *Stead* (1828), 8 B. & C. 528).

(*f*) See title DISTRESS, Vol. XI., pp. 218 *et seq.*

(*g*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 89.

(*h*) *Ibid.*, s. 88.

(*i*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 18.

(*k*) *Ibid.*, s. 40.

(*l*) As to what is or is not timber, see titles LANDLORD AND TENANT, pp. 331 *et seq.*, *post*; SETTLEMENTS.

(*m*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 41.

(*n*) *Ibid.*, ss. 42, 125. Compare title DISTRESS, Vol. XI., p. 219.

(*o*) *Patchett* v. *Bancroft* (1797), 7 Term Rep. 367; *Allen* v. *Sharp* (1848), 2 Exch. 352; *Simpkin* v. *Robinson* (1881), 45 L. T. 221.

(*p*) *Charleton* v. *Alway* (1840), 11 Ad. & El. 993. It would seem that no levy

SECT. 5. Collection.

Actions against collectors must be defended by the Commissioners, and the costs are defrayed by assessment (*q*).

Proceedings in High Court.

Land tax may also be recovered as a debt due to the Crown, or by any other means whereby a debt of record due to the Crown can be recovered (*r*).

Costs and re-assessments.

Costs of any proceedings, and reassessed land tax, may be recovered in the same way as land tax is recovered (*s*).

Acquittances.

748. On payment of the land tax the collector must give acquittances to the persons paying the same (*t*).

Receipt insupers.

749. In the event of failure to assess or charge the land tax in any parish, or to return the duplicates of the assessments, or to raise or pay the sums charged, the Commissioners of Inland Revenue may set *insuper* all sums appearing in arrear and return such failure to the High Court by certificate to the King's Remembrancer, who is to cause such certificate to be enrolled in his office. The enrolment is a record in the office valid and effectual to authorise the issuing of process on the application of the Commissioners of Inland Revenue against the defaulting parish and the Commissioners, collectors, assessors, or other persons liable for the default. The defaulting parish is liable to be reassessed in respect of the sums so returned *insuper* (*u*).

Fines.

750. Fines, penalties, and forfeitures under the Land Tax Acts (*a*), if under £20, are recoverable before the Commissioners (*b*). If over £20, they are recoverable in the High Court (*c*), unless directed to be added to the assessments (*d*). Proceedings for their recovery in the High Court can only be brought by order of the Commissioners of Inland Revenue in the name of the Attorney-General (*e*), and must be commenced within two years next after the fine or penalty is incurred (*f*).

could be made for an assessment which included arrears for past years, in respect of which no assessment had been made (see *Newton* v. *Young* (1805), 1 Bos. & P. (N. R.) 187). Assessment in a wrong parish is not a ground for subsequently setting aside a writ of *levari facias* under which the amount owing has been levied (*Re Glatton Land-Tax* (1839), 4 M. & W. 570); and see *Bristol Poor* (*Governors*) v. *Wait* (1834), 1 Ad. & El. 264. As to trespass generally, see title TRESPASS.

(*q*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 19, 20 (7), (8); and see p. 313, *ante*. As to notice of action against collectors, see *Thomas* v. *Williams* (1844), 1 Dow. & L. 624.

(*r*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 111 (1). The schedule of arrears is conclusive evidence of the debt (*ibid.*, s. 111 (2)). The case of *A.-G.* v. *Sewell* (1838), 4 M. & W. 77, does not seem to have any application to this Act. See, generally, title CROWN PRACTICE, Vol. X., pp. 1 *et seq.*

(*s*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 113.

(*t*) *Ibid.*, s. 85 (3).

(*u*) *Ibid.*, s. 112.

(*a*) See note (*a*), p. 314, *ante*.

(*b*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 21 (5).

(*c*) *Ibid.*, s. 21 (3); Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 22 (1).

(*d*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 21 (3). For cases where penalties are to be added to the assessments, see *ibid.*, s. 121 (3), (4).

(*e*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21.

(*f*) *Ibid.*, s. 22 (2), which appears impliedly to repeal the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 21 (4).

Surplus Land Tax.

751. If the total amount of the sums charged in any year by the assessment for a parish exceeds the actual amount of the quota to be raised in such parish, such excess must be accounted for in the ordinary course of collection, and, subject to any remuneration that the Commissioners may make to the assessors therefrom, must be paid into the Bank of England to "The Account of Surplus Land Tax (*g*)."

A certificate of the excess of each assessment by the amount of £5 over and above the quota is to be transmitted by the Commissioners to the Board of Inland Revenue before the 24th December following the expiration of the year of assessment (*h*).

SECT. 6.—*Redemption.*

SUB-SECT. 1.—*Who may Redeem.*

In general.

752. All corporations and persons (other than tenants at rack-rent or tenants of Crown lands) having an estate or interest (*i*) in land subject to land tax may redeem such land tax (*k*).

Persons under disability.

Trustees, guardians, or committees may redeem on behalf of any person subject to disability (*l*).

(*g*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 114 (7); and see note (*g*), p. 315, *ante*. Provision is made for the application of such surplus in the redemption of the tax payable by the parish (*ibid.*, s. 114 (8), (9)).

(*h*) *Ibid.*, s. 114.

(*i*) Land Tax Redemption (No. 2) Act, 1853 (16 & 17 Vict. c. 117), s. 1. Under the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), persons or corporations beneficially interested in land had the right to redeem in the first place. If they failed to exercise such right the land tax might be purchased by a stranger. The option given to persons or corporations having such benefit of preference to be considered on the footing of purchasers was repealed by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), but the preference was continued to 24th June, 1803, after which date strangers were entitled to purchase the land tax as a fee-farm rent. Although this right has now ceased to exist, questions arising out of redemptions under the earlier Act are to be determined according to the law in force at the time of the transaction (Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 2), so that questions of title can arise even now under the early Acts (see *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91; *Pigott* v. *Pigott* (1867), L. R. 4 Eq. 549, in both of which cases the court had to consider questions depending on the construction of the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60). Provision is made by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 40, for the exoneration of lands where the original redeemer exercised his option to be treated on the footing of a purchaser.

(*k*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 9, 10. In the case of companies which acquire lands under Acts of Parliament incorporating the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the promoters are entitled to redeem (*ibid.*, s. 133). As to the liability of promoters to make good any deficiencies in the assessment, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 18.

(*l*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 14. Where land tax was redeemed on behalf of an infant tenant in tail by persons who had no authority to act under this provision, the court by an equity charged the estate in favour of the personal representatives of the infant with payment of the same consideration that they would have been paid if it had been within the Act (*Ware* v. *Polhill* (1805), 11 Ves. 257); and as to the effect of the charge, see *Ware* v. *Polhill* (1852), 5 De G. & Sm. 455; *Ware* v. *Egmont* (*Lord*) (1854),

SECT. 6. Redemption.

Any one of two or more persons entitled to lands in undivided shares as coparceners, tenants in common, joint tenants etc. may redeem his proportion of the tax (*m*). In the event of a subsequent partition, the share allotted to the person who has redeemed is forthwith exonerated (*n*).

Joint owners.

Charitable trustees.

Trustees for charitable or other public purposes may redeem the land tax on the lands held by them (*o*).

Crown lands.

Crown lands or lands in the Duchies of Lancaster or Cornwall are not redeemable by the tenants, but may be redeemed, subject to certain consents, by the surveyor-general of the land revenues of the Crown, now superseded by the Commissioners of Woods (*p*), or the receiver-general of the Duchy of Lancaster, or the surveyor-general of the Duchy of Cornwall (*q*).

Benefices.

Land tax charges charged on lands, tithes, or other profits arising from any living may be redeemed in the first place by the incumbent (*r*). If the incumbent does not redeem, the Governors of Queen Anne's Bounty, the trustees of property given for the benefit of the poor clergy, or the patron of the living, may redeem (*s*). In cases where there is an alternate right of presentation, the patron first applying to the Commissioners of Inland Revenue may redeem as if entitled to the exclusive patronage (*t*).

If the living is under sequestration, the sequestrator may redeem, with the consents of the patron and of the ordinary, or the patron may redeem, with the consent of the ordinary (*u*).

4 De G. M. & G. 460. In the case of an infant tenant for life the provision of this section is largely superseded by the powers conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60, as to which see title SETTLEMENTS. In the case of lunatics the consent of the Lord Chancellor seems to have been always necessary (*Ex parte Phillips* (1812), 19 Ves. 118, 124); and see note (*o*), p. 327, *post*. As to lunatics generally, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*m*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 11. Proprietors of shares in the New River Company or in waterworks etc. may redeem the land tax on their shares either as a body or individually (*ibid.*, s. 13). So too canal companies, if authorised by Parliament to contract for the redemption of land tax, or their individual shareholders as to their respective shares, may redeem (*ibid.*, s. 12).

(*n*) *Ibid.*, s. 39. As to partition generally, see title PARTITION.

(*o*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 9.

(*p*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 178—180, 222, 248; Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 8.

(*q*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 10, 131.

(*r*) *Ibid.*, ss. 10, 15. As to the position of an incumbent so redeeming, see *Kilderbee* v. *Ambrose* (1854), 10 Exch. 454. If the land tax has been redeemed by a patron or a former incumbent, the incumbent for the time being may purchase an assignment of the tax for the benefit of the living (Land Tax Redemption Act, 1805 (45 Geo. 3, c. 77), s. 1), which assignment has to be registered within six months from the date of the contract (Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), s. 30; and see title ECCLESIASTICAL LAW, Vol. XI., p. 760.

(*s*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 15, 16, 17.

(*t*) Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), s. 28.

(*u*) *Ibid.*, s. 27.

SUB-SECT. 2.—*Procedure for Redemption.*

SECT. 6. Redemption.

753. The control of the redemption of land tax is regulated by the Commissioners of Inland Revenue (*a*).

Procedure for redemption.

Any person entitled and desiring to contract for the redemption of the land tax charged upon his property must, either personally or by his authorised agent, attend before the clerk to the Land Tax Commissioners for the division in which the property is situate and sign a declaration in the prescribed form (*b*). He must furnish the clerk with particulars in writing of the property proposed to be exonerated, together with satisfactory plans in triplicate of the property. If the redemption is effected by a corporation, the authority to the agent should be under the seal of the corporation.

The clerk attests the signature to the declaration, and, on a special form, certifies the amount of the land tax charged on the property proposed to be exonerated. In the absence of the clerk the declaration may be attested by one of the Land Tax Commissioners for the district, and the certificate of the amount of land tax signed by two of such Commissioners. An assistant clerk is not authorised to attest. Both documents, with the plans, are forwarded by the clerk to the Registrar of Land Tax, who, if the documents are in order, prepares a certificate of the contract to be signed by the Commissioners of Inland Revenue (*c*).

In due course the Registrar of Land Tax notifies to the contractor, or his agent, the amount of the consideration (*d*), which must be paid or remitted to the Accountant-General of Inland Revenue at Somerset House. Payment must be made in pursuance of such notice and to the officers named therein, no other person having any authority to receive the money. Upon the money being paid, the contract is registered (*e*), after which the certificate of the contract is forwarded to the contractor, or his agent, further indorsed with a certificate of registration and of the period from which the property will be exonerated from land tax (*f*).

No fee may be charged for certificates of assessments, or other proceedings, in the redemption of land tax.

(*a*) Under the Land Tax Redemption Act, 1802 (42 Geo. 3. c. 116), Commissioners for selling the land tax redeemed or unsold were appointed by the Crown from among the Land Tax Commissioners (see *ibid.*, ss. 5, 199). The powers of those Commissioners were subsequently transferred to the Commissioners for the Taxes (Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), s. 1). The Boards of Stamps and Taxes were consolidated in 1834 by the Land Tax Act, 1834 (4 & 5 Will. 4, c. 60), and in 1849 were, with the Board of Excise, made into one Board of Commissioners of Inland Revenue by the Inland Revenue Board Act, 1849 (12 & 13 Vict. c. 1). As to the appointment and powers of the Commissioners of Inland Revenue generally, see title REVENUE. As to the forms in use, see note (*b*), *infra*.

(*b*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 34. For forms, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 46—48.

(*c*) Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), ss. 10, 11, 12.

(*d*) As to how the amount of the consideration is determined, see p. 324, *post*.

(*e*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 164.

(*f*) *Ibid.*, ss. 37, 38. The registration, if necessary, could be enforced by mandamus (*Williams* v. *Steward* (1817), 3 Mer. 472, 501).

SECT. 6 Redemption.

SUB-SECT. 3.—*Questions arising on Contract.*

Questions arising on contract.

754. If any difficulty arises in the redemption of the land tax by reason of lands not having been assessed, or not having been distinctly assessed, the proportion of land tax that ought to be borne by the property which it is sought to exonerate is adjusted by the Land Tax Commissioners for the division (*g*). No contract for redemption is to be affected by any appeal from the assessment, but it may be revised if it appears that a reduction in the assessment has been obtained by fraud (*h*). Errors in the contract may be amended, or a new contract entered into (*i*), and a contract becoming impossible of completion may be rescinded (*k*).

Evidence of redemption.

755. The proper evidence of the redemption of land tax is the certificate or a copy of the register (*l*). In the event of a discrepancy between the description of the lands in the certificate and contract on the one hand, and in the duplicate rating assessment on the other, the certificate and contract, in the absence of affirmative evidence to the contrary (which it lies with the Land Tax Commissioners to produce), are to be taken as correct (*m*). All contracts for the redemption of land tax, copies of the register, and certificates and receipts are exempt from stamp duty (*n*).

SUB-SECT. 4.—*Application of Redemption Moneys.*

Price of redemption.

756. The price of redemption is the payment to the Commissioners of Inland Revenue of a capital sum equal to thirty times the sum assessed on the land to be redeemed, by the assessment last made and signed, less any increase that may be due to the assessment of the full penny rate (*o*). Payment may be made either in a lump sum or by such annual instalments as may be agreed on with the Commissioners of Inland Revenue, interest at the rate of 3 per cent. per annum being payable on so much of

(*g*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 35. Under *ibid.*, s. 36, the Commissioners of Inland Revenue have a similar power, but the practice is to refer such questions to the Land Tax Commissioners.

(*h*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 129, 130.

(*i*) Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), s. 21.

(*k*) Land Tax Redemption Act, 1817 (57 Geo. 3, c. 100), s. 23.

(*l*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 165; *Poppleton* v. *Buchanan, Buchanan* v. *Poppleton* (1858), 4 C. B. (N. S.) 20. When the tax on lands adjoining a highway is redeemed the redemption extends to the middle of the highway (*Central London Railway* v. *City of London Land Tax Commissioners* (1911), 27 T. L. R. 561, C. A., reversing on this point S. C., [1911] 1 Ch. 467).

(*m*) *Hodgson* v. *Pearson* (1874), 31 L. T. 679.

(*n*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 173; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1. As to stamp duty generally, see title REVENUE

(*o*) As to this, see p. 316, *ante*. The meaning of this is that if a rate of less than a penny is sufficient to raise the unredeemed quota of the parish, but by virtue of the provisions of the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32 (2), the full penny rate is assessed, the price for the purposes of redemption is to be not thirty times the amount actually assessed, but is to be thirty times the amount which would have been assessed on such land at the rate which would have been required to make up the unredeemed quota of the parish. As to the application of surplus land tax towards redemption, see note (*g*), p. 321, *ante*.

the capital sum as remains unpaid. All instalments remaining unpaid may be paid at any time (*p*).

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757. Moneys paid on account of redemption must be paid into the Bank of England to the account of the Commissioners for the Reduction of the National Debt (*q*), who may apply such moneys in the purchase and cancelling of any parliamentary stocks and annuities chargeable upon and payable out of the Consolidated Fund (*r*). If any payment is made which ought not to have been made, it may be refunded (*s*).

Application of redemption moneys.

758. If the contractor dies before the payment of all the instalments, the unpaid instalments may be paid out of his assets as a debt due to the Crown (*t*).

Death of contractor.

If default is made in payment of any of the instalments, then, subject to any relief that the courts may grant, the land tax revives and is reassessed, and the defaulter becomes subject to a penalty (*u*).

Default in payment.

SUB-SECT. 5.—*Charge on Lands in favour of Owner who Redeems.*

759. Any person entitled to redeem may, if he makes application at the date of the redemption, receive from the Commissioners of Inland Revenue a certificate charging the lands with the amount of the sum paid for redemption, and with interest equal to the amount of the land tax redeemed (*x*). Such a charge

Charge on lands in favour of owner who redeems.

(*p*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32 (1). Before 1896 the land tax might be redeemed either by a transfer of consols, or, in cases in which the amount of land tax to be redeemed in any place for which separate Commissioners were appointed did not exceed £25 per annum, by a money payment of an amount calculated according to the price of consols. Now the only method of payment is by cash.

(*q*) Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), s. 13. For the extent to which this section is repealed, see Finance Act, 1896 (59 & 60 Vict. c. 28), Schedule.

(*r*) Land Tax Redemption (Investment) Act, 1853 (16 & 17 Vict. c. 90), s. 8.

(*s*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 171; and see the text, *supra*.

(*t*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 166.

(*u*) *Ibid.*, ss. 167, 168, 169, 170. The provisions in *ibid.*, ss. 189—192, as to the recovery of penalties, appear to be impliedly repealed by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 21. Where land tax had been, in fact, redeemed, but the redemption money had not been paid on the stipulated day, the court declined to make a declaration that the land tax had been redeemed to supply the defect of title (*Re Jackman's Land-Tax, Ex parte Sparkes* (1824), M'Cle. 518).

(*x*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 33 (a). Under the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 123, on redemption by a person who was not entitled to an estate of inheritance in the land (which words do not include an estate tail (*Ware* v. *Polhill* (1805), 11 Ves. 257; *Blundell* v. *Stanley* (1849), 3 De G. & Sm. 433)), the lands were charged with the amount of the redemption money and a yearly sum by way of interest thereon equal to the amount of the land tax redeemed. This right was taken away by the Land Tax Redemption (No. 2) Act, 1853 (16 & 17 Vict. c. 117), s. 2, but was restored as to contracts for redemption made after the year 1856 by the Taxes Act, 1856 (19 & 20 Vict. c. 80), s. 3, which is repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66). The right to a charge is now conferred on any person redeeming who makes application, and is not confined to persons having limited interests. Formerly several land tax charges might be included in one contract for redemption, but the person redeeming was not entitled to

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has the same effect as if it were a mortgage secured by deed (*y*), and when the certificate is registered (*a*) it has priority over all other charges and incumbrances (*b*). It is the personal property of the person in whose favour it is made, and, in the absence of expressed intention on his part, will not merge in the estate (*c*).

Effect of charge.

The interest on the charge is payable on the same days as the land tax was payable at the time of the redemption thereof, and is recoverable as if it were rent reserved on a lease (*d*).

The owner of the charge has also a right to bring an action in a court of equity to have the charge realised by sale of the land (*e*). His rights to recover may, however, be barred by the Statute of Limitations (*f*).

SUB-SECT. 6.—*Raising of Redemption Money.*

Raising of the redemption money.

760. If the land on which the tax is to be redeemed is held for any purpose by a corporation or trustees, money may be applied which is applicable for such purpose, and any part of such land may be sold to raise money for the redemption (*g*).

consolidate his charge so as to make the whole of the property comprised in the contract liable for the payment of the whole amount of the land tax redeemed (*Cox* v. *Coventon* (1862), 31 Beav. 378), and this would appear still to be the case. For a form of application for a charge, see Encyclopædia of Forms and Precedents, Vol. VII., p. 48.

(*y*) As to the effect of mortgages secured by deed, see title MORTGAGE.

(*a*) Under the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51). As to registrations under this Act, see title REAL PROPERTY AND CHATTELS REAL.

(*b*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 33 (a). The Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 114, does not apply to charges obtained under the Finance Act, 1896 (59 & 60 Vict. c. 28). These charges, having the same effect as a mortgage, can, presumably, be redeemed by subsequent holders of the land (compare *Cousins* v. *Harris* (1848), 12 Q. B. 726).

(*c*) *Monday* v. *Hurley and Bond* (1827), 5 L. J. (O. S.) (K. B.) 212; *Trevor* v. *Trevor* (1833), 2 My. & K. 675. On redemption by the owner of a leasehold interest he will become entitled to a charge on the fee simple, but if he should make no application for a charge, the land tax will merge for the benefit of the freehold (*Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91). For circumstances in which a charge under the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), was held to have been merged as against a tenant for life, see *Bulkeley* v. *Hope* (1855), 1 K. & J. 482.

(*d*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 116, 125. As to the recovery of rent under a lease, see title LANDLORD AND TENANT, pp. 485 *et seq.*, *post*.

(*e*) *Skene* v. *Cook*, [1902] 1 K. B. 682, C. A., *per* ROMER, L.J., at p. 688.

(*f*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 8; *Skene* v. *Cook*, *supra*; and see, generally, title LIMITATION OF ACTIONS.

(*g*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 33 (b). The power of sale given by this provision only relates to land held by trustees for a purpose, which would seem to mean a public purpose, as distinguished from a trust for the benefit of an individual or corporation. As to redemption by universities or colleges, see title CHARITIES, Vol. IV., p. 242, and as to redemption of land tax on land settled to charitable uses, see *ibid.*, pp. 242, 243. Sales by limited owners in excess of their powers under prior Acts were confirmed by the Land Tax Redemption Act, 1814 (54 Geo. 3, c. 173), ss. 12, 13. Where land tax charged upon lands belonging to a non-ecclesiastical corporation or any other person and granted out upon any beneficial lease was redeemed by sale of part of the lands, the unsold parts became chargeable with an annual sum by way of rent-charge equal to the amount of the land tax redeemed (Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 118). This provision is unrepealed, but seems

SECT. 6. Redemption.

If the land is settled land, capital money arising under the Settled Land Acts (*h*) may be applied in the redemption of the land tax (*i*), or the money may, if necessary, be raised by sale or mortgage of the settled land (*j*).

Settled land.

Money in court which is liable to be laid out in the purchase of lands under any statutory provision may be applied in redeeming land tax (*k*), or in recouping to a tenant for life money expended by him out of his own personal estate for this purpose (*l*).

Money in court liable to be laid out in the purchase of land.

The powers conferred by the Settled Land Acts (*m*) are also available for the redemption of land tax on the property of infants (*n*).

Infants.

Any part of the property of a lunatic may also be sold or mortgaged for this purpose by order of the Judge in Lunacy (*o*), or, in the case of a lunatic tenant for life, his committee may by a like order be empowered to exercise the powers conferred on a tenant for life by the Settled Land Acts (*p*).

Lunatics.

761. Any person beneficially entitled may, with the sanction of the Court of Chancery, raise money for the redemption of land tax by the cutting down and sale of timber on the land. In such case the land tax merges in the lands, unless the court otherwise directs (*a*).

Timber money.

762. The money to redeem land tax on ecclesiastical lands may be raised in the following ways :—

Ecclesiastical lands.

The Governors of Queen Anne's Bounty may apply moneys

practically obsolete. Questions arising on sales as to the apportionment of charges and adjustments between landlord and tenant were determined by the Commissioners for the Redemption of Land Tax (*ibid.*, ss. 82, 83, 84). Mortgages or charges effected to raise money for the redemption of land tax had priority over all other charges only as to interest secured, and not as to the principal, and no reversioner was liable for payment of more than one year's arrear of interest (Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 114, 115). Exemption from stamp duty was given to the deeds of sale or mortgage for this purpose (*ibid.*, ss. 68, 81). These provisions are unrepealed, but *quære* whether they would be available in the case of a sale or mortgage for the purpose under the powers conferred by other Acts. As to corporations generally, see title CORPORATIONS, Vol. VIII., pp. 299 *et seq.*

(*h*) See note (*w*), p. 279, *ante*.

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (ii.). As to what is settled land and what is capital money arising under the Settled Land Acts, see title SETTLEMENTS.

(*j*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2 (9), 3 ; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11.

(*k*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69 ; Partition Act, 1868 (31 & 32 Vict. c. 40), s. 8 ; Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 34 ; Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32.

(*l*) *Re Shephard* (1811), Wight. 131 ; *Re London and Birmingham Rail. Co., Ex parte Northwick* (1834), 1 Y. & C. (EX.) 166.

(*m*) See note (*h*), *supra*.

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 59, 60.

(*o*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 117 (1) (b) ; see title LUNATICS AND PERSONS OF UNSOUND MIND. The consent of the Lord Chancellor seems to have been required from the earliest times to the exercise of the powers of sale etc. conferred on the committee of a lunatic by the Land Tax Redemption Acts (*Re Wade* (1849), 1 H. & Tw. 202 ; and see *Ex parte Phillips* (1812), 19 Ves. 118 ; *Weld* v. *Tew* (1829), Beat. 266, 275).

(*p*) See the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62.

(*a*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 67.

SECT. 6. Redemption.

applicable to the augmentation of any living in the redemption of the land tax or the purchase of any rentcharge granted by the incumbent of any living which it is proposed to augment (*b*). Gifts or devises of redeemed land tax for the augmentation of a living or to the Governors of Queen Anne's Bounty for such purpose are exempt from the Statutes of Mortmain (*c*).

Sale or mortgage.

If the incumbent for the time being of a living purchases an assignment of the land tax for the benefit of the living (*d*), the money may be raised by sale or mortgage of the glebe lands (*e*).

Sale or grant of rentcharge.

If the land tax on any living in the patronage of any college of the universities of Oxford or Cambridge, or of Eton or Winchester, or of the trustees for any such body, or in the patronage of any other corporation aggregate, is redeemed by such patron corporation, the money may be raised by sale of, or grant of a rentcharge out of, the lands belonging to the patron corporation, which in such case is entitled to a rentcharge issuing out of the living, unless it be declared otherwise at the time of presentation (*f*).

Sale of land belonging to rectory.

An ecclesiastical rector, who redeems the land tax on any vicarage or perpetual curacy whereof he is patron by virtue of his rectory, may for the purpose sell part of the glebe lands belonging to the rectory, but so long as the rectory and vicarage, or perpetual curacy, are held by different incumbents, the incumbent of the rectory is entitled to a rentcharge (*g*).

Ecclesiastical charity.

The governors of the charity for the relief of poor widows and children of clergyman may sell any lands to redeem the land tax on any other lands vested in them (*h*).

Sale to raise costs.

A sale to raise the costs of previous sales for the redemption of land tax is valid (*i*).

(*b*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 44.

(*c*) *Ibid.*, ss. 161, 162.

(*d*) See note (*r*), p. 322, *ante*.

(*e*) Land Tax Redemption Act, 1805 (45 Geo. 3, c. 77), s. 1; Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), s. 29. A purchase of the lands on such a sale by the incumbent himself, or by a trustee for him, is an objection to the title (*Grover* v. *Hugell* (1827), 3 Russ. 428), but such an objection might be removed by the confirming statutes, Land Tax Redemption Acts, 1814 and 1817 (54 Geo. 3, c. 173 and 57 Geo. 3, c. 100), in the absence of fraud (*Beaden* v. *King* (1852), 9 Hare, 499).

(*f*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 78.

(*g*) *Ibid.*, s. 79. This Act provides (*ibid.*, s. 80) that no sale by an ecclesiastical corporation thereunder shall pass any mines under the lands sold or any advowson appendant or appurtenant thereto. It has been held that a purported grant of minerals by a corporation was not rendered effective by a subsequent Act of Parliament confirming invalid sales (*Whidborne* v. *Ecclesiastical Commissioners for England* (1877), 7 Ch. D. 375). This restriction does not apply to sales prior to stat. (1799) 39 Geo. 3, c. 21 (*Wilson* v. *Grey* (1866), L. R. 3 Eq. 117), and as the law now stands it would seem to apply only to sales by an ecclesiastical patron or by an incumbent purchasing an assignment, which apparently are the only cases in which a sale of glebe lands can now be carried out under the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116). For reservations of minerals on sales under the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), s. 5 (2) (c), see title ECCLESIASTICAL LAW, Vol. XI., p. 766.

(*h*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 77.

(*i*) *Croydon Hospital* v. *Farley* (1816), 6 Taunt, 467.

SECT. 6. Redemption.

Glebe lands may be sold by the incumbent, and the purchase-money applied in the redemption of land tax on any part of the glebe which is not sold, so that the same may merge in the glebe (*k*).

Glebe lands.

763. Persons holding, under any grant from the Crown or under any Act of Parliament, lands in which the Crown has any interest in remainder, reversion, or expectancy (other than tenants of the Duchies of Lancaster and Cornwall), may, under the direction of the Commissioners (*l*), sell or enfranchise a portion of such lands to redeem the land tax on the rest (*m*).

Lands held under royal or parliamentary grant.

SUB-SECT. 7.—*Effect of Redemption.*

764. The word "lands" in a redemption contract must be construed as having its natural meaning, including everything down to the centre of the earth, and the effect of the redemption is to relieve the lands and their natural production and profits from further tax, although at the time of redemption such profits may not have come into existence or be known to exist (*n*). So, also, where land tax on a manor has been redeemed, if the waste is afterwards enclosed and brought into profitable occupation, such waste cannot be assessed for land tax (*o*), nor does land tax attach to allotments made under an Inclosure Act in respect of lands which have been redeemed (*p*). If, however, there is in existence at the time of redemption a separate and distinct hereditament liable to be separately assessed, all the circumstances of the case existing at the time of redemption must be looked at in order to see whether the intention of the certificate was that the surface only should be redeemed, or the land and everything beneath it (*q*). If a new hereditament distinct from, and not a natural production of, the land is created subsequently to the redemption of the land, such new hereditament is subject to land tax (*r*).

Effect of redemption.

(*k*) Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), ss. 4 (2) (b), 8 (4). For sales under the Glebe Lands Act generally, see title ECCLESIASTICAL LAW, Vol. XI., p. 764.

(*l*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 74, 76. Owing to the changes in procedure and the repeals of this Act by the Finance Act, 1896 (59 & 60 Vict. c. 28), the duties of these Commissioners, which are now vested in the Treasury (Land Tax Redemption Act, 1838 (1 & 2 Vict. c. 58), s. 1), seem practically obsolete; and see note (*a*), p. 323, *ante*. Their approbation, in the absence of fraud on the part of a vendor, cured any defects of title (*Doe* d. *Strickland* v. *Woodward* (1847), 1 Exch. 273). As to tenants of Crown lands, see title CONSTITUTIONAL LAW, Vol. VII., pp. 180, 237.

(*m*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 71. It is conceived that in most cases such persons would be able to avail themselves of the powers conferred by the Settled Land Acts (see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (i.), (iii.)).

(*n*) *New River Co.* v. *Land Tax Commissioners for Hertford* (1857), 2 H. & N. 129; *Newton, Chambers & Co., Ltd.* v. *Hall*, [1907] 2 K. B. 446; *Central London Railway* v. *City of London Land Tax Commissioners*, [1911] 1 Ch. 467; but see *Metropolitan Rail. Co.* v. *Fowler*, [1892] 1 Q. B. 165, 178, C. A.; affirmed, [1893] A. C. 416.

(*o*) *Hodgson* v. *Pearson* (1874), 31 L. T. 679.

(*p*) *Boehm* v. *Wood* (1823), Turn. & R. 332. As to assessments on land, the tax on which has been redeemed, see note (*a*), p. 316, *ante*.

(*q*) *Newton, Chambers & Co., Ltd.* v. *Hall*, *supra*, at p. 459; *Central London Railway* v. *City of London Land Tax Commissioners*, *supra*.

(*r*) *Charing Cross Bridge Co.* v. *Mitchell* (1855), 4 E. & B. 549; *Waterloo Bridge Co.* v. *Cull* (1858), 1 E. & E. 213.

SECT. 6. Redemption.

Fee farm rent.

Where the redeemed land is subject to a fee-farm rent-charge, an owner redeeming is entitled to continue to deduct the proportions of rate which he would have been entitled to deduct if the land had not been redeemed (*s*).

Ecclesiastical lands.

765. If the land tax on lands belonging to any bishop or ecclesiastical corporation has been redeemed by alienation of any of the possessions of such ecclesiastical corporation under the Land Tax Redemption Acts, the amount of the tax during the continuance of existing leases is considered as rent and paid as such, while in future leases it has to be added to the accustomed rent and made recoverable as such, and a lease failing to make provision for such addition and recovery is voidable (*t*).

(*s*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 127. For the right to deduct a proportion of the rate, see p. 309, *ante*. As to the effect of redemption by a landlord, see title LANDLORD AND TENANT, p. 477, *post*; and in the case of Crown Lands, see title CONSTITUTIONAL LAW, Vol. VII., pp. 180, 228, 229, 237.

(*t*) *Doe* d. *Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847; and see *Warner* v. *Potchett* (1832), 3 B. & Ad. 921. This provision (Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 88) has been repealed by the Finance Act, 1896 (59 & 60 Vict. c. 28), but the law as stated in the text would seem to apply to cases where ecclesiastical lands have been redeemed before 1896.

LAND TRANSFER.

See REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

LAND VALUES.

See REVENUE.

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LANDLORD AND TENANT.

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Easements - - - -	,,	EASEMENTS AND PROFITS À PRENDRE.
Ecclesiastical Corporations -	,,	ECCLESIASTICAL LAW.
Ecclesiastical Lease - -	,,	ECCLESIASTICAL LAW.
Improvement of Land -	,,	LAND IMPROVEMENT.
Injunction - - -	,,	INJUNCTION.
Land Values - - -	,,	REVENUE.
Licensing - - - -	,,	INTOXICATING LIQUORS; REVENUE.
Limitation to Recovery -	,,	LIMITATION OF ACTIONS.
Mines and Minerals - -	,,	MINES, MINERALS, AND QUARRIES.
Mortgages - - - -	,,	MORTGAGE.
Rentcharges - - -	,,	RENTCHARGES AND ANNUITIES.
Small Holdings - - -	,,	SMALL HOLDINGS AND SMALL DWELLINGS.
Solicitors' Remuneration -	,,	SOLICITORS.
Specific Performance - -	,,	SPECIFIC PERFORMANCE.
Summary Jurisdiction, Courts of - - -	,,	MAGISTRATES.
Title, Investigation of -	,,	REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.
Trespass - - - -	,,	TRESPASS.

Part I.—Relation of Landlord and Tenant.

SECT. 1.—*How created or arising.*

SECT. 1. How created or arising.

Creation of tenancy.

766. The relation of landlord and tenant arises when one party confers on another the right to the exclusive possession of land, mines or buildings, for a time which is either subject to a definite limit originally, as in the case of a lease for a term of years, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from year to year. The interest in the property which remains in the landlord is called the reversion, and, as a rule, there is incident to it the right to receive from the tenant payment for the use of the property in the shape of rent (*a*).

Tenancy based on contract.

767. A tenancy is created by contract, and any words which express the intention of giving and taking possession for a certain time are sufficient for this purpose (*b*). Usually the contract is express, but in the case of tenancies at will or from year to year it may be implied from the acts of the parties or other circumstances (*c*). For the full establishment of the relation of landlord and tenant it is necessary that the tenant should enter on the property; until entry he has no estate, but only a right of entry which is known as an *interesse termini* (*d*).

Effect of attornment by tenant.

768. When a person is already in occupation of property, and it is desired to establish the relation of landlord and tenant between another person and himself, this may be done by attornment. He who is in occupation attorns tenant, or acknowledges that he is tenant, to him who is to be landlord. Where the occupier has been holding under an agreement of tenancy, and there is a change of landlord during the currency of the agreement without any change in the terms of the tenancy, this is a mere attornment (*e*), and if it is contained in an instrument in writing, the instrument requires

(*a*) The reservation of rent is not essential (*Knight's Case* (1588), 5 Co. Rep. 54 b, 55 a; 2 Platt, Law of Leases, 82); and consequently where no rent is intended to be paid there is no object in adopting the practice of reserving a peppercorn rent. The acceptance of the lease by the tenant is a sufficient consideration for the contract. For forms of lease for a term of years and for tenancy from year to year, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 190 *et seq.*; pp. 225 *et seq.*

(*b*) *Morgan* d. *Dowding* v. *Bissell* (1810), 3 Taunt. 65, *per* LAWRENCE, J., at p. 67; *Doe* d. *Pritchard* v. *Dodd* (1833), 5 B. & Ad. 689, 693; *Stratton* v. *Pettit* (1855), 16 C. B. 420, 436. Compare Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 3, and see the Act generally for the codification in Ireland of the law of landlord and tenant.

(*c*) See pp. 434, 440, *post.*

(*d*) See p. 404, *post.*

(*e*) *Cornish* v. *Searell* (1828), 8 B. & C. 471, *per* HOLROYD, J., at p. 476: "The attornment is the act of the tenant's putting one person in the place of another as his landlord." Attornment was formerly necessary upon a grant of the reversion in order to complete the title of the grantee, but not in the case of a devise (see *Doe* d. *Wright* v. *Smith* (1838), 8 Ad. & El. 255, 260). For form of attornment, see Encyclopædia of Forms and Precedents, Vol. XII., p. 966.

SECT. 1. How created or arising.

no stamp (*f*). But, where the attornment is accompanied by an agreement for a new tenancy, or for a continuation of the old tenancy upon different terms, the instrument operates as an agreement, and not as a mere attornment, and requires to be stamped (*g*). Attornment both estops the tenant from disputing the landlord's title (*h*), and is evidence of that title as against future occupiers though not claiming through the tenant (*i*).

Attornment by mortgagor.

Attornment is also appropriate when an owner in occupation of property conveys the property to another under whom he becomes tenant, and an attornment clause is frequently inserted in mortgages by an occupying owner in order to give the mortgagee the remedies incident to his position as landlord. Formerly the mortgagor attorned tenant at a rent equal to the interest, and the mortgagor then obtained a power to distrain for the interest (*j*). So far as an attornment clause would be effectual to confer on the mortgagee this power, it is now void (*k*), but it is not void for other purposes (*l*).

Title by estoppel.

769. It is not essential to the relation of landlord and tenant that the landlord should be entitled to create the tenancy; and if he has purported to do so, and has delivered possession to the tenant, the latter is estopped from disputing his title (*m*).

(*f*) *Doe* d. *Linsey* v. *Edwards* (1836), 5 Ad. & El. 95; *Barry* v. *Goodman* (1837), 2 M. & W. 768.

(*g*) *Cornish* v. *Searell* (1828), 8 B. & C. 471; *Doe* d. *Frankis* v. *Frankis* (1840), 11 Ad. & El. 792 (where the instrument stated the rent and when payable); *Cooper* v. *Lands* (1866), 14 L. T. 287. As to attornment to a person claiming by title paramount, see *Doe* d. *Chawner* v. *Boulter* (1837), 6 Ad. & El. 675.

(*h*) See title ESTOPPEL, Vol. XIII., pp. 402 *et seq.*

(*i*) *Doe* d. *Linsey* v. *Edwards*, *supra*.

(*j*) *West* v. *Fritche* (1848), 3 Exch. 216; *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A.; *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, C. A. In *Walker* v. *Giles* (1848), 6 C. B. 662, the scope of the mortgage deed was held to be inconsistent with a tenancy. If the deed purports to create a yearly tenancy, this will not be converted into a tenancy at will by a power for the mortgagee to determine it at any time (*Re Threlfall, Ex parte Queen's Benefit Building Society* (1880), 16 Ch. D. 274, C. A.; see *Doe* d. *Garrod* v. *Olley* (1840), 12 Ad. & El. 481; *Doe* d. *Snell* v. *Tom* (1843), 4 Q. B. 615).

(*k*) Under the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43); see *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384, C. A.; *Green* v. *Marsh*, [1892] 2 Q. B. 330, C. A.; and title BILLS OF SALE, Vol. III., p. 15.

(*l*) See title MORTGAGE.

(*m*) See title ESTOPPEL, Vol. XIII., pp. 402 *et seq.* Where the lease is by deed, the estoppel also arises by virtue of the deed (Co. Litt. 47 b; *Smith* v. *Low* (1739), 1 Atk. 489); and if the lessor subsequently acquires the legal estate, this "feeds the estoppel," and the lease thereupon becomes good in point of interest (*Sturgeon* v. *Wingfield* (1846), 15 M. & W. 224, 230; see title ESTOPPEL, Vol. XIII., pp. 373, 374). But the estoppel as between landlord and tenant is not confined to leases by deed; it depends on the acceptance of possession from the landlord or other recognition of his title, and is an instance of estoppel by matter *in pais*; see title ESTOPPEL, Vol. XIII., pp. 402—406, where the cases on the subject are collected. Where possession has been received from an agent for an unnamed principal, the estoppel applies in favour of the principal (*Fleming* v. *Gooding* (1834), 10 Bing. 549). The estoppel, when arising from delivery of possession, is absolute (*Parry* v. *House* (1817), Holt (N. P.), 489), and is not excluded by the fact that the defect in the lessor's title appears on the lease (*Duke* v. *Ashby* (1862), 7 H. & N. 600; *Morton* v. *Woods* (1869), L. R. 4

SECT. 1. How created or arising.

Distinction between lease and licence.

770. It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises (*n*). A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence, and not as a lease (*o*). In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance of the agreement (*p*). If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease (*q*); if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence (*r*). To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession (*s*). On the other hand, the employment of words appropriate to a lease will not prevent the grant from being a licence merely, if from the whole document it appears that the possession of the property is to remain with the grantor (*t*). In order that a licence may give an exclusive right to

Q. B. 293, Ex. Ch.; in effect overruling *Pargeter* v. *Harris* (1845), 7 Q. B. 708). Estoppel also arises where there is no delivery of possession, but merely an act on the part of the tenant recognising the title of the landlord, such as attornment, payment of rent, or submission to distress (*Cooke* v. *Loxley* (1792), 5 Term Rep. 4; *Panton* v. *Jones* (1813), 3 Camp. 372; *Cooper* v. *Blandy* (1834), 1 Bing. (N. C.) 45; *Jump* v. *Payne* (1899), 68 L. J. (Q. B.) 607). But in such cases the estoppel is not absolute, and the tenant may dispute the landlord's title if he can show that the act of recognition was due to misrepresentation or mistake, and that a third person is in fact entitled (*Cooper* v. *Blandy*, *supra*, at p. 50; *Knight* v. *Cox* (1856), 18 C. B. 645; *Carlton* v. *Bowcock* (1884), 51 L. T. 659; title ESTOPPEL, Vol. XIII., p. 405); and the tenant may show that the person to whom he paid rent is an agent for a third person (*Jones* v. *Stone*, [1894] A. C. 122, P. C.). But attornment to a new landlord by direction of the old landlord prevents the tenant from setting up the title of a third person (*Hall* v. *Butler* (1839), 10 Ad. & El. 204). As to the effect on the estoppel of the determination of the landlord's title during the currency of the term, see title ESTOPPEL, Vol. XIII., pp. 373, 403.

(*n*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 832. As to leases of incorporeal hereditaments, see p. 340, *post*.

(*o*) *Hancock* v. *Austin* (1863), 14 C. B. (N. S.) 634; *London and North Western Rail. Co.* v. *Buckmaster* (1875), L. R. 10 Q. B. 70, 444, Ex. Ch.; *Wilson* v. *Tavener*, [1901] 1 Ch. 578, 581.

(*p*) *Smith* v. *St. Michael, Cambridge, Overseers* (1860), 3 E. & E. 383, 390.

(*q*) *Glenwood Lumber Co.* v. *Phillips*, [1904] A. C. 405, 408, P. C.

(*r*) *Wells* v. *Kingston-upon-Hull* (1875), L. R. 10 C. P. 402, 408; *Cory* v. *Bristow* (1877), 2 App. Cas. 262, 276.

(*s*) *Roads* v. *Trumpington Overseers* (1870), L. R. 6 Q. B. 56, 64. A purchaser of a crop of grass for hay has been held to have exclusive possession (*Crosby* v. *Wadsworth* (1805), 6 East, 602); *contra*, where he purchases the grass for feeding, and the vendor pays all rates, tithes, and taxes (*Mogg* v. *Yatton Overseers* (1880), 29 W. R. 74).

(*t*) *Taylor* v. *Caldwell*, *supra* (where an agreement to let and take a concert room for four days for the purpose of giving concerts was held to be a licence, the terms of the agreement showing that the owner was not to give exclusive possession). Other instances of licences are: agreement for standing room in a factory for lace machines, the owner of the factory supplying steam power, and reserving the right to enter for the purpose of attending to the running gear (*Hancock* v. *Austin*, *supra*); letting of bookstalls on a

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the benefit conferred by it, it must either be expressed to be exclusive in the grant, or it must be possible to infer from the language of the grant a clear intention to that effect (*a*). But the grantor is not at liberty to grant fresh licences so as to defeat the purposes of the first licence (*b*).

Nature of licence.

771. A mere licence does not create any estate or interest in the property to which it relates; it only makes an act lawful which without it would be unlawful (*c*). It is not assignable by the licensee (*d*); and, unless expense has been incurred by the licensee on the faith of it (*e*), it is revocable by the grantor (*f*), and it is determined by an assignment by him of the subject-matter of the licence (*g*). But if under the licence the licensee has brought

railway platform (*Smith & Son* v. *Lambeth Assessment Committee* (1882), 10 Q. B. D. 327, C. A.); letting of space for a stall in an exhibition (*R.* v. *Morrish* (1863), 32 L. J. (M. C.) 245; *Rendell* v. *Roman* (1893), 9 T. L. R. 192); permission to use shed for particular purpose (*Williams* v. *Jones* (1864), 3 H. & C. 256); right for directors of one company to use board room on premises of another company (*Municipal Freehold Land Co.* v. *Metropolitan and District Railways Joint Committee* (1883), Cab. & El. 184); exclusive right to use pleasure boats on a canal (*Hall* v. *Tupper* (1863), 2 H. & C. 121); licence to search for and get copperas stone on certain land at a yearly rental, with proviso for re-entry on non-payment of rent (*Ward* v. *Day* (1863), 4 B. & S. 337, 355); power to dig for fireclay (*Carr* v *Benson* (1868), 3 Ch. App. 524, 532); liberty to fasten coal-hulk to mooring in the river Thames (*Watkins* v. *Milton-next-Gravesend Overseers* (1868), L. R. 3 Q. B. 350); liberty to lay and stack coals upon land (*Wood* v. *Lake* (1751), 13 M. & W. 848, note (*a*)); liberty to search and dig for coal (*Chetham* v. *Williamson* (1804), 4 East, 469; *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724, 738; compare *Jones* v. *Reynolds* (1836), 4 Ad. & El. 805); agreement giving permission to erect advertising hoarding (*Wilson* v. *Tavener*, [1910] 1 Ch. 578). But an agreement to let "all the room and power" in a mill, with warehouse room and supply of steam power, operates as a lease (*Marshall* v. *Schofield* (1882), 52 L. J. (Q. B.) 58, C. A.). It follows from the distinction between a lease and a licence that a licensee is not liable to be rated; consequently the question of exclusive occupation frequently arises in rating cases (*Watkins* v. *Milton-next-Gravesend Overseers*, *supra*; *London and North Western Rail. Co.* v. *Buckmaster* (1875), L. R. 10 Q. B. 70, 444, Ex. Ch.; *Cory* v. *Bristow* (1877), 2 App. Cas. 262, 276; *Rochester Canal Co.* v. *Brewster*, [1894] 2 Q. B. 852, 857, C. A.; *Young & Co.* v. *Liverpool Assessment Committee*, [1911] 2 K. B. 195); and as to rating law, see title RATES AND RATING.

(*a*) *Sutherland* (*Duke*) v. *Heathcote*, [1892] 1 Ch. 475, 485, C. A. But this question usually arises where the licence is accompanied by the grant of a *profit d prendre*, such as a right to take minerals (*Huntington* (*Earl*) v. *Mountjoye* (*Lord*) (1583), 4 Leon. 147; *Chetham* v. *Williamson*, *supra*, at p. 476; *Sutherland* (*Duke*) v. *Heathcote*, *supra*), or game (*Wickham* v. *Hawker* (1840), 7 M. & W. 63, 78; *Hooper* v. *Clark* (1867), L. R. 2 Q. B. 200).

(*b*) *Newby* v. *Harrison* (1861), 1 John. & H. 393, 397; *Carr* v. *Benson* (1868), 3 Ch. App. 524, 532.

(*c*) *Thomas* v. *Sorrell* (1677), Vaugh. 344, 351; *Muskett* v. *Hill* (1839), 5 Bing. (N. C.) 694, 707; *Heap* v. *Hartley* (1889), 42 Ch. D. 461, 468, C. A. Consequently an agreement for a licence is not an agreement for an interest in land so as to require to be in writing under the Statute of Frauds (29 Car. 2, c. 3), s. 4 (*Wells* v. *Kingston-upon-Hull* (1875), L. R. 10 C. P. 402, 409), though as to agreements for letting furnished lodgings see p. 372, *post*.

(*d*) Compare *Re Davis & Co.*, *Ex parte Rawlings* (1888), 22 Q. B. D. 193, 197, C. A.

(*e*) *Winter* v. *Brockwell* (1807), 8 East, 308; *Liggins* v. *Inge* (1831), 7 Bing. 682, 694; *Davies* v. *Marshall* (1861), 10 C. B. (N. S.) 697, 711.

(*f*) *R.* v. *Horndon-on-the Hill* (*Inhabitants*) (1816), 4 M. & S. 562, 565. This is so whether the licence is by parol or under seal (*Wood* v. *Leadbitter* (1845), 13 M. & W. 838).

(*g*) *Coleman* v. *Foster* (1856), 1 H. & N. 37.

property on to the land, he is entitled to notice of revocation, and to a reasonable time for removing his property (*h*); and, if the revocation of the licence is a breach of contract, he can recover damages for the breach (*i*).

Licence coupled with grant of an interest.

A licence coupled with a grant of an interest in property is not revocable (*k*). Such a licence is capable of assignment (*l*), and covenants may be made to run with it (*m*). A right to enter on land and enjoy a *profit à prendre* or other incorporeal hereditament is a licence coupled with an interest, and is irrevocable provided the grant of the interest is valid. Thus, if the interest is an incorporeal hereditament—such as a right to make and use a watercourse—the grant is not valid unless under seal, and the licence, unless so made, is therefore a mere licence and is revocable (*n*); if the interest is a *profit à prendre* which does not amount to an incorporeal hereditament, such as a licence to hunt and take away deer (*o*), the grant is valid although made by parol, and the licence is irrevocable.

Lodgers.

772. A lodger who has no separate apartment is only a licensee (*p*), and, even though he has a separate apartment, he has not in law an exclusive occupation, and is therefore in the position of a licensee, if the landlord retains the general control and dominion of the house (*q*), including the part occupied by the lodger; but,

(*h*) *Cornish* v. *Stubbs* (1870), L. R. 5 C. P. 334; *Mellor* v. *Watkins* (1874), L. R. 9 Q. B. 400; *Aldin* v. *Latimer, Clark, Muirhead & Co.*, [1894] 2 Ch. 437.

(*i*) *Smart* v. *Jones* (1864), 15 C. B. (N. S.) 717; *Kerrison* v. *Smith*, [1897] 2 Q. B. 445; compare *Wilson* v. *Tavener*, [1910] 1 Ch. 578.

(*k*) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838.

(*l*) *Muskett* v. *Hill* (1839), 5 Bing. (N. C.) 694.

(*m*) *Norval* v. *Pascoe* (1864), 34 L. J. (CH.) 82.

(*n*) *Wood* v. *Leadbitter*, *supra*; but it has been doubted whether this is now law, having regard to the doctrine of *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.; *Lowe* v. *Adams*, [1901] 2 Ch. 598.

(*o*) *Wood* v. *Leadbitter*, *supra*.

(*p*) *Wright* v. *Stavert* (1860), 2 E. & E. 721. A lodger, in the absence of stipulation to the contrary, is entitled to the use of the general conveniences of the house (*Underwood* v. *Burrows* (1835), 7 C. & P. 26). The keeper of lodgings or of a boarding house is bound to take reasonable care of the property of his lodger or guest (*Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, 811, 813, C. A., following *Dansey* v. *Richardson* (1854), 3 E. & B. 144, and questioning *Holder* v. *Soulby* (1860), 8 C. B. (N. S.) 254; see *Calye's Case* (1584), 8 Co. Rep. 32 a; *Clench* v. *D'Arenberg* (1883), Cab. & El. 42; and see title INNS AND INNKEEPERS, Vol. XVII., p. 316. But the landlord of a "lock-up" shop is under no liability to protect the goods during the night (*Espir* v. *Todd* (1883), Cab. & El. 154). As to evidence of an agreement that board and lodging are to be paid for, see *Davies* v. *Davies* (1839), 9 C. & P. 87; compare *Keys* v. *Harwood* (1846), 2 C. B. 905.

(*q*) Hence he is not rateable (*Watkins* v. *Milton-next-Gravesend Overseers* (1868), L. R. 3 Q. B. 350, 357; *Smith* v. *Lambeth Assessment Committee* (1882), 9 Q. B. D. 585, 594; affirmed, 10 Q. B. D. 327, C. A.; see *R.* v. *St. George's Union* (1871), L. R. 7 Q. B. 90, 97; *Allan* v. *Liverpool, Inman* v. *Kirkdale* (1874), L. R. 9 Q. B. 180, 192; *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A. C. 117, 126; and see title RATES AND RATING. In such a case the landlord retains a concurrent right for the purpose of management (*Cory* v. *Bristow* (1877), 2 App. Cas. 262, 276). A guest at an inn is in the same position (*Smith* v. *St. Michael, Cambridge, Overseers* (1860), 3 E. & E. 383, 390). A tenant at will or on sufferance can create the relation of landlord and lodger between himself and another (*Bensing* v. *Ramsay* (1898), 62 J. P. 613).

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if in fact the landlord exercises no control over that part, the occupier is a tenant. The occupier does not, however, become a lodger merely by reason of the fact that the landlord resides on the premises and retains control of the passages and staircases and other parts used in common (*a*).

Servants.

773. Where a servant is in occupation of premises of his master in the course of his employment, his possession is treated as that of the master, and the relation of landlord and tenant is not created between the parties (*b*). The test is whether the occupation is subservient and necessary to the service (*c*). If this test is satisfied, possession can be required at any moment, though the servant will have a remedy on the contract of service if it is terminated improperly (*d*). But where the occupation is allowed solely as remuneration for services (*e*), and is not related to the performance of those services (*f*), the possession is that of the servant, and he is in the position of tenant.

SECT. 2.—*Subject-matter of Leases.*

Subject-matter of leases.

774. A lease may be granted of land or any part thereof. In the term "land" are included minerals and other strata under the surface, and buildings erected upon the surface; and all these are corporeal hereditaments (*g*). Consequently leases can be granted of the surface of land, with the minerals and strata below and buildings above it, or of the surface alone (*h*), or of such minerals and strata (*i*), or of such buildings or any part thereof (*k*). Leases may also be granted of interests in land which involve the right to some use of, or benefit from, or privilege incident to land, but which do not involve exclusive possession, and are therefore called incorporeal

(*a*) *Kent* v. *Fittall*, [1906] 1 K. B. 60, C. A.; compare *Kent* v. *Fittall* (1911), 27 T. L. R. 564; and see title ELECTIONS, Vol. XII., p. 168.

(*b*) *Mayhew* v. *Suttle* (1854), 4 E. & B. 347, Ex. Ch.; see further, title MASTER AND SERVANT.

(*c*) *Dobson* v. *Jones* (1844), 5 Man. & G. 112; *R.* v. *Spurrell* (1865), L. R. 1 Q. B. 72; *Smith* v. *Seghill* (1875), L. R. 10 Q. B. 422: "where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant," *ibid.*, *per* MELLOR, J., at p. 428. See further, title MASTER AND SERVANT.

(*d*) *Mayhew* v. *Suttle*, *supra*, at p. 356; *White* v. *Bailey* (1861), 10 C. B. (N. S.) 227, at p. 234.

(*e*) *Hughes* v. *Chatham Overseers* (1843), 5 Man. & G. 54, 78; *Doe* d. *Hughes* v. *Derry* (1840), 9 C. & P. 494, seems to the contrary effect, but in fact the occupation there appears to have been both for the convenience of service and as remuneration.

(*f*) *Smith* v. *Seghill*, *supra*; *Marsh* v. *Estcourt* (1889), 24 Q. B. D. 147.

(*g*) See title REAL PROPERTY AND CHATTELS REAL. As to agricultural leases, see p. 563, *post*; as to building leases, see p. 567, *post*.

(*h*) Thus the surface, vesture, or herbage may be leased (Co. Litt. 47 a; *Masters* v. *Green* (1888), 20 Q. B. D. 807 (lease of "the exclusive right to feed the grass")); see *Cattle* v. *Gamble* (1838), 5 Bing. (N. C.) 46; *Burt* v. *Moore* (1793), 5 Term Rep. 329.

(*i*) See *Jegon* v. *Vivian* (1865), L. R. 1 C. P. 9, 18; *Great Western Rail. Co.* v. *Smith* (1876), 24 W. R. 443, C. A.; *Re Gladstone*, *Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, C. A.; see also title MINES, MINERALS, AND QUARRIES.

(*k*) *Leader* v. *Moody* (1875), L. R. 20 Eq. 145, 152 (boxes at a theatre).

hereditaments, such as easements (*l*), *profits à prendre* (*m*), manors (*n*), franchises (*o*), and tithes (*p*). Agreements which confer the right of exclusive possession of goods for a limited time are also sometimes called leases (*q*).

SECT. 2. Subject-matter of Leases.

SECT. 3.—*Capacity of Parties to make and take Leases.*

SUB-SECT. 1.—*In General.*

775. An owner entitled absolutely in fee simple, who is an individual and is under no personal incapacity, has, as incident to his right of disposition, power to grant leases for such periods, and on such terms and conditions, as he pleases; and an individual who is under no personal incapacity which disables him from contracting or from holding land is able to accept any such lease. Persons entitled to limited, or defeasible, or partial interests in property, and persons under disability, and corporations, can grant leases to the extent permitted by law in the particular case; and similarly persons under disability and corporations can accept leases to the same extent (*r*).

Absolute owners.

(*l*) *Newmarch* v. *Brandling* (1818), 3 Swan. 99 (use of waggon-way in colliery); and see title EASEMENTS AND PROFITS À PENDRE, Vol. XI., p. 274.

(*m*) Such as rights of sporting (*Bird* v. *Great Eastern Rail. Co.* (1865), 19 C. B. (N. S.) 268; *Bird* v. *Higginson* (1837), 6 Ad. & El. 824; *Gearns* v. *Baker* (1875), 10 Ch. App. 355; *West* v. *Houghton* (1879), 4 C. P. D. 197; see title GAME, Vol. XV., p. 221; and p. 575, *post*); a several fishery (*Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875; *Grove* v. *Portal*, [1902] 1 Ch. 727; see title FISHERIES, Vol. XIV., p. 584); rights of common (*Sury* v. *Brown* (1623), Lat. 99); estovers (Shep. Touch. 222); tolls (*Bridgland* v. *Shapter* (1839), 5 M. & W. 375; *Harris* v. *Morrice* (1842), 10 M. & W. 260; *Shepherd* v. *Hodsman* (1852), 18 Q. B. 316); and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 341 *et seq.*

(*n*) *Gybson* v. *Searls* (1607), Cro. Jac. 84, 176.

(*o*) Such as fairs or markets (*Bridgland* v. *Shapter*, *supra*; see title MARKETS AND FAIRS); or a ferry (*R.* v. *Nicholson* (1810), 12 East, 330; *Peter* v. *Kendal* (1827), 6 B. & C. 703; see title FERRIES, Vol. XIV., p. 558).

(*p*) *Walker* v. *Wakeman* (1676), 1 Vent. 294; *Brewer* v. *Hill* (1794), 2 Anst. 413; *Boushier* v. *Morgan* (1794), 2 Anst. 404; *Cox* v. *Brain* (1810), 3 Taunt. 95; see the Ecclesiastical Leases Act, 1765 (5 Geo. 3, c. 17). As to the effect of commutation of tithes for a rentcharge on liability for rent, see *Tasker* v. *Bullman* (1849), 3 Exch. 351. Offices which concern the administration of justice, and dignities and honours, are incapable of being leased (*Reynel's* (*Sir George*) *Case* (1612), 9 Co. Rep. 95 a, 96 b, 97 b; *Howard* v. *Wood* (1679), 2 Lev. 245). As to tithes generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*

(*q*) Thus it is said that there may be a lease of live stock (*Spencer's Case* (1583), 5 Co. Rep. 16 a, 16 b; *Tudgay* v. *Sampson* (1874), 30 L. T. 262; *Holme* v. *Brunskill* (1877), 3 Q. B. D. 495, C. A.); and agreements for the use of chattels, such as railway rolling stock, are styled leases; see *Sheffield Waggon Co.* v. *Stratton* (1878), 48 L. J. (Q. B.) 35, C. A.; *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, C. A.; *Lancashire Waggon Co.* v. *Nuttall* (1879), 40 L. T. 291. For a letting of rooms in a mill with an agreement for supply of power, see *Bentley Bros.* v. *Metcalfe & Co.*, [1906] 2 K. B. 548, C. A. But the term "lease" is properly restricted to corporeal and incorporeal hereditaments; see *Jones* v. *Inland Revenue Commissioners*, *Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484, 493; *Sheffield Waggon Co.* v. *Stratton*, *supra*.

(*r*) As to aliens, see title ALIENS, Vol. I., pp. 306 *et seq.*; as to convicts, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428 *et seq.*

SECT. 3. SUB-SECT. 2.—*Building Societies.*

Capacity of Parties to make and take Leases.

Building societies.

776. A building society incorporated under the Building Societies Act, 1874 (*s*), may hire or take upon lease any building for conducting its business, and may hold upon lease any land for the purpose of erecting thereon a building for the same purpose, and may let such building or any part thereof (*t*). A society may make rules for granting leases of land which it holds as mortgagee in possession, and may grant leases in accordance with such rules (*a*).

SUB-SECT. 3.—*Charities.*

Charities.

777. Subject to certain restrictions in the case of charities within the Charitable Trusts Acts (*b*), trustees of a charity may grant leases in pursuance of directions given by the founder, or of express powers contained in the instrument of trust; or, in the absence of such directions or powers, may lease the charity property at the full annual value, and for such term as is proper in the course of provident management (*c*).

778. Leases to trustees for charitable purposes are void unless they comply with the requirements of the Mortmain and Charitable Uses Act, 1888 (*d*), or unless they fall within the exemptions from that Act (*e*).

SUB-SECT. 4.—*Companies.*

Companies.

779. Companies incorporated under the Companies (Consolidation) Act, 1908 (*f*), or the statutes which it replaces, have, with certain exceptions (*g*), an unrestricted power of holding lands (*h*).

There being no restriction on the mode in which the company may acquire land, this provision authorises the taking of land on lease, if required for the purposes of the company as stated in the memorandum of association; and, having acquired land by purchase or lease, the company can let the land so far as the objects of the company expressly or impliedly authorise the letting of its

(*s*) 37 & 38 Vict. c. 42.

(*t*) *Ibid.*, s. 37.

(*a*) *I.e.*, under the powers conferred by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18. Since that Act the registrar allows such rules to be registered, but they must only authorise leases permitted by the statute. As to building societies generally, see title BUILDING SOCIETIES, Vol. III., pp. 321 *et seq.*

(*b*) See title CHARITIES, Vol. IV., p. 303.

(*c*) *Ibid.*, pp. 223—231.

(*d*) 51 & 52 Vict. c. 42, which does not apply to lands already in mortmain (*Walker* v. *Richardson* (1837), 2 M. & W. 882; *A.-G.* v. *Glyn* (1841), 12 Sim. 84; *Ashton* v. *Jones* (1860), 28 Beav. 460).

(*e*) See title CHARITIES, Vol. IV., pp. 127—133. In the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (5), the term "assurance" includes a lease (*ibid.*, s. 10 (i.)); and from the definition, and also from the Charity Lands Act, 1863 (26 & 27 Vict. c. 106), it appears that leases for charitable uses are authorised. As to leases under the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), replaced by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), see *Doe* d. *Wellard* v. *Hawthorn* (1818), 2 B. & Ald. 96; *Webster* v. *Southey* (1887), 36 Ch. D. 9.

(*f*) 8 Edw. 7, c. 69.

(*g*) *Ibid.*, s. 19; and see title COMPANIES, Vol. V., p. 334.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (2).

property (*i*). Usually express provision, authorising the taking of land on lease and the letting of the property of the company, is made by the memorandum of association (*k*).

SECT. 3. Capacity of Parties to make and take Leases.

SUB-SECT. 5.—*Co-owners.*

Joint tenants.

780. Where land belongs to two or more owners in joint tenancy, all should join to create an effective lease of the entirety. The lessee then holds the share of each owner under each separately, and holds the whole under all (*l*); and upon the death of any owner before the joint tenancy has been severed, the lessee holds the whole as tenant to the survivors (*m*). But each owner may deal with his share separately, and consequently can lease it, either to a stranger or to a co-owner (*n*), and such lease, although not made to commence till after the death of the lessor, will bind the surviving co-owners (*o*).

Tenants in common and co-parceners.

781. In the case of a tenancy in common, a lease by all the owners operates as a separate demise by each of his own undivided share, and a confirmation by each of the demise of the co-owners' shares (*p*); or each may lease his own share to a stranger (*q*), or to another co-owner (*r*). Where, in a lease of the whole, the interests of the lessors in a covenant—such as a covenant to repair—are

(*i*) A lease of the undertaking of the company may be sanctioned as a term in a scheme of arrangement made under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214 (*Re Dynevor, Dyffryn, and Neath Abbey Collieries Co.* (1879), 11 Ch. D. 605, C. A.).

(*k*) If the company takes premises which are the best that can be got for its purposes, it is no objection to the validity of the lease that the premises are too large, and that part will have to be sublet (*Re London and Colonial Co., Horsey's Claim* (1868), L. R. 5 Eq. 561, 562, n. (1)). Directors entering into an agreement for a lease in their own names are personally liable (*Kay* v. *Johnson* (1864), 2 Hem. & M. 118). If the company is dissolved without having assigned the lease, the term is determined, and the liability of sureties is also determined (*Hastings Corporation* v. *Letton*, [1908] 1 K. B. 378).

(*l*) *Doe* d. *Aslin* v. *Summersett* (1830), 1 B. & Ad. 135; see *Jurdain* v. *Steere* (1605), Cro. Jac. 83; joint tenants are seised *per mie et per tout* (Littleton's Tenures, s. 288; Co. Litt. 186 a; *Murray* v. *Hall* (1849), 7 C. B. 441, 455, n.). For form of lease by joint tenants, see Encyclopædia of Forms and Precedents, Vol. VII., p. 658.

(*m*) *Henstead's Case* (1594), 5 Co. Rep. 10 a.

(*n*) *Cowper* v. *Fletcher* (1865), 6 B. & S. 464. As to rent due from an occupying co-owner, see *Hill* v. *Hickin*, [1897] 2 Ch. 579. A lease of the entirety by one co-owner affects only his own share; see *Bellingham* v. *Alsop* (1604), Cro. Jac. 52; Co. Litt. 186 a.

(*o*) *Whitlock* v. *Horton* (1605), Cro. Jac. 91.

(*p*) *Thompson* v. *Hakewill* (1865), 19 C. B. (N. S.) 713, 726; see *Mantle* v. *Wollington* (1607), Cro. Jac. 166; *Burne* v. *Cambridge* (1836), 1 Mood. & R. 539. A joint lease by co-parceners has the same effect (*Milliner* v. *Robinson* (1600), Moore (K. B.), 682). For form of lease by tenants in common, see Encyclopædia of Forms and Precedents, Vol. VII., p. 659.

(*q*) Co. Litt. 199 a. For a case where each tenant in common leased the land to a different tenant, see *Jacob* v. *Seward* (1872), L. R. 5 H. L. 464.

(*r*) See *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A.; but mere occupation by one tenant in common does not create a tenancy under the other tenants in common (see *Bailey* v. *Hobson* (1869), 39 L. J. (CH.) 270); nor does mere occupation by a firm of premises belonging to one partner create a tenancy under him (*Re Wyche and Bryan, Ex parte Appleby and Wyche* (1872), 20 W. R. 411; compare *Doe* d. *Waithman* v. *Miles* (1816), 1 Stark. 181).

SECT. 3. Capacity of Parties to make and take Leases.

indivisible, they should join in suing on it (*s*). Each owner may bring ejectment for his share (*t*).

Tenants for life of undivided share.

782. Where land is settled, and two or more persons are entitled for life as tenants in common, or as joint tenants, they together constitute the tenant for life for the purpose of the Settled Land Act, 1882 (*u*), and they must therefore join in the exercise of the statutory power of leasing (*a*). Where an undivided share of land is subject to the settlement, the tenant for life can exercise the statutory power separately as to this share (*b*), or, subject to the statutory requirements, may concur with the owners of the other undivided shares in granting a lease (*c*).

SUB-SECT. 6.—*Copyholders.*

Power of copyholder to lease.

783. A copyholder can grant a lease of his copyhold lands which will be valid against all the world except the lord (*d*), but it is not valid against the lord unless authorised by general or special custom, or by licence, and a lease not so authorised is a cause of forfeiture (*e*). By the general custom of the realm a copyholder can make a lease for one year (*f*); by a special custom of the manor he can make a lease for a longer period (*g*). Where a pro-

(*s*) *Thompson* v. *Hakewill* (1865), 19 C. B. (N. S.) 713, 726. Where the interests are divisible, as in the covenant for payment of rent, they may either sue together, or each may sue for his share; see pp. 472, 473, *post*. On the death of one the survivors may sue for the whole (*Wallace* v. *M'Laren* (1828), 1 Man. & Ry. (K. B.) 516); and, as to suing by a surviving trustee, see *Wheatley* v. *Boyd* (1851), 7 Exch. 20; compare *Israel* v. *Simmons* (1818), 2 Stark. 356 (use and occupation). Similarly, assignees of the reversion who are tenants in common may join in suing and be jointly sued on the covenants (*Womersley* v. *Dally* (1857), 26 L. J. (EX.) 219); or may sue separately (*Roberts* v. *Holland*, [1893] 1 Q. B. 665). But co-parceners cannot sue separately for rent (*Decharms* v. *Horwood* (1834), 10 Bing. 526), or in ejectment (*Doe* d. *de Rutzen* (*Baron and Baroness*) v. *Lewis* (1836), 5 Ad. & El. 277; see Co. Litt. 163 b). As to severance of a joint tenancy in the leases, see *Goddard* v. *Lewis* (1909), 101 L. T. 528.

(*t*) *Cutting* v. *Derby* (1776), 2 Wm. Bl. 1077.

(*u*) 45 & 46 Vict. c. 38.

(*a*) *Ibid.*, s. 2 (6). For form of lease by tenant for life under Settled Land Acts, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 250 *et seq.*

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (10) (i.). And so, where one undivided share has passed out of the settlement, the tenant for life of the other undivided share can exercise his power separately (*Cooper* v. *Belsey* (1899), 47 W. R. 443, C. A.).

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 19.

(*d*) *Goodwin* v. *Longhurst* (1596), Cro. Eliz. 535; *Doe* d. *Tresidder* v. *Tresidder* (1841), 1 Q. B. 416; *Doe* d. *Robinson* v. *Bousfield* (1844), 6 Q. B. 492. The lord cannot lease waste land of the manor unless he has obtained a title to it free from rights of the tenants of the manor by lawful approvement; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 503; *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433, 451. As to leases with the consent of three-fourths of the commoners under the Inclosure Act, 1773 (13 Geo. 3, c. 81), s. 15, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 537. A custom for the lord to grant leases of the waste without restriction is bad (*Badger* v. *Ford* (1819), 3 B. & Ald. 153). As to copyholds generally, see title COPYHOLDS, Vol. VIII., pp. 1 *et seq.*

(*e*) *Jackman* v. *Hoddesdon* (1594), Cro. Eliz. 351; *Kensy* v. *Richardson* (1599), Cro. Eliz. 728. See title COPYHOLDS, Vol. VIII., p. 47.

(*f*) *Melwich* v. *Luter* (1588), 4 Co. Rep. 26 a; *Frosel* v. *Welsh* (1616), Cro. Jac. 403. As to a provision for a yearly tenancy pending the licence, see *Price* v. *Birch* (1841), 1 Dowl. (N. S.) 720; compare *Lufkin* v. *Nunn* (1805), 11 Ves. 170.

(*g*) See *Doe* d. *Robinson* v. *Bousfield*, *supra*, where the special custom was to

posed lease is not warranted by general or special custom and the copyholder applies to the lord for a licence to grant it, the giving or refusing the licence is a matter wholly in the lord's discretion (*h*). If the lease is granted without licence, the lord may waive the forfeiture (*i*), and if he is a limited owner, and does not take advantage of the forfeiture during his life, the remainderman cannot, after his death, treat the lease as a ground of forfeiture (*k*); nor can the heir of a lord who was entitled in fee simple (*l*). But a licence given by a limited owner not under a statutory or other power (*m*) is effectual only during the continuance of his interest (*n*), and, if the term is in existence when that interest determines, the lease is a ground of forfeiture at the instance of the remainderman (*o*). A lease granted without licence is none the less a cause of forfeiture because it is to commence *in futuro*, for it is at once an effective lease between the parties (*p*).

Effect of licence.

784. A lease granted under a licence may be for a shorter period than that authorised by the licence (*q*), but otherwise it must conform to the terms of the licence (*r*). If the term is within the authorised period, the inclusion in the lease of a covenant for renewal beyond the period does not cause a forfeiture; no estate beyond the authorised period is created, and the lessee has his remedy only on the covenant (*s*). The lease need not be granted by the original licensee. By the custom of most manors the licence runs with the land, and the lease may be made by the person taking the interest of the licensee by devolution on death, or by alienation *inter vivos* (*t*).

lease for three years. The restriction imposed by the custom cannot be evaded by the grant of a succession of leases, each for a term within that allowed by the custom (*Lutterel* v. *Weston* (1612), Cro. Jac. 308; *Mathews* v. *Whetton* (1631), Cro. Car. 233).

(*h*) *R.* v. *Hale* (1838), 9 Ad. & El. 339, 341.

(*i*) *Doe* d. *Robinson* v. *Bousfield* (1844), 6 Q. B. 492.

(*k*) *Montague's* (*Lady*) *Case* (1612), Cro. Jac. 301; see *Doe* d. *Robinson* v. *Bousfield*, *supra*.

(*l*) *Eastcourt* v. *Weeks* (1698), 1 Salk. 186, on the ground that the granting of the lease was, like waste, a personal wrong and did not descend.

(*m*) As to the power of limited owners of manors to grant licences to lease under statute, or under express powers, see titles COPYHOLDS, Vol. VIII., p. 52; SETTLEMENTS.

(*n*) *Petty* v. *Evans* (1611), 2 Brownl. 40.

(*o*) Otherwise the licence would be effective against the remainderman, since forfeiture is the only remedy, and the limited owner, by reason of the licence, cannot say there is a forfeiture.

(*p*) *East* v. *Harding* (1596), Cro. Eliz. 498. For form of lease by copyholder without licence, see Encyclopædia of Forms and Precedents, Vol. VII., p. 271.

(*q*) *Goodwin* v. *Longhurst* (1596), Cro. Eliz. 535. For form of lease by copyholder with licence, see Encyclopædia of Forms and Precedents, Vol. VII., p. 270.

(*r*) *Jackson* v. *Neal* (1595), Cro. Eliz. 395; but it is sufficient if it produces the same legal effect as if it were in the terms of the licence; where, for instance, a lease, though in terms granted for too long a period, will necessarily determine within the period allowed by the licence (*Haddon* v. *Arrowsmith* (1596), Cro. Eliz. 461; *Worledge* v. *Benbury* (1617), Cro. Jac. 436).

(*s*) *Fenny* d. *Eastham* v. *Child* (1814), 2 M. & S. 255; see *Montague's* (*Lady*) *Case*, *supra*; *Rawstorne* v. *Bentley* (1793), 4 Bro. C. C. 415. As to enforcing the covenant against a trustee, see *Worley* v. *Frampton* (1846), 5 Hare, 560.

(*t*) See *Whitton* v. *Peacock* (1834), 3 My. & K. 325, 335.

SECT. 3.
Capacity of Parties to make and take Leases.

The lease takes effect as an interest at common law, and not as a copyhold interest (*a*); consequently the lessee may assign or underlet without obtaining any licence from the lord (*b*); and since the licence operates as a confirmation by the lord, the lessee is not affected by a forfeiture of the copyholder's estate (*c*).

Assignment of lease of copyholds.

Corporations.

SUB-SECT. 7.—*Corporations.*

785. A statutory corporation (*d*) has such power of granting or accepting leases as is expressly conferred upon it by its constitution (*e*), or is implied from the nature of its objects. A corporation created otherwise than by statute has the same power of dealing with its property and contracting as an individual, and hence it may make and take leases except so far as the general power is restricted by its constitution or by statute (*f*). But since, in general, it has power to contract only under seal (*g*), the lease, whether by or to the corporation, must be under the common seal (*h*), except where overriding considerations of convenience or expediency require that this rule should be relaxed (*i*). Although a lease by a

(*a*) On this ground building leases of copyhold lands in Middlesex require registration (Rigge (John) on Registration, 87, note (m)).

(*b*) *Johnson* v. *Smart* (1614), 1 Roll. Abr. 508, pl. 14.

(*c*) *Clarke* v. *Arden* (1855), 16 C. B. 227.

(*d*) As to leases by and to particular corporations, see titles ECCLESIASTICAL LAW, Vol. XI., pp. 760, 794 (ecclesiastical corporations); LOCAL GOVERNMENT (county, district, and parish councils, municipal corporations); as to letting of parish lands to the poor, title POOR LAW; as to taking leases and letting for the purpose of allotments and small holdings, see titles ALLOTMENTS, Vol. I., pp. 336, 344; SMALL HOLDINGS AND SMALL DWELLINGS and for educational purposes, see title EDUCATION, Vol. XII., pp. 21 *et seq.* As to corporations generally, see title CORPORATIONS, Vol. VIII., pp. 299 *et seq.*

(*e*) In general, where power to lease is given by statute, the requirements of the statute must be strictly complied with (*Kent Coast Rail. Co.* v. *London, Chatham and Dover Rail. Co.* (1868), 3 Ch. App. 656); but a statutory power to sell may authorise the grant of a building lease with an option of purchase (*Re Female Orphan Asylum* (1867), 15 W. R. 1056).

(*f*) See *Colchester Corporation* v. *Lowten* (1813), 1 Ves. & B. 226, 244; title CORPORATIONS, Vol. VIII., pp. 356, 359, 375. Thus a corporation can take a husbandry lease for twenty-one years (*Jesus College, Oxford* v. *Gibbs* (1835), 1 Y. & C. (EX.) 145, 147). It was formerly suggested that a lease for a long period might be subject to forfeiture under the Mortmain Acts (now the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), Part I.); see *Rowles* v. *Mason* (1612), 2 Brownl. 192, 197; *Cotton's Case* (1612), Godb. 191, 192; *Hemming* v. *Brabazon* (1660), O. Bridg., ed. by Bannister, 1, 7; but this seems not to be the case (*Vigers* v. *St. Paul's (Dean and Chapter)* (1849), 14 Q. B. 909, 919); at any rate if the lease does not exceed ninety-nine years (15 Vin. Abr., tit. Mortmain, 485). As to leases to local authorities, see Mortmain and Charitable Uses Act Amendment Act, 1892 (55 & 56 Vict. c. 11).

(*g*) See *Ludlow Corporation* v. *Charlton* (1840), 6 M. & W. 815, 823; compare *Smith* v. *Barrett and Clifford* (1663), 1 Sid. 161, 162.

(*h*) *Finlay* v. *Bristol and Exeter Rail. Co.* (1852), 7 Exch. 409; see *R.* v. *Chipping-Norton (Inhabitants)* (1804), 5 East, 239, 242; and compare *Cooch* v. *Goodman* (1842), 2 Q. B. 580. Possibly a lease to a corporation, which is defective for want of the corporation seal, may be good in favour of its assignee (*Predyman* v. *Wodry* (1606), Cro. Jac. 109, 110). It is sufficient if the corporation is described with substantial correctness (*Lynne Regis Corporation's Case* (1612), 10 Co. Rep. 122 b; *Croydon Hospital* v. *Farley* (1816), 6 Taunt. 467; *R.* v. *Haughley (Inhabitants)* (1833), 4 B. & Ad. 650, 655; and see further as to leases by corporations, title CORPORATIONS, Vol. VIII., p. 376.

(*i*) The exception is allowed wherever the application of the rule would

corporation is not under seal, a lessee who has entered and paid rent under it is tenant from year to year and is bound by such of the terms of the lease as are applicable to a yearly tenancy (*k*); and a corporation may become liable for the use and occupation of land (*l*).

SECT. 3. Capacity of Parties to make and take Leases.

SUB-SECT. 8.—*The Crown.*

786. The letting of Crown lands is subject to the provisions of the Crown Lands Acts (*m*). Subject to conditions thereby prescribed, the Commissioners of Woods and Forests (*n*) may lease for any term not exceeding thirty-one years, or in the case of building leases ninety-nine years (*o*).

Crown lands.

SUB-SECT. 9.—*Executors and Administrators.*

787. Executors and administrators (*p*) have an absolute power of disposition over leasehold property of the deceased, and, as incident to this power, they can grant underleases which are good at law (*a*). But this is an exceptional way of dealing with the assets, and the underlease will only be supported in equity if the granting of it was the best way of administering the estate (*b*).

Executors and administrators.

occasion great inconvenience, or tend to defeat the very object for which the corporation was created (*Church* v. *Imperial Gas Light and Coke Co.* (1838), 6 Ad. & El. 846, 861; *Ludlow Corporation* v. *Charlton* (1840), 6 M. & W. 815, 822); where, for instance, the granting of a lease or licence is a continually recurring matter, and the transactions are too insignificant for the use of a seal (*Wells* v. *Kingston-upon-Hull* (1875), L. R. 10 C. P. 402, 409). See title CORPORATIONS, Vol. VIII., p. 382.

(*k*) *Wood* v. *Tate* (1806), 2 Bos. & P. (N. R.) 247; *Stafford Corporation* v. *Till* (1827), 4 Bing. 75; *Doe* d. *Pennington* v. *Taniere* (1848), 12 Q. B. 998; *Ecclesiastical Commissioners* v. *Merral* (1869), L. R. 4 Exch. 162; but a tenancy of an incorporeal hereditament cannot be thus created (*R.* v. *North Duffield (Inhabitants)* (1814), 3 M. & S. 247). See also title CORPORATIONS, Vol. VIII., p. 375.

(*l*) *Lowe* v. *London and North Western Rail. Co.* (1852), 18 Q. B. 632; see title CORPORATIONS, Vol. VIII., p. 384. As to enforcing performance of a contract with a corporation not under seal on the ground of part performance, see *Crook* v. *Seaford Corporation* (1871), 6 Ch. App. 551, titles CORPORATIONS, Vol. VIII., p. 385; SPECIFIC PERFORMANCE. If the contract is made by an agent he must be appointed under seal (*Kidderminster Corporation* v. *Hardwick* (1873), L. R. 9 Exch. 13, 18; *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535; *Athy Guardians* v. *Murphy*, [1896] 1 I. R. 65). For form of lease by borough corporation, see Encyclopædia of Forms and Precedents, Vol. VII., p. 442.

(*m*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 147 *et seq.*; as to leases of lands of the Duchy of Lancaster and Duchy of Cornwall, and of land comprised in the private estates of the Crown, see *ibid.*, pp. 231 *et seq.*, pp. 251 *et seq.*, and pp. 273 *et seq.*

(*n*) See title CONSTITUTIONAL LAW, Vol. VII., p. 122, note (*c*).

(*o*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 22, 23. As to the enrolment of such leases, see title CONSTITUTIONAL LAW, Vol. VII., pp. 171 *et seq.*, 238.

(*p*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 237, note (*c*), 299. An administrator *durante minore ætate* can grant leases which will be valid during the minority (*Finch's (Sir Moyle) Case* (1606), 6 Co. Rep. 63 a, 67 b); as to his power of sale, see *Re Cope, Cope* v. *Cope* (1880), 16 Ch. D. 49; *Re Thompson and M'Williams' Contract*, [1896] 1 I. R. 356.

(*a*) Bac. Abr., tit. "Leases and Terms for Years" (I.), 7.

(*b*) *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880), 16 Ch. D. 236, C. A.; see *Middleton* v. *Dodswell* (1806), 13 Ves. 266, 268; compare *Keating* v. *Keating* (1835), L. & G. *temp.* Sugd. 133, 136; *Hackett* v. *M'Namara* (1836), L. & G.

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Since real estate vests in the personal representatives in the same manner as a chattel real, and is subject to administration in the first instance as if it were personal estate (*c*), a similar power of leasing is exercisable over real estate (*d*).

But in neither case can the lease contain an option of purchase, since the personal representatives cannot bind themselves before hand as to the terms of sale (*e*).

An executor can make a lease before probate (*f*), but an administrator only after the grant of letters of administration (*g*). Each of several executors or administrators can dispose of the entirety of leasehold property, and therefore a lease of such property by one is good (*h*).

SUB-SECT. 10.—*Friendly Societies, Industrial Societies, and Trade Unions.*

Friendly societies and trade unions.

788. Registered friendly societies or branches, registered industrial societies, and trade unions have all various restricted powers of taking lands on lease and leasing land (*i*).

SUB-SECT. 11.—*Infants.*

Leases by infants.

789. A lease made by an infant may, when he comes of age, be either avoided or confirmed (*k*), and, if he dies before that

temp. Plunk. 283. If the persons beneficially interested require a sale, a lease should not be granted (*Drohan* v. *Drohan* (1809), 1 Ball & B. 185). For form of assignment of lease by executors or administrators, see Encyclopædia of Forms and Precedents, Vol. V., p. 626.

(*c*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2; this applies where the deceased died after 31st December, 1897 (*ibid.*, ss. 1 (5), 25).

(*d*) The personal representatives hold the real estate as trustees for the persons by law beneficially entitled thereto, and so far as not required for prior claims it is to be conveyed to them. Hence it must be possible to show that the lease is proper to be granted pending conveyance.

(*e*) *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880), 16 Ch. D. 236, C. A.

(*f*) *Roe* d. *Bendall* v. *Summerset* (1770), 2 Wm. Bl. 692, 694; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 145; but if he dies before probate the will must be subsequently proved in order to validate the lease (*Brazier* v. *Hudson* (1836), 8 Sim. 67; *Wankford* v. *Wankford* (1703), 1 Salk. 299, 308; *Johnson* v. *Warwick* (1856), 17 C. B. 516). An executor's power of leasing ceases on his assenting to the devise or bequest in the will (*Doe* d. *Saye and Sele* (*Lord*) v. *Guy* (1802), 3 East, 120).

(*g*) See *Wankford* v. *Wankford*, *supra*, at p. 301.

(*h*) *Doe* d. *Hayes* v. *Sturges* (1816), 7 Taunt. 217, 222; see *Jacomb* v. *Harwood* (1751), 2 Ves. Sen. 265, 267; *Simpson* v. *Gutteridge* (1816), 1 Madd. 609, 616. See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 235.

(*i*) As to friendly societies, see title FRIENDLY SOCIETIES, Vol. XV., p. 169; as to industrial societies, see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES, Vol. XVII., p. 20, and as to trade unions, see title TRADE AND TRADE UNIONS.

(*k*) See cases cited in title INFANTS AND CHILDREN, Vol. XVII., p. 99, note (*b*); *Williams* v. *Taperell* (1892), 8 T. L. R. 241; Co. Litt. 308 a; see *Ketsey's Case* (1613), 1 Brownl. 120; *North Western Rail. Co.* v. *M'Michael*, *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher* (1850), 5 Exch. 114, 124. Similarly, if the lessor executes after he attains twenty-one, but without having an opportunity of exercising his adult judgment, a lease arranged while he was an infant, he is entitled to have it set aside (*Say* v. *Barwick* (1812), 1 Ves. & B. 195; *Aylward* v. *Kearney* (1814), 2 Ball & B. 463, 478). But an infant over fifteen years of years, who is seised in fee of gavelkind land, can alien

event, his heir-at-law has the like option (*l*). If the lessee is in possession, avoidance of the lease must be by a distinct act which will intimate the fact of avoidance to the lessee, such as notice or entry, or demand of possession (*m*). If the lessor, after he has attained majority, accepts rent (*n*), or otherwise (*o*) recognises the lease as subsisting, he is taken to have confirmed it, and the lease is then valid as from its date (*p*); and, if he does not avoid it within a reasonable time after attaining majority, even though he was not aware of his right, the lease in effect is confirmed and he cannot avoid it (*q*). The lessee cannot repudiate the lease on the ground of the infancy of the lessor (*r*).

Ratification. Infants Relief Act, 1874.

It is provided (*s*) that no action to charge any person upon any ratification after full age of any contract made during infancy, whether there shall or shall not be any new consideration for such ratification, can be sustained (*t*). Apparently this statutory provision would prevent a lessor from being liable on any of the covenants on his part in a lease made by him during infancy and confirmed after full age (*u*), and since a lease is primarily a contract,

the land by feoffment, and hence he can make a lease thereof for life or lives; see title INFANTS AND CHILDREN, Vol. XVII., pp. 80, 81, note (*c*).

(*l*) Co. Litt. 45 b. But there is some authority that a lease which is not beneficial —as where it reserves no rent or a nominal rent—is absolutely void (*Humphreston's Case* (1574), 2 Leon. 216; *Lane* v. *Cowper* (1575), Moore (K. B.), 103, 105; *Baylis* v. *Dineley* (1815), 3 M. & S. 477, 481); *contra*, as to a lease made under the old practice in ejectment in order to try the title (*Rames* v. *Machin* (*circa* 1608), Noy, 130; *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794; *Slator* v. *Brady* (1863), 14 I. C. L. R. 61, 65); and also that a lease which is for the benefit of the infant cannot be avoided (*Maddon* d. *Baker* v. *White* (1787), 2 Term Rep. 159, 161); but see *Martin* v. *Gale* (1876), 4 Ch. D. 428, *per* JESSEL, M.R., at p. 431. If no rent is reserved the infant can avoid the lease before majority, since he loses his means of subsistence, and any person, suing as his next friend, can recover possession (*Slator* v. *Trimble* (1861), 14 I. C. L. R. 342, 357).

(*m*) *Slater* v. *Brady*, *supra*, at p. 66. The execution of a new lease to another person is not in itself sufficient (*Slator* v. *Brady*, *supra*, at p. 65; compare *Inman* v. *Inman* (1873), L. R. 15 Eq. 260).

(*n*) See title INFANTS AND CHILDREN, Vol. XVII., p. 99, note (*e*); *Slator* v. *Trimble*, *supra*, at p. 352. If the lessor elects to avoid the lease he cannot recover arrears of rent as rent, but he can recover them as damages in an action of trespass; see *Slator* v. *Trimble*, *supra*, at p. 352. During his infancy, however, he can, apparently, sue for the rent (*Smith* v. *Bowin* (1669), 1 Mod. Rep. 25).

(*o*) *Anon.* (1583), 4 Leon. 4, pl. 15 ("God give you joy of it"); *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586, 607.

(*p*) *Slator* v. *Trimble*, *supra*, at p. 353; compare *Doe* d. *Miller* v. *Noden* (1797), 2 Esp. 530; and see *Smith* v. *Low* (1739), 1 Atk. 489.

(*q*) See *Carter* v. *Silber*, *Carter* v. *Hasluck*, [1892] 2 Ch. 278, 284, 288, C. A.; affirmed, *Edwards* v. *Carter*, [1893] A. C. 360. If the lessor avoids the lease he is not bound to repay any fine which he has received, unless there was fraud on his part in granting the lease; see *Esron* v. *Nicholas* (1773), 1 De G. & Sm. 118. The doctrine of confirmation does not apply to a lease made by an agent for an infant, and a ratification after the infant has attained twenty-one does not validate the lease (*Doe* d. *Thomas* v. *Roberts* (1847), 16 M. & W. 778, 781).

(*r*) *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1806; *Slator* v. *Brady*, *supra*, at p. 66; compare *Forrester's Case* (1661), 1 Sid. 41, 42.

(*s*) By the Infants Relief Act, 1874 (37 & 38 Vict. c. 62).

(*t*) *I bid.*, s. 2. See title INFANTS AND CHILDREN, Vol. XVII., pp. 58, 65.

(*u*) The provision extends to contracts of all kinds (*Coxhead* v. *Mullis* (1878), 3 C. P. D. 439).

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it may be that the effect of the provision is to make the lease void altogether; but probably, so far as the lease creates an estate in the land, it is outside the statute, so that the common law rule above stated still prevails, and the lease is only voidable (*a*).

Lease of infant's lands under Settled Land Acts.

790. A lease of lands of an infant can usually be granted under the Settled Land Acts, 1882—1890 (*b*). Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then, for the purposes of these Acts, the land is settled land, and the infant is deemed tenant for life thereof (*c*).

Where a tenant for life, or a person having the powers of a tenant for life under these Acts (*d*), is an infant, or where an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under the Acts, these powers may be exercised on his behalf by the trustees of the settlement (*e*), and, if there are none, by such person and in such manner as the court orders (*f*).

Consequently, where the infant is entitled in fee simple, or is, or has the powers of, a tenant for life, or, if he were of full age, would be or would have the powers of, a tenant for life, such leases of his lands as are authorised by these Acts (*b*) can be

(*a*) If the lease were one which might be made by parol, a verbal confirmation might operate as a grant of a new lease (see *Northcote* v. *Doughty* (1879), 4 C. P. D. 385); but otherwise the confirmation, in order to take effect as a grant, would have to be in a form to suit the statutory requirements as to the creation of the lease; see p. 383, *post*.

(*b*) 1882 (45 & 46 Vict. c. 38); 1884 (47 & 48 Vict. c. 18); 1887 (50 & 51 Vict. c. 30); 1889 (52 & 53 Vict. c. 36); 1890 (53 & 54 Vict. c. 69).

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 59, which applies where the infant is absolutely entitled in possession to land of any tenure (see the general definition of "land" in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3). In the Settled Land Acts "land" includes incorporeal hereditaments and also an undivided share in land (Settled Land Act, 1882 (45 & 46 Vict. c. 38) s. 2 (10) (i.)). If the infant is entitled in fee simple, with an executory limitation over, he has the powers of a tenant for life under *ibid.*, s. 58 (1) (ii.), and the statutory powers can be exercised on his behalf under *ibid.*, s. 60 (*Re Morgan* (1883), 24 Ch. D. 114; *Re James' Settled Estates* (1884), 32 W. R. 898). If he is only contingently entitled to the land, the Settled Land Acts do not apply (*Re Horne's Settled Estate* (1888), 39 Ch. D. 84, C. A.); but recourse can be had to the Settled Estates Act, 1877 (40 & 41 Vict. c. 18). As to infants concurrently entitled where there is a trust for sale, see *Re Powell, Re Allaway, Allaway* v. *Oakley*, [1884] W. N. 67.

(*d*) As to the persons who have the powers of a tenant for life, see Settled Land Act, 1882 (45 & 46 Vict. c. 38) s. 58 (1), and title SETTLEMENTS.

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60, the effect of which is to enable the trustees of the settlement to act for the infant generally in regard to the exercise of the statutory powers, and hence they can give the consent required by *ibid.*, s. 56, to the exercise of a power of leasing contained in the settlement by a person other than the tenant for life (*Re Newcastle's (Duke) Estates* (1883), 24 Ch. D. 129, 139). For form of lease by trustees of a settlement, see Encyclopædia of Forms and Precedents, Vol. VII., p. 643.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60. The application is made by the guardian or next friend of the infant by summons in chambers (*ibid.*, s. 60; Settled Land Act Rules, 1882, r. 2). The application assumes that there are no trustees of the settlement, and it is not necessary for trustees to be appointed so as to enable notice to be given under *ibid.*, s. 45 (*Re Dudley's (Countess) Contract* (1887), 35 Ch. D. 338).

granted; and the statutory powers of accepting surrenders and granting new leases can be exercised on his behalf (*g*).

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Lease under Settled Estates Act.

791. Where the interest of an infant is such that the powers of leasing conferred by the Settled Land Acts (*h*) are not exercisable, application may be made to the court to sanction a lease under the Settled Estates Act, 1877 (*i*); and this Act applies, not only where there is a settled estate, but also where a person, in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant (*j*). Hence a lease can be sanctioned by the court where an infant is entitled contingently (*k*).

Guardians.

792. Testamentary (*l*) and statutory guardians (*m*) can make leases which will be effectual during the minority of the ward (*n*). After he has attained full age, they are voidable, but he can confirm them by acceptance of rent or otherwise (*o*).

(*g*) As to these powers of leasing, see, further, title SETTLEMENTS.

(*h*) 1882 (45 & 46 Vict. c. 38; 1884 (47 & 48 Vict. c. 18); 1887 (50 & 51 Vict. c. 30); 1889 (52 & 53 Vict. c. 36); 1890 (53 & 54 Vict. c. 69).

(*i*) 40 & 41 Vict. c. 18, which authorises leases in certain cases without the sanction of the court; in other cases with such sanction. As regards leases out of court, it is in practice superseded by the Settled Land Acts (see note (*h*), *supra*). As regards leases which can be granted under it with the sanction of the court, see title SETTLEMENTS. All powers given by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and all applications to the court, and consents to and notifications respecting such applications, may be executed, made, and given by, and all notices under it may be given to, guardians on behalf of infants; but where the infant is tenant in tail the special direction of the court must be obtained for any application to the court, or consent to or notification respecting any such application (*ibid.*, s. 49).

(*j*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 41. As to the expression "land" in this statute, see *ibid.*, s. 2 (ii.).

(*k*) *Liddell* v. *Liddell* (1882), 31 W. R. 238; *Re Sparrow's Settled Estate*, [1892] 1 Ch. 412; and see title INFANTS AND CHILDREN, Vol. XVII., p. 94. Leases of the land of an infant, seised in fee or in tail or, as to leaseholds, entitled absolutely, were formerly sanctioned by the court under the Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), but this statute appears to be obsolete; for cases under it, see *Re Evans* (1835), 2 My. & K. 318; *Ex parte Legh* (1846), 15 Sim. 445; *Anstey* v. *Hobson* (1853), 1 Sm. & G. 505; *Re Clark* (1866), 1 Ch. App. 292; *Re Spenser's Estates* (1867), 37 L. J. (CH.) 18; *Re Letchford* (1876), 2 Ch. D. 719; *Re Griffiths* (*an Infant*) (1885), 29 Ch. D. 248; and as to rectifying a lease granted under the statute, see *Seaton* v. *Staniland* (1862), 4 Giff. 61. For the practice, see Seton, Judgments and Orders, 5th ed., 873—877; R. S. C., Ord. 55, r. 2 (9).

(*l*) See Stat. (1660) 12 Car. 2, c. 24.

(*m*) That is, guardians appointed under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27).

(*n*) Guardians in socage have this power during the guardianship, that is, till the ward attains fourteen (*Wade* v. *Baker* (1696), 1 Ld. Raym. 130, 131; *Eyre* v. *Shaftsbury* (*Countess*) (1723), 2 P. Wms. 102, 122; *R.* v. *Oakley* (*Inhabitants*) (1809), 10 East, 491; *R.* v. *Sutton* (1835), 3 Ad. & El. 597, 613); and the guardians mentioned in the text, who are now the usual class of guardians, have the same powers as guardians in socage, the period of guardianship being extended to the age of twenty-one years (*Bedell* v. *Constable* (1664), Vaugh. 177, 179; *Shaw* v. *Shaw* (1788), Vern. & Scr. 607). A guardian by nature, or for nurture, can at most create a tenancy at will (*Pigot* v. *Garnish* (1600), Cro. Eliz. 678, 734). A guardian appointed by the court cannot grant leases without the sanction of the court; see *R.* v. *Sutton*, *supra*, at p. 608; 1 Platt, Law of Leases, xvii., 380). See title INFANTS AND CHILDREN, Vol. XVII., pp. 121 *et seq.*

(*o*) Bac. Abr., tit. "Leases and Terms for Years" (I.), 9, 784.

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Lease to infant.

793. A lease granted to an infant appears to be subject to the same considerations as a lease granted by an infant. At common law it is voidable by the lessee on attaining majority, and if he elects to avoid it, it is in strictness void *ab initio* so as to relieve the lessee from all liability under it (*p*); but the lessee is liable for rent which accrued during the infancy in respect of actual occupation (*q*), at any rate if the occupation can be treated as necessary for the infant (*r*). The avoidance should be by express notice (*s*). The lessee will be taken to have confirmed the lease if he continues to occupy the premises, and does not give notice to avoid it within a reasonable time (*t*). In that case he became, under the former law, liable to satisfy all the obligations of the lease (*a*), including the payment of rent which accrued during his infancy (*b*). But (*c*) an infant lessee cannot by any confirmation of the lease on attaining his majority make himself liable on any of the covenants of the lease; and the remedy of the lessor would be confined to re-entry for breach of covenant, if such right is conferred by the lease. Probably, however, the lessee, if he confirmed the lease, would be liable for the rent accruing both before and after his attaining full age, since the liability for rent arises under the reservation of rent as an incident of the estate, and not merely under the covenant (*d*).

If the lessee, on attaining full age, avoids the lease, he cannot recover any moneys which he has paid under it (*e*), unless he has received no benefit (*f*).

Surrender of infant's lease.

794. Where an infant is entitled to a lease, the court may (*g*) order a surrender and an acceptance of a new lease for the term of the surrendered lease or otherwise (*h*).

(*p*) See *Ketsey's Case* (1613), Cro. Jac. 320; *Lemprière* v. *Lange* (1879), 12 Ch. D. 675. The lessor can avoid the lease if the infant obtained it on the representation that he was of full age; but this must be a complete avoidance of the transaction, and the lessor cannot at the same time recover for use and occupation (*Lemprière* v. *Lange*, *supra*); and see *Ex parte Grace* (1799), 1 Bos. & P. 376.

(*q*) *Blake* v. *Concannon* (1870), 4 I. R. C. L. 323.

(*r*) See title INFANTS AND CHILDREN, Vol. XVII., p. 98, note (*h*).

(*s*) *Holmes* v. *Blogg* (1817), 8 Taunt. 35.

(*t*) See *Carter* v. *Silber*, *Carter* v. *Hasluck*, [1892] 2 Ch. 278, C. A.; affirmed, *sub nom. Edwards* v. *Carter*, [1893] A. C. 360; *Holmes* v. *Blogg* (1817), 8 Taunt. 35, 39; *Dublin and Wicklow Rail. Co.* v. *Black* (1852), 8 Exch. 181; compare *Doe* d. *Bromfield* v. *Smith* (1788), 2 Term Rep. 436.

(*a*) *North Western Rail. Co.* v. *M'Michael*, *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* v. *Pilcher* (1850), 5 Exch. 114, 124; see *Ketsey's Case*, *supra*.

(*b*) *Mahon* v. *O'Farrell* (1847), 10 I. L. R. 527; *Evelyn* v. *Chichester* (1765), 3 Burr. 1717.

(*c*) By virtue of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62); see p. 349, *ante*.

(*d*) See p. 467, *post*.

(*e*) *Holmes* v. *Blogg* (1818), 8 Taunt. 508; *Valentini* v. *Canali* (1889), 24 Q. B. D. 166; see *Wilson* v. *Kearse* (1800), Peake, Add. Cas. 196; *Re Burrows*, *Ex parte Taylor* (1856), 8 De G. M. & G. 254, C. A.

(*f*) *Corpe* v. *Overton* (1833), 10 Bing. 252; *Everett* v. *Wilkins* (1874), 29 L. T. 846; *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589.

(*g*) Under the Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 12.

(*h*) The statute applies though the infant is only beneficially entitled (*Re Griffiths* (*an Infant*) (1885), 29 Ch. D. 248); but, if he is part owner, it is doubtful

SUB-SECT. 12.—*Lunatics.*

SECT. 3. Capacity of Parties to make and take Leases

Lunatics

795. A contract made by a lunatic is not necessarily void. *Primâ facie* it is binding, and the lunatic cannot avoid it unless it can be shown that the state of his mind was known to the other party and that advantage was taken of it (*i*). Hence a lease made by or to a lunatic is valid if the other party acted in good faith and was not aware of the lunacy; and a lease made by a lunatic in a lucid interval is valid, the burden of proof that it was so made being upon the lessee (*k*).

Where a lunatic is entitled to property, provision for making leases, and, in the case of leasehold property, for surrendering it and accepting a new lease, is made by statute (*l*).

SUB-SECT. 13.—*Married Women.*

Legal separate use.

796. Where a married woman is entitled to land in fee simple, she is now, in the majority of cases, entitled for her separate use by virtue of the Married Women's Property Act, 1882 (*m*). This is so where she has been married on or after the 1st January, 1883 (*n*), and also where, though she was married before that date, her title to the land has accrued since (*o*). She can thus dispose of the land as a *feme sole* (*p*), and, consequently, create leases of it in the same manner as if she were not under the disability of coverture (*q*).

Equitable separate use.

Where land is vested in trustees on trusts under which a married woman is entitled in fee simple for her separate use without restraint on anticipation, she has the same power of disposition in equity (*r*), and can create leases by deed unacknowledged (*s*). The

whether the surrender and the acceptance of the new lease can be effected under the statute, even with the consent of the co-owner (*Betty* v. *Humphreys* (1875), 9 I. R. Eq. 332, 347). The application is made by the infant, or by his guardian or other person on his behalf.

(*i*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, C. A.; *Baxter* v. *Portsmouth* (*Earl*) (1826), 5 B. & C. 170; *Browne* v. *Joddrell* (1827), Mood. & M. 105; *Dane* v. *Kirkwall* (*Viscountess*) (1838), 8 C. & P. 679; *Molton* v. *Camroux* (1848), 2 Exch. 487, 503; affirmed (1849), 4 Exch. 17, Ex. Ch.; *Beavan* v. *M'Donnell* (1854), 9 Exch. 309; 10 Exch. 184.

(*k*) *Creagh* v. *Blood* (1845), 2 Jo. & Lat. 509, 520; and see, generally, title LUNATICS AND PERSONS OF UNSOUND MIND. For form of lease by committee of lunatic, see Encyclopædia of Forms and Precedents, Vol. VII., p. 652.

(*l*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5); and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*m*) 45 & 46 Vict. c. 75. As to married women's property, see, generally, title HUSBAND AND WIFE, Vol. XVI., pp. 321 *et seq.*

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 2.

(*o*) *Ibid.*, s. 5; and see title HUSBAND AND WIFE, Vol. XVI., p. 348.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; *Hope* v. *Hope*, [1892] 2 Ch. 336, 342; see *Re Cuno*, *Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12, C. A.

(*q*) See *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524, 531.

(*r*) *Taylor* v. *Meads* (1865), 4 De G. J. & Sm. 597, 604; *Pride* v. *Bubb* (1871), 7 Ch. App. 64, 69. But in enforcing an agreement to grant a lease, the court could not formerly make a decree against the married woman *in personam*, the contract not binding her personally; it only had jurisdiction over the separate property, hence it could not decree specific performance against her (*Francis* v. *Wigzell* (1816), 1 Madd. 258, 261; *Aylett* v. *Ashton* (1835), 1 My. & Cr. 105).

(*s*) *Adams* v. *Gamble* (1861), 12 I. Ch. R. 102, 110, C. A.

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lease does not vest a legal interest in the lessee, except by estoppel, but operates as a direction to the trustees to hold the land to the extent of the term in trust for the lessee. If the trustees concur in the lease, the lessee's title is complete both at law and in equity (*t*).

Leases by married woman under a power.

797. A power of leasing conferred upon a woman may be so expressed as to be exercisable only while she is sole (*a*), but otherwise it is exercisable by her without the consent of her husband (*b*), and without acknowledgment under the Fines and Recoveries Act, 1833 (*c*), during coverture (*d*); and this is so although the power was conferred upon her while she was unmarried (*e*), or during a previous marriage (*f*).

Non-separate property. Statutory powers. Fines and Recoveries Act, 1833.

798. Where land is vested in a married woman, not as her separate property, a lease of it may be granted for a term not exceeding her interest under the Fines and Recoveries Act, 1833 (*g*). Under this Act she can by deed dispose of the land —and can, therefore, grant leases—as if she were a *feme sole;* but, for the deed to be effectual, the husband must concur in it, and it must be separately acknowledged by her (*h*). If she is seised in fee, and her husband is entitled to possession or to receipt of the rents and profits in her right, he can grant a lease under the Settled Estates Act, 1877 (*i*). But the lease must not include the principal mansion-house or the demesnes thereof, nor lands usually occupied therewith, and it must be subject to the requirements of the statute (*k*).

Settled Estates Act, 1877.

Limited interest.

799. Where a married woman is entitled to land for life or for other limited interest, then, whether she is entitled for her separate

(*t*) *Taylor* v. *Meads* (1865), 4 De G. J. & Sm. 597, 604; see *Allen* v. *Walker* (1870), L. R. 5 Exch. 187.

(*a*) *Antrim* (*Marquis*) v. *Buckingham* (*Duke*) (1663), 1 Cas. in Ch. 17.

(*b*) Sugden on Powers, 8th ed., 155.

(*c*) 3 & 4 Will. 4, c. 74; see Farwell on Powers, 2nd ed., 117.

(*d*) *Travel's* (*Lady*) *Case* (1725-34), cited in *Hearle* v. *Greenbank* (1749), 3 Atk. 695, 711; *Doe* d. *Blomfield* v. *Eyre* (1846), 3 C. B. 557, 578; affirmed (1848), 5 C. B. 713, 745, Ex. Ch. It is, apparently, not exercisable in favour of her husband (*Doe* d. *Hartridge* v. *Gilbert* (1843), 5 Q. B. 423).

(*e*) *Gibbons* v. *Moulton* (1678), Cas. *temp.* Finch, 346. A provision that a power may be exercised "notwithstanding coverture" does not prevent the donee from exercising it while sole (*Doe* d. *Smith* v. *Bird* (1833), 5 B. & Ad. 695, 712; and see title POWERS).

(*f*) *Burnet* v. *Mann* (1748), 1 Ves. Sen. 156.

(*g*) 3 & 4 Will. 4, c. 74.

(*h*) *Ibid.*, s. 77. A lease by a married woman who is tenant in tail must also be made with the concurrence of her husband and by deed acknowledged (*ibid.*, s. 40), and must in other respects comply with the statutory provision as to disposition by tenants in tail (see p. 360, *post*). As to separate acknowledgment, see title HUSBAND AND WIFE, Vol. XVI., p. 381.

(*i*) 40 & 41 Vict. c. 18. The lease will be valid against the husband and against his wife and all persons claiming through or under her (*ibid.*, s. 47). For form of such a lease, see Encyclopædia of Forms and Precedents, Vol. VII., p. 649.

(*k*) See p. 365, *post*. Where a married woman would, if not under disability, be under an obligation to renew a lease, she may, by direction of the court, accept

SECT. 3. **Capacity of Parties to make and take Leases.**

use or not, a lease can usually be granted under the Settled Land Act, 1882 (*l*), subject to the requirements and restrictions of that and the other Settled Land Acts (*m*). Where a married woman, if she were not a married woman, would be a tenant for life, or would have the statutory powers of a tenant for life, and is entitled, by statute or otherwise, for her separate use, then she, without her husband, has the statutory powers of a tenant for life (*n*). Where she is not entitled for her separate use, she and her husband together have the statutory powers of a tenant for life (*o*). A restraint on anticipation does not prevent her from exercising the statutory powers (*p*).

Separate and non-separate property.

800. Apart from statute, a married woman's lease of her non-separate freehold property, if made by her alone, is void (*q*). If the husband concurs (*r*), or if he makes a lease alone (*s*), this is valid to the extent of the term during their joint lives (*t*), and if the husband survives and becomes entitled as tenant by the curtesy, it is valid to the same extent during such tenancy (*a*). On the death of the husband, the lease is void as against the wife and her heir-at-law if

Apart from statute: (i.) Freeholds.

a surrender and grant a new lease (Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 16.

(*l*) 45 & 46 Vict. c. 38.

(*m*) 1884 (47 & 48 Vict. c. 18); 1887 (50 & 51 Vict. c. 30); 1889 (52 & 53 Vict. c. 36); 1890 (53 & 54 Vict. c. 69).

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (2).

(*o*) *Ibid.*, s. 61 (3), (4), (5). The provisions of the Settled Land Acts have rendered obsolete the power under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46, for a husband to grant leases where his wife is entitled to a non-separate limited interest; but in cases not covered by the Settled Land Acts it may still be necessary to have recourse to the power of the court to authorise leases under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 40. The married woman must be separately examined (*ibid.*, ss. 50—52); and, if she is an infant, a guardian appointed under the Act does not represent her so as to make the separate examination unnecessary (*Re Broadwood's Settled Estates* (1872), 7 Ch. App. 323), though under special circumstances the court may dispense with separate examination, where, for example, the proposed lease is clearly beneficial and the examination would cause delay (*Re Halliday's Settled Estates* (1871), L. R. 12 Eq. 199; *Re Thorne's Settled Estates* (1872), 20 W. R. 587), or the woman's interest is remote (*Re De Tabley's* (*Lord*) *Settled Estates* (1863), 11 W. R. 936; and see *Re Marshall's Settled Estates* (1872), L. R. 15 Eq. 66; *Re Kilmorey's* (*Earl*) *Settled Estates* (1877), 26 W. R. 54); and separate examination is not necessary where the married woman's interest is her separate property under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) (*Riddell* v. *Errington* (1884), 26 Ch. D. 220; *Re Robinson's Settled Estate* (1894), 38 Sol. Jo. 325; compare *Re Smith's Estate*, *Clements* v. *Ward* (1887), 35 Ch. D. 589, 596). As to separate examination, see also Settled Estates Act Orders, 1878, rr. 13, 14.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (6).

(*q*) *Goodright* d. *Carter* v. *Straphan* (1774), 1 Cowp. 201, 203.

(*r*) The wife may now execute by attorney (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 40). Formerly, if she executed by attorney, the lease was that of the husband alone (*Gardiner* v. *Norman* (1621), Cro. Jac. 617).

(*s*) 2 Wms. Saund. 180 (ed. 1845), note (9). The lease operates only as regards the husband; consequently the reversion, and the right of distress incident to it, are in him (*Harcourt* v. *Wyman* (1849), 3 Exch. 817).

(*t*) *Bateman* v. *Allen* (1595), Cro. Eliz. 437; *Wiscot's Case* (1599), 2 Co. Rep. 60 b, 61 b; *Toler* v. *Slater* (1867), L. R. 3 Q. B. 42.

(*a*) *Miller* v. *Manwaring* (1635), Cro. Car. 397.

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not made by deed (*b*); if made by deed it is voidable only (*c*), and it will become effective by acceptance of rent or other act of confirmation (*d*), or by her omitting to disaffirm it and allowing the lessee to continue in possession (*e*).

(ii.) Leaseholds.

A married woman is equally unable to create a lease of her non-separate leasehold property by herself; but her husband can lease it without her concurrence, and the lease will be valid against her even though she survives, and although made to commence after her husband's death (*f*).

Leases to married women.

801. The disability of a married woman to contract formerly prevented her from taking a lease so as to be at once effectual. The husband might disaffirm it, though until he did so it vested in her (*g*); and after his death she or her representatives might avoid it (*h*). But now (*i*) she can take a lease and render herself liable, to the extent of her present or future separate estate, on the covenants (*k*).

SUB-SECT. 14.—*Mortgagors and Mortgagees.*

Leases by mortgagor or mortgagee under statutory powers.

802. A mortgagor of land, while in possession, has, subject to certain requirements (*l*), statutory (*m*) power as against every incumbrancer to make (1) an agricultural or occupation lease for any

(*b*) *Walsal* v. *Heath* (1599), Cro. Eliz. 656; *Parry* v. *Hindle* (1809), 2 Taunt. 180, 181 (as to leases by husband and wife); *Harvy* v. *Thomas* (1589), Cro. Eliz. 216 (as to leases by husband alone); see *Turney* v. *Sturges* (1553), Dyer, 91 a.

(*c*) *Smallman* v. *Agborow* (1616), Cro. Jac. 417; see *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 28 a.

(*d*) *Jordan* v. *Wikes* (1613), Cro. Jac. 332; *Greenwood* v. *Tyber* (1620), Cro. Jac. 563; *Doe* d. *Collins* v. *Weller* (1798), 7 Term Rep. 478.

(*e*) *Toler* v. *Slater* (1867), L. R. 3 Q. B. 42, 46.

(*f*) *Anon.* (1592), Poph. 4; *Grute* v. *Locroft* (1592), Cro. Eliz. 287; *Herbin* v. *Chard* (1595), Poph. 96; S. C., *sub nom. Harbin* v. *Barton*, Moore (K. B.), 395. Formerly, if the husband reserved the rent to himself it went after his death to his personal representatives (*Blaxton* v. *Heath* (1618), Poph. 145); but now the rent goes to the person entitled to the reversion on the lease, and consequently goes to the wife or her representatives (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10). It is not clear whether the lease must be actually granted by the husband; possibly a contract to grant it is sufficient, since this creates an interest in equity (*Steed* v. *Cragh* (1723), 9 Mod. Rep. 43; *Druce* v. *Denison* (1801), 6 Ves. 385). As to the grant by the husband of part of the land, see *Sym's Case* (1584), Cro. Eliz. 33.

(*g*) Co. Litt. 3 a; *Swaine* v. *Holman* (1616), Hob. 203, 204.

(*h*) Co. Litt. 3 a.

(*i*) Having regard to the Married Women's Property Acts, 1882 (45 & 46 Vict. c. 75), and 1893 (56 & 57 Vict. c. 63).

(*k*) Where a married woman is entitled to leaseholds, a surrender of the lease and acceptance of a new lease may be ordered by the court under the Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 12; see p. 352, *ante;* but this statute is practically obsolete. For form of lease to a married women, see Encyclopædia of Forms and Precedents, Vol. VII., p. 651.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (1), (3); see title MORTGAGE. The statutory provisions apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (17)), and they do not prevent the conferring by the mortgage deed of an express power of leasing (*ibid.* s. 18 (14)). As to the effect of a lease by the mortgagor under *ibid.*, s. 18, see *Wilson* v. *Queen's Club*, [1891]

(*m*) For note (*m*) see next page.

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Conveyancing and Law of Property Act, 1881.

term not exceeding twenty-one years (*n*); and (2) a building lease for any term not exceeding ninety-nine years. A mortgagee of land, while in possession, has the like power as against all prior incumbrancers, if any, and as against the mortgagor (*o*). But the power is exercisable only if and so far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing (*p*). A contract to make or accept such a lease may be enforced by or against every person on whom the lease, if granted, would be binding (*q*).

Leases not under statutory powers: (i.) By mortgagor.

803. A lease by the mortgagor, not made under the statutory power, is binding on the mortgagee if made before the mortgage (*r*); if made after the mortgage, it is valid by way of estoppel as between the mortgagor and the lessee (*s*), but it is void as against the mortgagee (*t*). In the latter case the lessee does not become tenant under the mortgagee unless an agreement for a tenancy, express or implied, is entered into between them (*a*). For this purpose notice given to the lessee by the mortgagee is not sufficient (*b*), even though followed by continued occupation by the lessee (*c*). There must be payment of rent to the mortgagee, which usually creates a tenancy from year to year, or other evidence of a new tenancy (*d*).

3 Ch. 522. The lease must not be of the mortgaged property and other property at a single rent (*King* v. *Bird*, [1909] 1 K. B. 837). It may contain a power for the lessee to determine the lease within the term; and it is not invalidated because it contains an option for the lessee to take a new lease at the end of the term, though the lessee could not require the mortgagor to grant a renewed lease unless the lease was at the time a proper one to be granted under the statute (*ibid.*). The mortgagee, on going into possession, becomes entitled to the benefits of the lease as if he had been a party to it (*Municipal Permanent Investment Building Society* v. *Smith* (1888), 22 Q. B. D. 70, C. A.).

(*m*) Under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18.

(*n*) A lease of a mansion-house may include sporting rights over the whole of the estate (*Brown* v. *Peto*, [1900] 1 Q. B. 346).

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (2).

(*p*) *Ibid.*, s. 18 (13).

(*q*) *Ibid.*, s. 18 (12).

(*r*) *Moss* v. *Gallimore* (1779), 1 Doug. (K. B.) 279.

(*s*) *Alchorne* v. *Gomme* (1824), 2 Bing. 54; *Doe* d. *Downe* (*Viscount*) v. *Thompson, Downe* (*Viscount*) v. *Thompson* (1847), 9 Q. B. 1037; *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135, 139, Ex. Ch.; *Hartcup & Co.* v. *Bell* (1883), Cab. & El. 19.

(*t*) *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21; *Pope* v. *Biggs* (1829), 9 B. & C. 245, 253; *Lows* v. *Telford* (1876), 1 App. Cas. 414, 425. But the lessee is entitled to redeem (*Tarn* v. *Turner* (1888), 39 Ch. D. 456, C. A.); and a mortgagee who purchases the equity of redemption may be bound by the lease (*Smith* v. *Phillips* (1837), 1 Keen, 694); or the lease may be established against the mortgagee by his conduct (*Lysaght* v. *Callinan* (1831), Hayes, 141).

(*a*) *Evans* v. *Elliot* (1838), 9 Ad. & El. 342; *Doe* d. *Prior* v. *Ongley* (1850), 10 C. B. 25; see *Doe* d. *Whitaker* v. *Hales* (1831), 7 Bing. 322.

(*b*) *Evans* v. *Elliot*, *supra*; compare *Biner* v. *Walters* (1869), 20 L. T. 326.

(*c*) *Towerson* v. *Jackson*, [1891] 2 Q. B. 484, C. A.

(*d*) *Doe* d. *Prior* v. *Ongley*, *supra*; *Brow* v. *Storey* (1840), 1 Man. & G. 117, 126. A tenancy from year to year between mortgagee and lessee arising from payment of rent does not import the terms of the lease made by the mortgagor unless such is in fact agreed expressly or by implication between the mortgagee and lessee (*Oakley* v. *Monck* (1866), L. R. 1 Exch. 159, Ex. Ch.; *Keith* v. *Gancia* (*R.*) *& Co., Ltd.*, [1904] 1 Ch. 774, C. A.). The new tenancy

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(ii.) By mortgagee.

A lease by the mortgagee, not made under the statutory power, is not binding on the mortgagor after redemption (*e*). Consequently, where the lease is not made under the statute, nor under an express power of leasing, both mortgagor and mortgagee should concur to grant it (*f*).

Lease by receiver.

804. A lease granted by a receiver appointed by the court is good by estoppel as between the receiver and the tenant (*g*), and similarly an attornment to the receiver by the person in possession creates a tenancy under the receiver by estoppel. The attornment does not enure for the benefit of the owner of the legal estate, but gives the legal powers of a landlord to the receiver (*h*). The lease is also binding on the persons beneficially interested if it is for a term not exceeding three years, since such a lease can be created at the discretion of the receiver (*i*), but a lease for a longer period requires the sanction of the court (*j*). In order to pass the legal estate in the term (*k*), the legal owner must be a party to the lease, and in practice, where a receiver is in possession, the court directs the lease to be made by the legal owner or by the person in whom a statutory or conventional power of leasing is vested (*l*).

SUB-SECT. 15.—*Settled Land.*

(i.) *Leases by Limited Owners.*

Tenants for life: (i.) Settled Land Acts, 1882—1890.

805. A lease can be granted by a tenant for life under the provisions of the Settled Land Acts, 1882—1890 (*m*). The power of

gets rid of the mortgagor's lease (*Johnson* v. *Jones* (1839), 9 Ad. & El. 809; *Corbett* v. *Plowden* (1884), 25 Ch. D. 678, C. A.; *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A.).

(*e*) *Franklinski* v. *Ball* (1864), 33 Beav. 560; unless, perhaps, where the granting of it was urgent (*Hungerford* v. *Clay* (1722), 9 Mod. Rep. 1).

(*f*) The lease operates then as a demise by the mortgagee and confirmation by the mortgagor (*Doe* d. *Barney* v. *Adams* (1832), 2 Cr. & J. 232; compare *Smith* v. *Pocklington* (1831), 1 Cr. & J. 445). The lease should treat the mortgagee as the actual lessor (see *Webb* v. *Russell* (1789), 3 Term Rep. 393; *Saunders* v. *Merryweather* (1865), 3 H. & C. 902). As to leases under the Settled Land Acts, where the mortgagor is tenant for life, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50 (3); and, as to a lease of the mansion-house under Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 10, compare *Re Sebright's Settled Estates* (1886), 33 Ch. D. 429, C. A.

(*g*) *Dancer* v. *Hastings* (1826), 4 Bing. 2. As to receivers generally, see title RECEIVERS.

(*h*) *Evans* v. *Mathias* (1857), 7 E. & B. 590. Where the premises are already subject to a lease the mere appointment of the receiver, without attornment, constitutes him the "landlord" for the purpose of the Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 1 (*Cox* v. *Harper*, [1910] 1 Ch. 480, C. A.). See title EXECUTION, Vol. XIV., p. 53.

(*i*) *Shuff* v. *Holdaway* (1863), Daniell's Chancery Practice, 7th ed., 1443. Formerly, it seems, a receiver could not let even for one year without the sanction of the court (*Wynne* v. *Newborough* (*Lord*) (1790), 1 Ves. 164).

(*j*) *Morris* v. *Elme* (1790), 1 Ves. 139; see *Neale* v. *Bealing* (1744), 3 Swan 304, n.

(*k*) *I.e.*, the true legal estate as distinguished from a legal estate by estoppel.

(*l*) *Shuff* v. *Holdaway*, *supra*; see *Gibbins* v. *Howell* (1818), 3 Madd. 469.

(*m*) See note (*h*), p. 351, *ante*. As to the persons having the powers of a tenant for life, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58; and as to settlements by way of trust for sale, see *ibid.*, s. 63; Settled Land Act, 1884

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leasing extends to the settled land, or any part thereof (*n*), or any easement, right or privilege of any kind over or in relation to the same, and the lease may be for any purpose whatever, whether involving waste or not, and for the following terms:—(i.) In the case of a building lease, ninety-nine years; (ii.) in the case of a mining lease, sixty years; and (iii.) in the case of any other lease, twenty-one years (*o*). The lease must be granted with due regard to the interests of all parties under the settlement (*p*), and must conform to the requirements of the statutes (*q*).

A lease may also be granted by a tenant for life under the Settled Estates Act, 1877 (*r*), or under an express power contained in the settlement under which the life estate arises (*s*). A lease not so authorised granted by a tenant for life is valid only during his life (*t*).

(ii.) Settled Estates Act, 1877.

(iii.) Express power.

(47 & 48 Vict. c. 18), s. 7; *Re Daniell's Settled Estates*, [1894] 3 Ch. 503); and title SETTLEMENTS. For form of lease by tenant for life under the Settled Land Acts, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 250, 641.

(*n*) The principal mansion-house, and the park and lands usually occupied therewith, cannot be leased without the consent of the trustees or an order of the court (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 10); see *Sutherland (Dowager Duchess)* v. *Sutherland (Duke)*, [1893] 3 Ch. 169; compare, as to sale, *Re Ailesbury's (Marquis) Settled Estates*, [1892] 1 Ch. 506, C. A.; affirmed *sub nom. Bruce (Lord Henry)* v. *Ailesbury (Marquis)*, [1892] A. C. 356.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 6. As to building leases (including repairing and improving leases, see *ibid.*, s. 2 (10) (iii.)) see *ibid.*, ss. 8, 10, 16; *Re Daniell's Settled Estates, supra*. A building lease or agreement may be granted with an option of purchase (Settled Land Act, 1889 (52 & 53 Vict. c. 36), s. 2). As to mining leases, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 9—11, 17; and title MINES, MINERALS, AND QUARRIES.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53; see *Sutherland (Dowager Duchess)* v. *Sutherland (Duke)*, *supra*; *Chandler* v. *Bradley*, [1897] 1 Ch. 315; *Middlemas* v. *Stevens*, [1901] 1 Ch. 574; *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, C. A.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7. As to the effect on a sale of the lease, where the best rent has not been reserved, see *Re Handman and Wilcox's Contract, supra*. As to leases for workmen's dwellings, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18; and title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to small holdings, see Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40; and title SMALL HOLDINGS AND SMALL DWELLINGS. As to agricultural holdings, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 36; and title AGRICULTURE, Vol. I., pp. 237 *et seq.* As to notice to the trustees of the settlement for the purposes of the Settled Land Acts, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45; Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5; *Wheelwright* v. *Walker* (1883), 23 Ch. D. 752; *Hatten* v. *Russell* (1888), 38 Ch. D. 334; *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, C. A. As to relaxation of the statutory requirements in the case of leases not exceeding twenty-one years, see Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7; and generally as to the power of leasing under the Settled Land Acts, see, further, title SETTLEMENTS.

(*r*) 40 & 41 Vict. c. 18, s. 46; see title SETTLEMENTS. The lease must be in accordance with the statutory requirements, which include the provision that it shall not be made without impeachment of waste; hence a clause exempting the lessee from liability for fair wear and tear and damage by tempest must not be inserted (*Davies* v. *Davies* (1888), 38 Ch. D. 499). A tenant for life cannot lease to himself and others (*Boyce* v. *Edbrooke*, [1903] 1 Ch. 836).

(*s*) See p. 361, *post*, and titles POWERS; SETTLEMENTS.

(*t*) *Bragg* v. *Wiseman* (1614), 1 Brownl. 22; see *Re Smyth, a Lunatic, Ex parte Smyth* (1818), 1 Swan. 337; *Symons* v. *Symons and Powell* (1821), Madd. & G. 207. But the lease subsists for his life, notwithstanding the determination of his

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On his decease it is absolutely void (*u*). But if the remainderman allows the tenant to continue in possession, and stands by while the tenant expends money on the property, he may be bound to grant him a new lease (*v*); and merely allowing a yearly tenant to continue in possession for a substantial time is a recognition of his tenancy and entitles him to notice to quit (*a*).

Tenants in tail.

806. A tenant in tail has the powers of a tenant for life (*b*) under the Settled Land Acts (*c*) and the Settled Estates Act, 1877 (*d*).

He can also create a lease under the general power of disposition conferred by the Fines and Recoveries Act, 1833 (*e*), the lease in such a case being subject to the requirements of that statute; that is, if there is a protector of the settlement, his consent is necessary to make the lease effectual against persons entitled after the estate tail (*f*); the lease must be by deed (*g*); and, unless it is for a term not exceeding twenty-one years to commence from the date of the lease, or from a time not exceeding twelve months from such date, and the rent is a rack-rent, or not less than five-sixths of a rack-rent, it must be enrolled in the Enrolment Department of the Central Office within six months after execution (*h*).

A lease by a tenant in tail, made neither under one of the above-mentioned statutes nor under an express power, is void as regards

estate by surrender, or even, it has been said, by forfeiture (*Sutton's (Marshal) Case* (1701), 12 Mod. Rep. 557). As to covenants for renewal entered into by a limited owner, see *Macartney* v. *Blundell* (1789), 2 Ridg. Parl. Rep. 113; *Higgins* v. *Roose* (1821), 3 Bli. 112, H. L.; *Brereton* v. *Tuohey* (1858), 8 I. C. L. R. 190, Ex. Ch.

(*u*) *Doe* d. *Simpson* v. *Butcher* (1778), 1 Doug. (K. B.) 50; *Roe* d. *Jordan* v. *Ward* (1789), 1 Hy. Bl. 98; *Doe* d. *Potter* v. *Archer* (1796), 1 Bos. & P. 531. Hence the remainderman cannot confirm the lease (*James* d. *Aubrey* v. *Jenkins* (1758), Buller, Law of Nisi Prius, 7th ed. 96; *Jenkins* d. *Yate* v. *Church* (1776), 2 Cowp. 482; *Doe* d. *Simpson* v. *Butcher*, *supra*; *Ludford* v. *Barber* (1786), 1 Term Rep. 90; *Doe* d. *Jolliffe* v. *Sybourn* (1798), 2 Esp. 677); though the receipt of rent will constitute a yearly tenancy under the remainderman (see *Doe* d. *Martin* v. *Watts* (1797), 7 Term Rep. 83); and the tenancy will commence from the day and be on the terms of the original demise, so far as applicable to a yearly tenancy (*Roe* d. *Jordan* v. *Ward*, *supra*); but to have this effect the rent must be suitable to a tenancy from year to year (see *Reynolds* v. *Reynolds* (1848), 12 I. Eq. R. 172); the receipt of a nominal sum as "chief rent" will not suffice (*Smith* v. *Widlake* (1877), 3 C. P. D. 10, C. A.; compare *Jegon* v. *Vivian* (1865), L. R. 1 C. P. 9, as to infant remainderman).

(*v*) See *Stiles* v. *Cowper* (1749), 3 Atk. 692; *Hardcastle* v. *Shafto* (1793), 1 Anst. 184; *Dann* v. *Spurrier* (1802), 7 Ves. 231, 236; *Pilling* v. *Armitage* (1805), 12 Ves. 78, 85; and compare *Bowes* v. *East London Water-works* (1818), 3 Madd. 375, 384; *O'Fay* v. *Burke* (1858), 8 I. Ch. R. 511.

(*a*) *Doe* d. *Cates* v. *Somerville* (1826), 6 B. & C. 126, 132; *O'Keeffe* v. *Walsh* (1880), 8 L. R. Ir. 184, C. A.; and the acceptance of a lessee by the remainderman will impart into the new tenancy a covenant by the lessee to repair (*Morrogh* v. *Alleyne* (1873), 7 I. R. Eq. 487).

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (i.).

(*c*) See note (*h*), p. 351, *ante*.

(*d*) 40 & 41 Vict. c. 18, s. 46, which confers the powers on a person entitled in possession "for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate."

(*e*) 3 & 4 Will. 4, c. 74, s. 15.

(*f*) *Ibid.*, s. 34; as to who is "protector of the settlement," see *ibid.*, s. 22, and title SETTLEMENTS.

(*g*) *Ibid.*, s. 40.

(*h*) *Ibid.*, s. 41; see R. S. C., Ord. 61, r. 9.

persons entitled after the estate tail (*i*); but as against the issue in tail it is voidable only (*k*), and may be either expressly or impliedly confirmed by the heir in tail (*l*).

(ii.) *Leases under Powers.*

Express powers of leasing in trustees etc.

807. Leases of settled land may also be granted under express powers of leasing vested in trustees or other persons (*m*). A lease granted under a power of leasing contained in a settlement or will must conform strictly to the terms of the power; otherwise, if granted by trustees, it will be bad in equity as a breach of trust, notwithstanding that it may be valid at law by reason of a sufficient legal estate in the trustees (*n*); if granted by a tenant for life it will be void as against those entitled in remainder (*o*); but if granted by a tenant in tail it will, as against the issue, be voidable only (*p*). As between the parties to the lease, it is in any case good by way of estoppel (*q*). Under a power to lease "to any person or persons" a lease may be granted to a limited company (*r*). Under a power to grant building leases, the lease must impose an obligation to build; hence a mere repairing lease is not justified by the power (*s*). If

(*i*) Co. Litt. 45 b; *Andrew* v. *Pearce* (1805), 1 Bos. & P. (N. R.) 158.

(*k*) Co. Litt. 45 b; *Bedford's (Earl) Case* (1586), 7 Co. Rep. 8 a.

(*l*) For instance, by acceptance of rent (*Stiles* v. *Cowper* (1749), 3 Atk. 692, 393; *Doe* d. *Southouse* v. *Jenkins* (1829), 5 Bing. 469, 476; see *Doe* d. *Phillips* v. *Rollings* (1847), 4 C. B. 188); and as to specific performance of an agreement for a lease not made in accordance with a statutory power where the remainderman has accepted rent, see *Osborn* v. *Marlborough (Duke)* (1866), 14 L. T. 789.

(*m*) There is some authority that, in the absence of a power of leasing, the trustees may make a lease which is reasonable and which is in accordance with the fair management of the estate (*A.-G.* v. *Owen* (1805), 10 Ves. 555, 560; *Middleton* v. *Dodswell* (1806), 13 Ves. 266, 268); and a lease for ten years has been held to be proper (*Naylor* v. *Arnitt* (1830), 1 Russ. & M. 501); but this last case has been in effect overruled (*Re Shaw's Trusts* (1871), L. R. 12 Eq. 124); see *Wood* v. *Patteson* (1847), 10 Beav. 541 (mining lease); and a trustee cannot safely do more than let from year to year (*Fitzpatrick* v. *Waring* (1882), 11 L. R. Ir. 35, C. A.; *Re North, Garton* v. *Cumberland*, [1909] 1 Ch. 625 (lease of brickfield)); as to renewal of leases by trustees, see *Bellringer* v. *Blagrave* (1847), 1 De G. & Sm. 63; *Hodges* v. *Blagrave* (1854), 18 Beav. 404. Trustees for sale cannot in general grant a lease (*Evans* v. *Jackson* (1836), 8 Sim. 217); and see title TRUSTS AND TRUSTEES.

(*n*) *Bowes* v. *East London Water-works* (1818), 3 Madd. 375, 383; compare *Doe* d. *Shrewsbury (Earl)* v. *Wilson* (1822), 5 B. & Ald. 363; *Doe* d. *Egremont (Lord)* v. *Hellings* (1842), 6 Jur. 821; and as to leases under a statutory power, see *Pearse* v. *Morrice* (1834), 2 Ad. & El. 84.

(*o*) *Doe* d. *Pulteney* v. *Cavan (Lady)* (1794), 5 Term Rep. 567. Consequently the lease cannot be confirmed by acceptance of rent by the remainderman or otherwise; see p. 360, *ante*.

(*p*) See *supra*.

(*q*) *Yellowly* v. *Gower* (1855), 11 Exch. 274. A tenant for life who agrees to grant a lease for a term in excess of the power is bound to carry out his agreement to the extent of his own interest (compare *Byrne* v. *Acton* (1722), 1 Bro. Parl. Cas. 186; *Dyas* v. *Cruise* (1845), 2 Jo. & Lat. 460) with compensation (*Leslie* v. *Crommelin* (1867), 2 I. R. Eq. 134). But the remainderman cannot have specific performance of the agreement: see *Ricketts* v. *Bell* (1847), 1 De G. & Sm. 335. As to an infant remainderman, see *Brummell* v. *Clavering* (1722), 3 Swan. 690.

(*r*) *Re Jeffcock's Trusts* (1882), 51 L. J. (CH.) 507.

(*s*) *Jones* d. *Cowper* v. *Verney* (1739), Willes, 169; *Hallett to Martin* (1883), 24

SECT. 3. Capacity of Parties to make and take Leases.

the power requires that the lessee shall not be made dispunishable for waste, the lease must not contain a covenant by the lessor to repair (*t*).

To what land power extends.

808. Under a power to lease lands usually demised, lands which have been previously demised, although not together, may be included in the same lease (*a*); but not lands which have not been leased for a considerable period, such as twenty years (*b*). A direction that the usual rents shall be reserved has the same effect, and prohibits a lease of property which has not been previously let (*c*). A power to lease land or any part thereof authorises leases only of the corporeal substance of the land, and hence it does not permit a lease of part of the land with an easement over the rest (*d*). If the power does not mention mines, a lease may be made of open mines, but not of unopened mines; if the power mentions mines generally, and there are any open mines on the land, then these only can be leased; but if there are no open mines a lease may be made of unopened mines (*e*).

Term authorised by power.

809. The term created by the lease may be less than the period authorised by the power (*f*); if it exceeds this period it is good to the extent of the period, but void as to the excess (*g*); and a lease for the specified period—as twenty-one years—may be made determinable at the option of either lessor or lessee within the period (*h*).

Ch. D. 624. But a repairing lease need not specify particular repairs or a particular sum to be spent in repairs; it is sufficient that it contains the usual covenants to repair and to yield up in repair (*Easton* v. *Pratt* (1863), 2 H. & C. 676, Ex. Ch.); *Truscott* v. *Diamond Rock Boring Co.* (1882), 20 Ch. D. 251, C. A.).

(*t*) *Yellowly* v. *Gower* (1855), 11 Exch. 274. But a provision for the lessee to pull down and rebuild does not permit "waste" for this purpose (*Doe* d. *Egremont* (*Earl*) v. *Stephens* (1844), 6 Q. B. 208; *Morris* v. *Rhydidefed Colliery Co.* (1858), 3 H. & N. 885, Ex. Ch.); as to a clause permitting waste where the power is unlimited, see *Muskerry* v. *Chinnery* (1835), L. & G. *temp.* Sugd. 185, 228; *Sheehy* v. *Muskerry* (*Lord*) (1839), 7 Cl. & Fin. 1, H. L.; *Sheehy* v. *Muskerry* (*Lord*) (1848), 1 H. L. Cas. 576. As to a direction that "usual covenants" shall be inserted, see *Medwin* v. *Sandham* (1789), 3 Swan. 685; and p. 388, *post*.

(*a*) *Doe* d. *Egremont* (*Earl*) v. *Stephens*, *supra*.

(*b*) Sugden on Powers, 8th ed., 728; see Co. Litt. 44 b. But trustees cannot include in one lease properties belonging to different trusts (*Tolson* v. *Sheard* (1877), 5 Ch. D. 19, C. A.).

(*c*) *Pomery* v. *Partington* (1790), 3 Term Rep. 665; *Doe* d. *Bartlett* v. *Rendle* (1814), 3 M. & S. 99.

(*d*) *Dayrell* v. *Hoare* (1840), 12 Ad. & El. 356; see *Brown* v. *Peto*, [1900] 1 Q. B. 346.

(*e*) *Clegg* v. *Rowland* (1866), L. R. 2 Eq. 160; *Re Baskerville*, *Baskerville* v. *Baskerville*, [1910] 2 Ch. 329; compare *Re Barker*, *Wallis* v. *Barker* (1903), 88 L. T. 685; see title MINES, MINERALS, AND QUARRIES.

(*f*) *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382.

(*g*) *Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640, 644; *Campbell* v. *Leach* (1775), 2 Amb. 740. A power to lease for a term not exceeding twenty-one years or three lives authorises either a chattel interest or a freehold interest, and whichever interest is created must be within its proper limit. Hence a lease for ninety-nine years determinable on three lives is bad, since it is a chattel interest and is in excess of the twenty-one years (*Roe* d. *Brune* v. *Prideaux* (1808), 10 East, 158).

(*h*) *Edwards* v. *Millbank* (1859), 4 Drew. 606. This was doubted in *Lowe* v. *Swift* (1814), 2 Ball & B. 529, 536; and see *Muskerry* v. *Chinnery* (1835), L. & G.

If no period is specified, the intention of the settlor in this respect must be gathered from all the relevant provisions of the instrument (*i*). The term must begin and the lease take effect in possession at once (*j*), unless a lease to commence *in futuro* is expressly or impliedly authorised by the power (*k*). But an agreement for a new lease may be made before the determination of the old one (*l*).

Rent and fines.

810. The power frequently requires that the lease shall be "at the best rent (*m*)." This precludes any fine being taken; for any advantage obtained by the lessor over his successors is decisive that he has not obtained the best rent (*n*). But the donee of the power need not accept the highest rent offered. He must have regard to other considerations which would influence a prudent owner, such as the solvency and eligibility of the proposing tenant (*o*). If, however, a tenant for life is empowered to grant such lease as he thinks proper, it appears to be no objection that he exercises the power so as to get a benefit for himself at the expense of the estate (*p*).

Validation of defective leases:

811. In favour of a purchaser for value equity will relieve against the defective execution of a power, though not against its

temp. Sugd. 185, 229; *Muskerry* v. *Chinnery* (1835), L. & G. *temp.* Plunk. 182; *Sheehy* v. *Muskerry* (*Lord*) (1839), 7 Cl. & Fin. 1, H. L.

(*i*) *Vivian* v. *Jegon* (1868), L. R. 3 H. L. 285, where the power was held to be restricted to mining leases for the life of the tenant for life; compare *Sheehy* v. *Muskerry* (*Lord*) (1848), 1 H. L. Cas. 576, 593.

(*j*) *Sussex* (*Countess*) v. *Wroth* (1582), Cro. Eliz. 5; *Fitzwilliam's Case* (1604), 6 Co. Rep. 32 a, 33 a; *Shecomb* v. *Hawkins* (1613), Cro. Jac. 318; *Bowes* v. *East London Water-works* (1818), 3 Madd. 375; *Doe* d. *Allan* v. *Calvert* (1802), 2 East, 376; see *Doe* d. *Mount* v. *Roberts* (1785), 4 Doug. (K. B.) 306. For this purpose possession includes receipt of rents (*Goodtitle* d. *Clarges* v. *Funucan* (1781), 2 Doug. (K. B.) 565).

(*k*) Sugden on Powers, 8th ed., 753. A covenant for renewal may be inserted, but it will not be effective unless at the time of renewal the conditions of the new lease as to rent and otherwise are proper for a lease under the power (*Dyas* v. *Cruise* (1845), 2 Jo. & Lat. 460, 486; *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519; see *Harnett* v. *Yielding* (1805), 2 Sch. & Lef. 549, 559).

(*l*) *Shannon* v. *Bradstreet* (1803), 1 Sch & Lef. 52; *Dowell* v. *Dew* (1842), 1 Y & C. Ch. Cas. 345.

(*m*) See *Ellard* v. *Llandaff* (*Lord*) (1810), 1 Ball & B. 241.

(*n*) *Montgomery* v. *Charteris* (*Earl of Wemyss*), *Buccleuch* (*Duke*) v. *Montgomery* (*Queensberry Leases*) (1817), 5 Dow, 293, 344, H. L. 'The lease is not necessarily void because it includes land held under a different title and reserves a single rent (*Muskerry* v. *Chinnery* (1835), L. & G. *temp.* Sugd. 185, 230; but see *Rees* d. *Perkins* v. *Phillip* (1810), Wight. 69).

(*o*) *Doe* d. *Lawton* v. *Radcliffe* (1808), 10 East, 278; *Dyas* v. *Cruise*, *supra*, at p. 482. Where a lease was granted in consideration of the rent and also of a covenant by the lessor to execute improvements, it seems to have been considered that this was evidence that the best rent was not reserved (*Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86), but this is only an element to be taken into consideration; whether the best rent is reserved is a question of fact, and the covenant putting improvements on the tenant may be a proper means of securing an adequate rent (see *Shannon* v. *Bradstreet*, *supra*, at p. 72).

(*p*) *Mostyn* v. *Lancaster*, *Taylor* v. *Mostyn* (1883), 23 Ch. D. 583, C. A. (where the tenant for life, under a power to grant such mining lease as he should think proper, granted a lease at a peppercorn rent by way of mortgage to secure a sum of money advanced to himself); compare *Muskerry* v. *Chinnery* (1835), L. & G. *temp.* Sugd. 185, at p. 225.

SECT. 3. Capacity of Parties to make and take Leases.

(i.) In equity.

non-execution (*q*). For this purpose a lessee is a purchaser for value (*r*). Consequently, where a lease is void at law through failure to comply with a mere formality required by the power, equity will relieve against the defect and will enforce the granting of a valid lease (*s*). Upon the same principle a contract by a tenant for life to grant a lease under a power may be enforced after his death against the remainderman (*t*) or may be properly carried out by trustees (*a*).

(ii.) By statute. Leases Act, 1849.

812. In addition to the above general doctrine of equity, statutory provision is made for validating leases where there has been a deviation from the terms of the power. Under the Leases Act, 1849 (*b*), if the lease has been made in intended exercise of the power (*c*), and has been made *bonâ fide* and the lessee has entered under it (*d*), it is to be considered in equity as a contract for a grant at the request of the lessee, or his representatives or assigns, of a valid lease to the same effect as the invalid lease, with any variation necessary for compliance with the terms of the power; but the lessee is not entitled to a variation, if the reversioners are willing to confirm the lease without variation (*e*). On the other

(*q*) *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52, 62; compare *Ellard* v. *Llandaff* (*Lord*) (1810), 1 Ball & B. 241. As to execution and attestation, it is sufficient that if the lease is by deed attested by two witnesses, notwithstanding that further or other formalities are required by the terms of the power (Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12); and see title POWERS. Equity will not relieve against the defective execution of a power which is originally in its nature legal, such as a statutory power (*Darlington* (*Earl*) v. *Pulteney* (1775), 1 Cowp. 260, 267).

(*r*) *Campbell* v. *Leach* (1775), 2 Amb. 740, 748; *Long* v. *Rankin* (1822), Sugden on Powers, 8th ed., 895, H. L., *per* ABBOTT, C.J., at p. 900; *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521, 525; *Shepheard* v. *Beetham* (1877), 6 Ch. D. 597 (as to premium); compare *Donnell* v. *Church* (1842), 4 I. Eq. R. 630; but perhaps a lessee at a rack-rent is not entitled to the interposition of equity unless he has expended money on the estate or there are other special circumstances which would make it unjust to deprive him of the lease; see Sugden on Powers, 8th ed., 567.

(*s*) *Doe* d. *Collins* v. *Weller* (1798), 7 Term Rep. 478, 480; *Clark* v. *Smith* (1842), 9 Cl. & Fin. 126, 141, H. L. But where a necessary consent has not been obtained, the court will not enforce an agreement for a lease under the power (*Lawrenson* v. *Butler* (1802), 1 Sch. & Lef. 13).

(*t*) *Shannon* v. *Bradstreet, supra; Dowell* v. *Dew* (1842), 1 Y. & C. Ch. Cas. 345. It is assumed that the contract was binding on the tenant for life (*Morgan* v. *Milman* (1853), 3 De G. M. & G. 24; *Kennan* v. *Murphy* (1879), 6 L. R. Ir. 108; (1880), 8 L. R. Ir. 285, C. A.). An equitable ground for enforcing it, such as part performance, is not available against the remainderman (*Shannon* v. *Bradstreet, supra*, at p. 72; see *Blore* v. *Sutton* (1817), 3 Mer. 237; *Lowry* v. *Dufferin* (*Lord*) (1839), 1 I. Eq. R. 281; *Morgan* v. *Milman, supra*, at p. 33), unless he has brought himself within the equity by lying by while the part performance was continued after the death of the tenant for life (*Stiles* v. *Cowper* (1749), 3 Atk. 692).

(*a*) *Davis* v. *Harford* (1882), 22 Ch. D. 128.

(*b*) 12 & 13 Vict. c. 26. The Act does not apply to leases by ecclesiastical corporations or to leases of charity property (*ibid.*, s. 7).

(*c*) If the lease cannot take effect except under the power, it is deemed to be granted in the intended exercise of the power, although the power is not referred to (*ibid.*, s. 5). The lease must not have been made by a stranger to the power (*Re North London Rail. Co., City Branch, Ex parte Cooper* (1865), 2 Drew. & Sm 312, 320).

(*d*) *Moffett* v. *Gough* (*Lord*) (1878), 1 L. R. Ir. 331, C. A.

(*e*) Leases Act, 1849 (12 & 13 Vict. c. 26), s. 2. The Act does not assist a

hand, if the reversioner wishes to confirm the lease, the lessee is bound to accept such confirmation (*f*). Consequently the lessee is entitled to have either a confirmation of the invalid lease, or a lease varied so as to conform with the power, but which form the lease shall take is at the option of the reversioner. The Leases Act, 1849 (*g*), further provides for the case of a lease granted in the intended exercise of a power (*h*), where the lessor is not at the time capable of granting it, but subsequently becomes capable. The lease becomes valid as soon as he becomes thus capable of granting it (*i*).

SECT. 3. Capacity of Parties to make and take Leases.

Leases Act, 1850.

(iii.) *Leases under Authority of the Court.*

813. Where a lease cannot be granted out of court under a power in the settlement or a statutory power, it may usually be granted, with the authority of the court, under the Settled Estates Act, 1877 (*k*). The court, if it deems it proper, and consistent with a due regard for the interests of all parties entitled under the settlement, may authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatever, whether involving waste or not, for terms not exceeding, for agricultural or occupation leases, twenty-one years in England and thirty-five years in Ireland; for a mining lease or lease of easements, forty years; for a repairing lease, sixty years; and for a building lease, ninety-nine years; but, except as to agricultural leases, leases for longer terms may be directed, where this is in accordance with the usual custom of the district and beneficial to the inheritance (*l*). The court cannot authorise a lease where an application to Parliament for the same purpose has been rejected on its merits (*m*); nor a lease in excess of one which

Leases under authority of the court.

lease which is of a different nature from that authorised by the power (*Hallett to Martin* (1883), 24 Ch. D. 624), or where the lease is in the form intended by the parties (*Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519, 539); nor does it enable matters of substance to be cured (*Re Newell and Nevill's Contract*, [1900] 1 Ch. 90, 94 (overruled, on another point, *Re Gladstone, Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, C. A.)); nor does it enable a lease which is invalid, because part of the premises cannot be demised, to be turned into a valid lease without this part (*Sutherland (Dowager Duchess)* v. *Sutherland (Duke)*, [1893] 3 Ch. 169, 194; *Brown* v. *Peto*, [1900] 1 Q. B. 346, 355; affirmed, [1900] 2 Q. B. 653, C. A.; *King* v. *Bird*, [1909] 1 K. B. 837.

(*f*) Leases Act, 1850 (13 & 14 Vict. c. 17), s. 3. The confirmation may be by memorandum or note in writing, signed by each of the parties or their agents. The effect is to validate the lease *ab initio* (*ibid.*). The confirmation may also be by mere acceptance of rent, provided a receipt, memorandum, or note in writing confirming the lease is signed by the person accepting the rent or his agent (*ibid.*, s. 2) (*Re North London Rail. Co., City Branch, Ex parte Cooper* (1864), 34 L. J. (CH.) 373, 378). The Leases Act, 1850 (13 & 14 Vict. c. 17), repealed the Leases Act, 1849 (12 & 13 Vict. c. 26), s. 3, under which acceptance of rent was not a confirmation of the lease.

(*g*) 12 & 13 Vict. c. 26.

(*h*) See note (*c*), p. 364, *ante*.

(*i*) Leases Act, 1849 (12 & 13 Vict. c. 26), s. 4.

(*k*) 40 & 41 Vict. c. 18.

(*l*) *Ibid.*, s. 4; and see *ibid.*, and ss. 5—15, 40, 48, as to further statutory powers and requirements; as to procedure, see *ibid.*, ss. 23—31, 41.

(*m*) *Ibid.*, s. 32.

SECT. 3. Capacity of Parties to make and take Leases.

might have been authorised in and by the settlement by the settlor (*n*).

SUB-SECT. 16.—*Universities and Colleges.*

Universities and colleges.

Application of Settled Land Acts, 1882—1890.

814. Leases of lands of the universities of Oxford, Cambridge, and Durham, and of the colleges in those universities, and of the colleges of Winchester and Eton, are granted under the Universities and College Estates Act, 1898 (*o*), which applies to these corporations the powers conferred on a tenant for life by the Settled Land Acts (*p*). For the purposes of leasing, any of these universities or colleges (*q*) may exercise any of such powers; but the power of granting building leases with an option of purchase (*r*) must not be exercised without the consent of the Board of Agriculture and Fisheries, and capital money payable on the exercise of any such option is to be paid to the Board (*s*). In adapting the Settled Land Acts (*p*) to the case of universities and colleges, references to a university or college and to land belonging to a university or college are to be substituted for references to a tenant for life and settled land; and the Board is to be substituted for the trustees of the settlement and the court (*t*).

Part II.—Agreements for Leases.

SECT. 1.—*Distinction between Lease and Agreement for Lease.*

Distinction between lease and agreement for lease.

815. An instrument by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee—either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently—is a lease; it is said to operate by way of actual demise, and when the lessee has entered under it the relation of landlord and tenant is fully created. An instrument which only binds the parties, the one to create and the other to accept a lease hereafter, is an agreement for a lease, and although the intending lessee enters, the legal relation of landlord and tenant

(*n*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 39; and as to such leases, see, further, title SETTLEMENTS.

(*o*) 61 & 62 Vict. c. 55; this repeals the provisions as to leasing contained in the earlier Universities and College Estates Acts, 1858—1883 (21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59; 43 & 44 Vict. c. 46); and see title EDUCATION, Vol. XII., p. 93.

(*p*) For these Acts, see note (*h*), p. 351, *ante*. For the statutory powers of a tenant for life, see pp. 358, 359, *ante*.

(*q*) Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), s. 7; see also Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44), preamble.

(*r*) See note (*o*) p. 359, *ante*.

(*s*) Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), s. 1. *Ibid.*, Sched. I., Part I., specifically applies to universities and colleges certain portions of the Settled Land Acts, 1882—1890 (see note (*h*), p. 351, *ante*), which include the sections relevant to powers of leasing.

(*t*) Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), Sched. I., Part II. As to Eton and Winchester Colleges, see also the Public Schools Act, 1868 (31 & 32 Vict. c. 118), s. 24; Public Schools (Eton College Property) Act, 1873 (36 & 37 Vict. c. 62); and see title EDUCATION, Vol. XII., pp. 77, 78.

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is not created (*u*) unless he also pays rent, in which case he becomes tenant from year to year, upon the terms of the agreement so far as applicable to a yearly tenancy (*w*). If, however, a question of the legal rights and liabilities of the parties arises in a court which has jurisdiction to order specific performance (*a*) of the agreement, and if the agreement is one of which specific performance will be ordered, then the parties are treated as having the same rights and as being subject to the same liabilities as if the lease had been granted; consequently the lessor is entitled to distrain, and the lessee, on the other hand, is entitled to hold for the agreed term (*b*).

Indications of intention.

816. An instrument is usually construed as a lease if it contains words of present demise (*c*); and although it is called an

(*u*) Thus, apart from the doctrine of *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A. (see note (*b*), *infra*), the landlord cannot distrain (*Dunk* v. *Hunter* (1822), 5 B. & Ald. 322); and see title DISTRESS, Vol. XI., p. 121.

(*w*) *Mann* v. *Lovejoy* (1826), Ry. & M. 355; *Richardson* v. *Gifford* (1834), 1 Ad. & El. 52. As to what terms are applicable to a yearly tenancy, see p. 441, *post*. Such a tenancy is determinable by six months' notice; see *Morgan* d. *Dowding* v. *Bissell* (1810), 3 Taunt. 65. For forms of agreement for a lease, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 163 *et seq.*

(*a*) See title SPECIFIC PERFORMANCE.

(*b*) *Walsh* v. *Lonsdale*, *supra*; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, 264, C. A.; see *Allhusen* v. *Brooking* (1884), 26 Ch. D. 559; *Re Maughan*, *Ex parte Monkhouse* (1885), 14 Q. B. D. 956; *Crump* v. *Temple* (1890), 7 T. L. R. 120. Covenants will run with the reversion notwithstanding that there is no lease under seal (*Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 613); and see note (*s*), p. 586, *post*. If the lessor re-enters under an order of the court, he ceases to be entitled to the benefit of the doctrine (*Murgatroyd* v. *Old Silkstone etc. Coal and Iron Co.*, *Ex parte Charlesworth* (1895), 44 W. R. 198). The doctrine does not apply where the question arises in a court not having jurisdiction to order specific performance of the agreement; thus, if the value of the property (see *Angel* v. *Jay*, [1911] 1 K. B. 667; title COUNTY COURTS, Vol. VIII., p. 444) exceeds £500, the agreement cannot be treated as a lease in proceedings in the county court (*Foster* v. *Reeves*, [1892] 2 Q. B. 255, C. A.; but see Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 89, 90; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18). Nor does it apply where the circumstances are such that specific performance would not be ordered (see p. 379, *post*). Thus if, owing to breaches by the tenant of the proposed covenants, the landlord would already have a right of re-entry, the tenant cannot have specific performance, and consequently he has no such equitable right to the term as will save him from liability to ejectment (*Coatsworth* v. *Johnson* (1886), 55 L. J. (Q. B.) 220, C. A.; *Swain* v. *Ayres* (1888), 21 Q. B. D. 289, C. A.). In consequence of the abolition of the distinction between stamp duties on leases and agreements for leases (see p. 377, *post*), and of the enhanced effect of agreements under the doctrine of *Walsh* v. *Lonsdale*, *supra*, questions as to whether an instrument is a lease or an agreement for a lease are of much less frequent occurrence than formerly.

(*c*) Since the effect of the instrument is to be gathered from the language as a whole, words of present demise are not essential to a lease (*Wright* v. *Trezevant* (1828), Mood. & M. 231); but when they are inserted they form the best indication of the intention of the parties. The words "demise" or "let" are the most usual words of present demise; see *Barry* v. *Nugent* (1782), 3 Doug. (K. B.) 179 ("doth demise"); *Baxter* d. *Abrahall* v. *Browne* (1775), 2 Wm. Bl. 973 ("set and let"); but other words are effectual if they import an immediate letting (*Maldon's Case* (1584), Cro. Eliz. 33 ("you shall have a lease")); compare *Doe* d. *Jackson* v. *Ashburner* (1793), 5 Term Rep. 163 ("shall enjoy"); and notwithstanding that they are expressed in the form of a covenant (*Harrington* v. *Wise* (1596), Cro. Eliz. 486 (covenant that the lessor "doth let"); *Tisdale* v. *Essex* (1614), Hob. 34; *Drake* v. *Munday* (1631), Cro. Car. 207). A lease for

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agreement, and contains a stipulation for the subsequent granting of a formal lease (*d*), it is construed as a lease if the essential terms are fixed (*e*); especially if possession is to be taken under it (*f*), and if the covenants which would be inserted in the lease are to be binding at once (*g*). It is construed as an executory agreement, notwithstanding that it contains words of present demise, if the provisions to be inserted in the lease are not finally ascertained (*h*), or if from other indications it appears that it was

three years is usually made in the form "agrees to let," and is styled an agreement, but these words operate by way of demise (*Poole* v. *Bentley* (1810), 12 East, 168; *Staniforth* v. *Fox* (1831), 7 Bing. 590; *Doe* d. *Pearson* v. *Ries* (1832), 8 Bing. 178; *Doe* d. *Phillip* v. *Benjamin* (1839), 9 Ad. & El. 644, 651; *Alderman* v. *Neate* (1839), 4 M. & W. 704; *Tarte* v. *Darby* (1846), 15 M. & W. 601; *Furness* v. *Bond* (1888), 4 T. L. R. 457; see *Doe* d. *Green* v. *Fidler* (1795), Peake, Add. Cas. 33.

(*d*) See *Doe* d. *Pearson* v. *Ries*, *supra*; *Pinero* v. *Judson* (1829), 6 Bing. 206; *Warman* v. *Faithfull* (1834), 5 B. & Ad. 1042; see also *Maldon's Case* (1584), Cro. Eliz. 33; *Harrington* v. *Wise* (1596), Cro. Eliz. 486.

(*e*) That is, the rent and mode of payment, the commencement and duration of the term, and the covenants; see *Chapman* v. *Towner* (1840), 6 M. & W. 100. The stipulation for a formal lease may specify the covenants to be contained in it (*Pinero* v. *Judson*, *supra*; *Warman* v. *Faithfull*, *supra*); or may define them by reference to another lease (*Wilson* v. *Chisholm* (1831), 4 C. & P. 474; *Doe* d. *Pearson* v. *Ries*, *supra*; *Hancock* v. *Caffyn* (1832), 8 Bing. 358); or may provide for "usual covenants" (*Barry* v. *Nugent* (1782), 3 Doug. (K. B.) 179; *Chapman* v. *Bluck* (1838), 4 Bing. (N. C.) 187; *Doe* d. *Phillip* v. *Benjamin*, *supra*; *Curling* v. *Mills* (1843), 6 Man. & G. 173; but see *Morgan* d. *Dowding* v. *Bissell* (1810), 3 Taunt. 65), or for usual covenants and other specified covenants (*Doe* d. *Walker* v. *Groves* (1812), 15 East, 244; *Hamerton* v. *Stead* (1824), 3 B. & C. 478). In such cases, provided the other terms are ascertained, the covenants are sufficiently ascertained for the instrument to operate as a lease, but not where the covenants are so referred to that further inquiry is necessary to ascertain them, as where they are to be covenants usual in a particular district (*Morgan* d. *Dowding* v. *Bissell*, *supra*; *Chapman* v. *Towner*, *supra*), or in leases of a particular class (*Doe* d. *Morgan* v. *Powell* (1844), 7 Man. & G. 980 (mining lease)).

(*f*) The circumstance that the lessee is to have immediate possession under the agreement is a strong indication that it is a present demise (*Doe* d. *Pearson* v. *Ries*, *supra*; *Hancock* v. *Caffyn*, *supra*; *Doe* d. *Morgan* v. *Powell*, *supra*, at p. 991; *Jones* v. *Reynolds* (1841), 1 Q. B. 506, 516); and so, too, is the fact that he is already in possession (*Doe* d. *Phillip* v. *Benjamin*, *supra*; *Lovelock* v. *Franklyn* (1840), 8 Q. B. 371). It favours the construction of the agreement as a lease if the term is to commence before the execution of the formal lease (*Alderman* v. *Neate*, *supra*; see *Doe* d. *Walker* v. *Groves*, *supra*).

(*g*) A provision in the agreement that the rent shall be paid and the covenants observed until the execution of the lease tells strongly in favour of its being a present demise (*Pinero* v. *Judson*, *supra*; *Wilson* v. *Chisholm*, *supra*; *Hancock* v. *Caffyn*, *supra*; *Doe* d. *Bailey* v. *Foster* (1846), 3 C. B. 215, *per* TINDAL, C.J., at p. 226); and since payment of rent would, if the agreement is executory, create a yearly tenancy, the argument for construing it as a lease is strengthened if the covenants are unsuitable to a yearly tenancy (*Pinero* v. *Judson*, *supra*).

(*h*) Where, *e.g.*, the rent is to be subsequently ascertained (*Morgan* d. *Dowding* v. *Bissell*, *supra*; *John* v. *Jenkins* (1832), 1 Cr. & M. 227; compare *M'Creesh* v. *M'Geough* (1873), 7 I. R. C. L. 236); or where, in an agreement for a mining lease, the mode of working the minerals is not sufficiently defined (*Jones* v. *Reynolds*, *supra*; *Doe* d. *Morgan* v. *Powell*, *supra*); or the terms of the lease are in other respects left indefinite (*Doe* d. *Bromfield* v. *Smith* (1805), 6 East, 530); compare, as to uncertainty in the commencement or duration of the term, *Dunk* v. *Hunter* (1822), 5 B. & Ald. 322; *Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41; *Gore* v. *Lloyd* (1844), 12 M. & W. 463, 476; *Doe* d. *Wood* v. *Clarke* (1845), 7 Q. B. 211. As to the lives not being

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not intended to take effect as a lease (*i*); where, for example, it is expressly provided that it shall not operate as a lease (*k*); or where it is in the form of an agreement to grant a lease, and there are none of the indications above referred to that it is to operate as a lease (*l*); or where the lessor is not yet in a position to demise (*m*); or where certain things have to be done by the lessor before the lease is granted, such as the completion (*n*), or repair (*o*), or improvement (*p*) of the premises, or by the lessee, such as the obtaining of sureties (*q*); or where possession (*r*), or the commencement of the rent (*s*), is postponed till a future date in order to allow of the preparation of the lease. But in all cases the question whether an agreement operates as a demise, or as an agreement only, depends on the intention of the parties (*t*); and though it is only an agreement, yet, if the tenant occupies under it, he is liable under the agreed covenants in respect of the time of his occupation (*a*).

SECT. 2.—*Requisites for Agreement for Lease.*

SUB-SECT. 1.—*Concluded Contract.*

Essential terms of agreement.

817. The essential terms of an agreement for a lease are:—(1) the identification of the lessor and lessee; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent or other consideration to be paid (*b*). A concluded

ascertained in an agreement for a lease for lives, see *Pentland* v. *Stokes* (1812), 2 Ball & B. 68.

(*i*) *Gore* v. *Lloyd*, (1844), 12 M. & W. 463, 476, *per* ALDERSON, B., at p. 478. Specific performance will be ordered of a further instrument required to carry out the intention of the parties (*Fenner* v. *Hepburn* (1843), 2 Y. & C. Ch. Cas. 159).

(*k*) *Perring* v. *Brook* (1835), 7 C. & P. 360; *Brook* v. *Biggs* (1836), 2 Bing. (N. C.) 572; *Anderson* v. *Midland Rail. Co.* (1861), 3 E. & E. 614.

(*l*) *Hegan* v. *Johnson* (1809), 2 Taunt. 148; *Phillips* v. *Hartley* (1827), 3 C. & P. 121; *Rawson* v. *Eicke* (1837), 7 Ad. & El. 451; *Bicknell* v. *Hood* (1839), 5 M. & W. 104; *Brashier* v. *Jackson* (1840), 6 M. & W. 549; *Doe* d. *Bailey* v. *Foster* (1846), 3 C. B. 215 (all cases where the lessor agreed that he would "by indenture demise," or agreed "to grant a lease," or "to make and execute a valid lease"); compare *Regnart* v. *Porter* (1831), 7 Bing. 451.

(*m*) Where, for example, the lessor is not at the time of the agreement entitled to grant a lease (*Doe* d. *Coore* v. *Clare* (1788), 2 Term Rep. 739; *Doe* d. *Pearson* v. *Ries* (1832), 8 Bing. 178; *Hayward* v. *Haswell* (1837), 6 Ad. & El. 265); or where he has not acquired the necessary land (*Doe* d. *Jackson* v. *Ashburner* (1793), 5 Term Rep. 163; see *Doe* d. *Walker* v. *Groves* (1812), 15 East, 244, 247); or where a necessary licence or consent has not been obtained (*Doe* d. *Bailey* v. *Foster*, *supra*; *Rollason* v. *Leon* (1861), 7 H. & N. 73).

(*n*) *Regnart* v. *Porter*, *supra*.

(*o*) *Hamerton* v. *Stead* (1824), 3 B. & C. 478; *Rawson* v. *Eicke*, *supra*; *Doe* d. *Wood* v. *Clarke* (1845), 7 Q. B. 211.

(*p*) *Gore* v. *Lloyd*, *supra*.

(*q*) *John* v. *Jenkins* (1832), 1 Cr. & M. 227.

(*r*) *Tempest* v. *Rawling* (1810), 13 East, 18.

(*s*) *Goodtitle* d. *Estwick* v. *Way* (1787), 1 Term Rep. 735; compare *Poole* v. *Bentley* (1810), 12 East, 168, *per* Lord ELLENBOROUGH, C.J., at p. 170.

(*t*) *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, 385, C. A.

(*a*) *Pistor* v. *Cater* (1842), 9 M. & W. 315, 320; see *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403, 406; and note (*g*), p. 442, *post*.

(*b*) These are the terms which are essential for a memorandum in writing to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 4 (see p. 374, *post*), and they are equally the essential terms of the contract.

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contract may be resolved, by examination of its language, into an offer by the lessor to let, and an unconditional assent by the lessee to take, the property on certain terms (*c*). If the matters just mentioned are ascertained to be thus offered and accepted, this is sufficient. Any other matters incident to the relation of landlord and tenant, if not defined by the parties, are sufficiently defined by law (*d*). If any other terms are mentioned by one party, these also must be unconditionally accepted by the other party in order that there may be a concluded contract (*e*). As long as the above necessary terms have not been agreed to, or any additional term has been mentioned on one side and not unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract (*f*). New terms may be added to an offer (*g*), or the offer may be withdrawn at any time, as long as it has not been accepted (*h*). On the other hand, as long as an offer remains open, the other party may withdraw any term which he has sought to introduce and accept the offer unconditionally (*i*). If, with a letter accepting an offer, a contract is enclosed for signature containing additional terms, the letter does not conclude the contract (*k*).

(*c*) See title CONTRACT, Vol. VII. pp. 345 *et seq.*; and see *Humphries* v. *Humphries*, [1910] 2 K. B. 531, C. A. If the acceptance is conditional, the condition must be satisfied (*White* v. *M'Mahon* (1886), 18 L. R. Ir. 460). If an offer to let is made alternatively, an acceptance of either alternative will conclude a contract (*Lever* v. *Koffler*, [1901] 1 Ch. 543).

(*d*) Thus, questions of repair are settled in accordance with the principles of waste; questions of compensation in agricultural tenancies by custom or statute; see title AGRICULTURE, Vol. I., pp. 258 *et seq.* A concluded contract is not affected by the lessee objecting to a usual term in the draft lease (*Blakeney* v. *Hardie* (1874), 8 I. R. Eq. 381).

(*e*) See *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, 1151, where, for the purpose of the same distinction, Lord BLACKBURN uses the terms "cardinal" and "essential": "Though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation." The terms mentioned above are essential to any contract for a lease, and are the cardinal terms, as the word is used in the above passage. Other terms proposed by either party are essential to the particular agreement.

(*f*) *Lucas* v. *James* (1849), 7 Hare, 410; *Forster* v. *Rowland* (1861), 7 H. & N. 103; *Clarke* v. *Fuller* (1864), 16 C. B. (N. S.) 24; *Cayley* v. *Walpole* (1870), 39 L. J. (CH.) 609; *Nesham* v. *Selby* (1872), 7 Ch. App. 406; *Crossley* v. *Maycock* (1874), L. R. 18 Eq. 180; *Stanley* v. *Dowdeswell* (1874), L. R. 10 C. P. 102; *Wilcox* v. *Redhead* (1880), 49 L. J. (CH.) 539; *Moritz* v. *Knowles* (1899), 48 Sol. Jo. 529, C. A. In *Cayley* v. *Walpole*, *supra*, the correspondence showed a concluded agreement; and see *Wood* v. *Scarth* (1855) 2 K. & J. 33; *Cavaleiro* v. *Puget* (1865), 4 F. & F. 537. As to agreement for renewal, see *Price* v *Assheton* (1834), 1 Y. & C. (EX.) 82.

(*g*) *Honeyman* v. *Marryat* (1855), 21 Beav. 14.

(*h*) *Warner* v. *Willington* (1856), 3 Drew. 523.

(*i*) See *Jolliffe* v. *Blumberg* (1870), 18 W. R. 784 (draft lease approved by the lessee; alterations made by the lessor, but not insisted on).

(*k*) *Jones* v. *Daniel*, [1894] 2 Ch. 332; see *Donnison* v. *People's Café Co.* (1881), 45 L. T. 187, C. A.; and so where the acceptance is accompanied by a suggestion as to covenants to be inserted in the lease (*Cartwright* v. *Miller* (1877), 36 L. T. 398); or a statement that a draft contract will be sent in due course (*Vale of Neath Colliery Co.* v. *Furness* (1876), 45 L. J. (CH.) 276).

SECT. 2. Requisites for Agreement for Lease.

Formal contract.

818. When the terms of the agreement have been committed to writing, in a form recognised by conveyancers as suitable for a contract entered into upon due deliberation and with legal advice, this is said to be a formal contract, and it is binding when executed by the parties. Such a contract contains the terms mentioned in the preceding paragraph, and also a concise statement of the reservations (if any), and the covenants and provisoes which are to be inserted in the lease (*l*). But it is not necessary that there should be a formal contract. A concluded contract may be contained in an informal document or documents, such as a letter or series of letters (*m*), and it is sufficient if, on the documents as a whole (*n*), there ultimately appears to be an unconditional acceptance on one side of all the terms offered by the other (*o*).

Operation of informal contract if terms agreed.

819. If the terms of the contract are in fact agreed between the parties, a provision that a formal contract shall be prepared and executed does not prevent the terms as agreed from constituting a concluded contract (*p*); but where the informal contract is expressly made "subject to a formal contract," there is no binding contract until the formal contract has been prepared and signed (*q*).

Agreements by agents;

820. A contract for a lease may be entered into by an agent, but he must be properly authorised for that purpose (*r*). A house

(*l*) For forms of such a contract, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 163 *et seq.*

(*m*) See *Boys* v. *Ayerst* (1822), Madd. & G. 316.

(*n*) See title CONTRACT, Vol. VII., pp. 351, 352, 372, note (*c*); *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481, 494; and S. C., [1891] 1 Ch. 412, C. A. (where the question of concluded contract was not dealt with); *Mason* v. *Von Buch* (1899), 15 T. L. R. 430.

(*o*) See *Holland* v. *Eyre* (1825), 2 Sim. & St. 194; *Clive* v. *Beaumont* (1847), 1 De G. & Sm. 397; *Chinnock* v. *Ely* (*Marchioness*) (1865), 4 De G. J. & Sm. 638, 646.

(*p*) *Ridgway* v. *Wharton* (1857), 6 H. L. Cas. 238; *Chinnock* v. *Ely* (*Marchioness*), *supra*; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, 1138; *Crossley* v. *Maycock* (1874), L. R. 18 Eq. 180, 181; *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295, 306, C. A.; *Filby* v. *Hounsell*, [1896] 2 Ch. 737; and there may be a binding contract, though there is a stipulation for a proper lease to be drawn up and approved by one of the parties and his solicitor (*Eadie* v. *Addison* (1882), 31 W. R. 320; *Chipperfield* v. *Carter* (1895), 72 L. T. 487).

(*q*) *Chinnock* v. *Ely* (*Marchioness*) *supra*; *Crossley* v. *Maycock*, *supra*; *Winn* v. *Bull* (1877), 7 Ch. D. 29; *Harvey* v. *Barnard's Inn* (*Principal and Ancients*) (1881), 50 L. J. (CH.) 750; *Hawkesworth* v. *Chaffey* (1886), 55 L. J. (CH.) 335; *Page* v. *Norfolk* (1894), 70 L. T. 23. *North* v. *Percival*, [1898] 2 Ch. 128, *contra*, cannot be relied on (see *Santa Fé Land Co.* v. *Forestal Land, Timber, and Railways Co.* (1910), 26 T. L. R. 534). Compare *May* v. *Thompson* (1882), 20 Ch. D. 705, C. A. The stipulation cannot be waived by one party alone, although the formal contract was to be prepared by his solicitor (*Lloyd* v. *Nowell*, [1895] 2 Ch. 744; and see *Ball* v. *Bridges* (1874), 22 W. R. 552).

(*r*) See p. 372, *post*. His authority need not be in writing (*Coles* v. *Trecothick* (1804), 9 Ves. 234, 250; *Callaghan* v. *Pepper* (1840), 2 I. Eq. R. 399). As to the necessity of appointment of the agent by deed where he is to execute a lease under seal, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 394. A mortgagee may create a legal term notwithstanding that he purports to let as agent (*Chapman* v. *Smith*, [1907] 2 Ch. 97); as to letting by a *cestui que trust*, see *Vallance* v. *Savage* (1831), 7 Bing. 595. As to death of the principal

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(i.) House agent; (ii.) Land agent.

agent's general authority is only to get offers and communicate them to his principal, and without special authority he cannot bind his principal by a contract (*s*). The general authority of a steward or land agent is similarly limited, and he cannot contract to grant leases of farms (*t*). But a land agent specially empowered to manage and superintend estates can enter into an agreement for a usual and customary lease according to the nature and locality of the property (*a*). An owner ratifies an unauthorised agreement if he lets the tenant into possession under it (*b*). A land or house agent must exercise reasonable care in ascertaining the fitness of a proposed tenant (*c*).

SUB-SECT. 2.—*Evidence of the Contract.*

(i.) *Memorandum in Writing.*

Agreement must be in writing.

821. Although an agreement for a lease has been concluded, no action can be brought upon it unless the agreement, or a memorandum thereof sufficient to satisfy the Statute of Frauds (*d*), is in writing and signed by the party to be charged therewith or his lawfully authorised agent (*d*); or unless there has been such part

see *Carr* v. *Levingston* (1865), 35 Beav. 41; as to agreement not being according to principal's intentions, see *Helsham* v. *Langley* (1841), 1 Y. & C. Ch. Cas. 175; as to agent taking lease from his principal, see *Selsey* (*Lord*) v. *Rhoades* (1827), 1 Bli. (N. S.) 1, H. L.; *Molony* v. *Kerman* (1842), 2 Dr. & War. 31, 38; compare *Rossiter* v. *Walsh* (1843), 4 Dr. & War. 485; and see *Taylor* v. *Salmon* (1838), 4 My. & Cr. 134.

(*s*) *Wilde* v. *Watson* (1878), 1 L. R. Ir. 402, 405; *Thuman* v. *Best* (1907), 97 L. T. 239; see *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108. Consequently a house agent has no authority to let an intending tenant into possession (see *Slack* v. *Crewe* (1860), 2 F. & F. 59; title AGENCY, Vol. I., pp. 166, 167).

(*t*) *Collen* v. *Gardner* (1856), 21 Beav. 540; *Mortal* v. *Lyons* (1858), 8 I. Ch. R. 112, 117; see *Ridgway* v. *Wharton* (1854), 3 De G. M. & G. 677, 688.

(*a*) *Peers* v. *Sneyd* (1853), 17 Beav. 151; and see *Firman* v. *Ormonde* (*Lord*) (1829), Beat. 347. Unusual terms require the sanction of the owner; see *Turner* v. *Hutchison* (1860), 2 F. & F. 185; *Re Pearson and I'Anson*, [1899] 2 Q. B. 618.

(*b*) *Powell* v. *Smith* (1872), L. R. 14 Eq. 85; and as to ratification, see title AGENCY, Vol. I., pp. 173 *et seq.*

(*c*) *Heys* v. *Tindall* (1861), 1 B. & S. 296, 298; see title AGENCY, Vol. I., pp. 185 *et seq.* As to the right of an agent to commission, see *ibid.*, p. 194.

(*d*) Statute of Frauds (29 Car. 2, c. 3), s. 4, which refers to "any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." An agreement for a lease is a contract for an interest in land, and is within *ibid.*, s. 4; see *Evans* v. *Roberts* (1826), 5 B. & C. 829, 839; *Falmouth* (*Earl*) v. *Thomas* (1832), 1 Cr. & M. 89; *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234. Although a lodger has not exclusive possession of the premises which he occupies, yet if a separate part of a house is assigned for his occupation he has an interest in land within the statute, and an agreement for the letting of lodgings requires to be in writing (*Inman* v. *Stamp* (1815), 1 Stark. 12; *Edge* v. *Strafford* (1831), 1 Cr. & J. 391); but not an agreement for board and lodging, which does not give the right to separate occupation (*Wright* v. *Stavert* (1860), 2 E. & E. 721). An agreement under which a purchaser of crops is entitled to exclusive possession is within the statute (*Crosby* v. *Wadsworth* (1805), 6 East, 602); and, as to a purchaser of crops, see *Poulter* v. *Killingbeck* (1799), 1 Bos. & P. 397; *Waddington* v. *Bristow* (1801), 2 Bos. & P. 452; *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357. An incorporeal hereditament confers an interest in land, and an agreement for a lease of such an interest —*e.g.*, a right of sporting—is within the statute (*Webber* v. *Lee* (1882), 9 Q. B. D.

performance of the agreement as to dispense in equity with compliance with that statute (*e*). All stipulations which are substantially part of the agreement for a lease must also be evidenced by writing, even though by themselves they are not within the statute (*f*); but an agreement which is merely collateral to the agreement for a lease, and which is not by the statute required to be in writing, may be made verbally (*g*). The contract, though itself required to be in writing, may be altogether rescinded verbally; but it cannot be varied verbally, even though the part affected by the variation would not by itself require to be in writing (*h*).

Effect of part performance.

Collateral agreement.

822. A memorandum to satisfy the Statute of Frauds (*i*) need not be made at the time of the contract (*j*), nor contained in a single document, nor delivered by one of the parties to the other. It may be made at any time, provided that the contract has been then concluded (*k*), and that the action on the contract has not been commenced (*l*); it may be contained in several documents, provided that these refer to each other or can be connected by reasonable inference (*m*); and it may be addressed by the party to be charged

What memorandum is necessary.

315, C. A.). The agent need not be authorised in writing (*Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22; and see title AGENCY, Vol. I., pp. 156 *et seq.*). The defence of the Statute of Frauds (29 Car. 2, c. 3), must be specifically pleaded (R. S. C., Ord. 19, r. 15), and if the defendant has omitted to raise the defence in an action brought on the agreement, he cannot raise it in a subsequent action (*Humphries* v. *Humphries*, [1910] 2 K. B. 531, C. A.).

(*e*) See p. 376, *post*.

(*f*) Such as an agreement, on letting a house and furniture, to send in more furniture (*Mechelen* v. *Wallace* (1837), 7 Ad. & El. 49; *Angell* v. *Duke* (1875), 32 L. T. 320); or an agreement by the lessor to sell fixtures and make improvements (*Vaughan* v. *Hancock* (1846), 3 C. B. 766).

(*g*) As to such agreements, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447.

(*h*) *Harvey* v. *Grabham* (1836), 5 Ad. & El. 61; see title CONTRACT, Vol. VII., p. 422; and see *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234. A draft lease subsequently prepared cannot be used to explain the contract (*Haywood* v. *Cope* (1858), 25 Beav. 140).

(*i*) See note (*d*), p. 372, *ante*.

(*j*) *Shippey* v. *Derrison* (1805), 5 Esp. 190, *per* Lord ELLENBOROUGH, C.J., at p. 193; and for a fuller statement of the requisites for a memorandum under the statute, see title CONTRACT, Vol. VII., p. 367; as to signature, see *ibid.*, p. 375; as to signature by an agent, see *ibid.*, p. 377. Signature by the agent's clerk is not sufficient (see *ibid.*, p. 379, note (*x*)); *Potter* v. *Peters* (1895), 72 L. T. 624. A bare entry by a steward in his employer's contract book is not evidence by itself of an agreement for a lease between the employer and the tenant (*Charlewood* v. *Bedford (Duke)* (1738), 1 Atk. 497). As to signature on behalf of a firm, see *Evans* v. *Curtis* (1826), 2 C. & P. 296.

(*k*) *Munday* v. *Asprey* (1880), 13 Ch. D. 855; see *Powell* v. *D llon* (1814), 2 Ball & B. 416.

(*l*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357, C. A.

(*m*) *Verlander* v. *Codd* (1823), Turn. & R. 352, 357; *Warner* v. *Willington* (1856), 3 Drew. 523; *Ridgway* v. *Wharton* (1857), 6 H. L. Cas. 238; *Baumann* v. *James* (1868), 3 Ch. App. 508; *Long* v. *Millar* (1879), 4 C. P. D. 450, C. A.; *Cave* v. *Hastings* (1881), 7 Q. B. D. 125; see *Wylson* v. *Dunn* (1887), 34 Ch. D. 569, 575; and see title CONTRACT, Vol. VII., p. 370, note (*x*). As to a letter referring to a draft lease, see *Craig* v. *Elliott* (1885), 15 L. R. Ir. 257. There must be certainty as to the document referred to; see *Price* v. *Griffith* (1851), 1 De G. M. & G. 80, C. A. See, further, title CONTRACT, Vol. VII., p. 369, note (*u*).

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to his agent (*n*). But it must state the following essential terms of the contract (*o*):—

Parties.

(1) The parties to the agreement (*p*), either by name, or by such terms as will enable them to be identified by verbal evidence independent of the contract. Thus the term "lessor" is not sufficient, since it depends for its meaning on the contract (*q*), but "owner" is sufficient (*r*).

Property.

(2) Similarly, the premises to be demised, described in such a manner as to enable them to be identified, and for this purpose extrinsic evidence is admissible, including verbal evidence (*s*).

Term.

(3) The commencement of the term (*t*), and its duration (*u*), but as to the commencement of the term, it is sufficient if this appears by reasonable inference from the circumstances stated in the memorandum (*a*). If the date of commencement is not

(*n*) *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1.

(*o*) See p. 369, *ante*; and see *Williams* v. *Lake* (1859), 2 E. & E. 349, 354; *Clarke* v. *Fuller* (1864), 16 C. B. (N. S.) 24.

(*p*) *Williams* v. *Lake*, *supra*; *Warner* v. *Willington* (1856), 3 Drew. 523; *Donnison* v. *People's Café Co.* (1881), 45 L. T. 187, C. A.; see *Williams* v. *Jordan* (1877), 6 Ch. D. 517. It is not essential that the names should be in the body of the document; the signature may be a sufficient statement of the name (*Stokell* v. *Niven* (1889), 61 L. T. 18, C. A.). See title CONTRACT, Vol. VII., p. 370. A person named as a party may be an agent for an undisclosed principal (*Filby* v. *Hounsell*, [1896] 2 Ch. 737).

(*q*) *Donnison* v. *People's Café Co.*, *supra*, at p. 189; compare *Potter* v. *Duffield* (1874), L. R. 18 Eq. 4 ("vendor" held insufficient); *Coombe* v. *Wilks*, [1891] 3 Ch. 77 ("landlord" held insufficient).

(*r*) *Sale* v. *Lambert* (1874), L. R. 18 Eq. 1; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.

(*s*) *Sheers and Serjeant* v. *Thimbleby & Son* (1897), 13 T. L. R. 451, 453, C. A.; and see title CONTRACT, Vol. VII., p. 372, note (*e*). The agreement is not enforceable if the premises to be demised are altogether uncertain (*Lancaster* v. *De Trafford* (1862), 31 L. J. (CH.) 554); but it is enforceable where they are substantially ascertained, but the boundaries are left for future determination (*Haywood* v. *Cope* (1858), 25 Beav. 140); *Wesley* v. *Walker* (1878), 26 W. R. 368 ("land at Forest Gate" sufficient when explained by verbal evidence); and see the statement of expressions which have been held sufficiently definite in *Sheers and Serjeant* v. *Thimbleby & Son*, *supra*, *per* CHITTY, J., at p. 453.

(*t*) *Blore* v. *Sutton* (1817), 3 Mer. 237; *Clarke* v. *Fuller* (1864), 16 C. B. (N. S.) 24, 37; *Nesham* v. *Selby* (1872), 7 Ch. App. 406; *Cartwright* v. *Miller* (1877), 36 L. T. 398. The date, if agreed at the time of the contract, may be ascertained from subsequent correspondence (*White v. Hay* (1895), 72 L. T. 281).

(*u*) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22; *Clarke* v. *Fuller*, *supra*; *Gordon* v. *Trevelyan* (1814), 1 Price, 64; *Cox* v. *Middleton* (1854), 2 Drew. 209; *Bayley* v. *Fitzmaurice* (1857), 8 E. & B. 664, Ex. Ch.; (1860), 9 H. L. Cas. 78; *Gilbert* v. *Hall* (1831), 1 L. J. (CH.) 15. It is sufficient if the term is ascertainable with certainty; see *Edwardes' Menu Co.* v. *Chudleigh* (1897), 14 T. L. R. 47, 64, C. A. ("so long as the property remains in the lessor's hands"); compare *Kensington* (*Lord*) v. *Phillips* (1817), 5 Dow, 61, H. L. On an agreement for an underlease with a nominal reversion, the length of the reversion must be stated (*Dolling* v. *Evans* (1867), 36 L. J. (CH.) 474). Where the lease is to be for lives it is not essential that the lives should be named in the agreement, since in the absence of stipulation to the contrary, it is for the tenant to nominate them (*Fitzgerald* v. *Vicars* (1839), 2 Dr. & Wal. 298; compare *Pentland* v. *Stokes* (1812), 2 Ball & B. 68; *Kensington* (*Lord*) v. *Phillips*, *supra*). An option for a lease for seven, fourteen, or twenty-one years is an agreement for a lease for twenty-one years determinable at seven or fourteen years at the option of the lessee (*Hersey* v. *Giblett* (1854), 18 Beav. 174).

(*a*) *Phelan* v. *Tedcastle* (1885), 15 L. R. Ir. 169, C. A.; *Re Lander and Bagley's*

expressly fixed, but the rent is made payable from a certain date, this is treated as the date for commencement of the term (*b*); and usually the date when possession is given is the date of commencement (*c*); and so, if possession is to be given on a future event, such as the payment of money, the occurrence of the event fixes the date of commencement (*d*). In the absence of circumstances showing the date of commencement, it will not be presumed that the term is to commence at the date of the agreement (*e*).

(4) The amount of the rent to be reserved; or the memorandum must state circumstances from which it can be ascertained (*f*), and also the amount of any fine or other consideration (*g*). Rent.

(ii.) *Parol Evidence.*

823. Although there is no memorandum (*h*) of an agreement for a lease such as to satisfy the Statute of Frauds (*i*), yet if the agreement has been partly performed, parol evidence of it may be given in an action for specific performance (*k*). Such evidence must clearly (*l*) establish that there is in fact a concluded agreement (*m*), the terms of which are certain and definite (*n*); and that there has been part Part performance.

Contract, [1892] 3 Ch. 41. Under an agreement for an extension or renewal of an existing term, the commencement of the new term is from the expiration of the old term (*Verlander* v. *Codd* (1823), Turn. & R. 352; *Wood* v. *Alyward* (1887), 58 L. T. 662, C. A.).

(*b*) *Wesley* v. *Walker* (1878), 26 W. R. 368.

(*c*) *Re Lander and Bagley's Contract*, *supra*. But the words "immediate possession if required" do not fix the commencement of the term (*Rock Portland Cement Co.* v. *Wilson* (1892), 52 L. J. (CH.) 214).

(*d*) *Erskine* v. *Armstrong* (1887), 20 L. R. Ir. 296, C. A.

(*e*) *Marshall* v. *Berridge* (1881), 19 Ch. D. 233, C. A. (overruling *Jaques* v. *Millar* (1877), 6 Ch. D. 153); *Wyse* v. *Russell* (1882), 11 L. R. Ir. 173; *White* v. *M'Mahon* (1886), 18 L. R. Ir. 460; *Humphery* v. *Conybeare* (1899), 80 L. T. 40, C. A.

(*f*) *Baumann* v. *James* (1868), 3 Ch. App. 508.

(*g*) *Dear* v. *Verity* (1869), 38 L. J. (CH.) 486, C. A.; compare title GUARANTEE, Vol. XV., p. 457, note (*d*).

(*h*) Parol evidence is not admissible to contradict or vary a written document; see titles CONTRACT, Vol. VII., p. 523; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444; EVIDENCE, Vol. XIII., p. 566; but it is admissible in order to show the external circumstances which enable its effect to be ascertained, such as the condition of the property at the time when the lease is granted (*Doe* d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701; *Baird* v. *Fortune* (1861), 4 Macq. 127, 149, H. L.); see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 448, note (*o*); and as to admitting evidence of custom, of collateral parol agreements, and of the meaning of technical words, see *ibid.*, pp. 446, 447, 449; CUSTOM AND USAGES, Vol. X., p. 261.

(*i*) 29 Car. 2, c. 3.

(*k*) See title SPECIFIC PERFORMANCE.

(*l*) *Mortal* v. *Lyons* (1858), 8 I. Ch. R. 112; see *Pilling* v. *Armitage* (1806), 12 Ves. 78; *Morphett* v. *Jones* (1818), 1 Swan. 172; *Reynolds* v. *Waring* (1831), You. 346; *Nunn* v. *Fabian* (1865), 1 Ch. App. 35, 39.

(*m*) *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131, 158; *Faulkner* v. *Llewellin* (1862), 31 L. J. (CH.) 549; *Price* v. *Salusbury* (1863), 32 Beav. 446, 459, affirmed (1866), 14 L. T. 110, H. L.; *Howe* v. *Hall* (1870), 4 I. R. Eq. 242; *Richards* v. *North London Rail. Co.* (1871), 20 W. R. 194; *Phillips* v. *Alderton* (1875), 24 W. R. 8; *Bertel* v. *Neveux* (1878), 39 L. T. 257.

(*n*) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22, 40; *Cooth* v. *Jackson* (1801), 6 Ves. 12, 38; *Price* v. *Salusbury*, *supra*; *Richards* v. *North London Rail. Co.*, *supra*.

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performance of a kind recognised as proper to exclude the defence of the statute (*o*). For this purpose the acts relied upon must be unequivocably referable to some such agreement as that alleged (*p*), and must imply the existence of the agreement (*q*). If both these matters are proved, and if the agreement is such that, if it were in writing, the plaintiff would be entitled to specific performance of it, he is entitled to specific performance, notwithstanding the absence of writing (*r*). The doctrine applies to verbal agreements to grant easements (*s*).

Acts of part performance.

824. The following acts or circumstances are sufficient to constitute part performance:—(1) Entry into possession and expenditure of money in improvements in pursuance of the agreement (*a*), or entry into possession alone (*b*); (2) expenditure of money in alterations by a tenant already in possession where the expenditure is not obligatory on the tenant under his existing lease (*c*); (3) payment of rent by a tenant in possession at an increased rate (*d*). In the

(*o*) The performance on one side must be such as to make it inequitable for the other side to set up the statute (*Mundy* v. *Jolliffe* (1839), 5 My. & Cr. 167, 177; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 475); and see titles CONTRACT, Vol. VII., pp. 379, 380; EQUITY, Vol. XIII., pp. 12, 65.

(*p*) *Cooth* v. *Jackson* (1801), 6 Ves. 12, 38; *Ex parte Hooper* (1815), 19 Ves. 477, 479; *Morphett* v. *Jones* (1818), 1 Swan. 172; *Alderson* v. *Maddison* (1881), 7 Q. B. D. 174, 178, C. A.; affirmed, *sub nom. Maddison* v. *Alderson, supra.*

(*q*) *Frame* v. *Dawson* (1807), 14 Ves. 386, 388; *Dale* v. *Hamilton* (1846), 5 Hare, 369.

(*r*) *Nunn* v. *Fabian* (1865), 1 Ch. App. 35. But the doctrine of part performance of a parol agreement is not to be extended; and it is not applied so as to enforce performance of an agreement to lease under a power where the terms of the power have not been complied with (*Phillips* v. *Edwards* (1864), 33 Beav. 440); or where the lease would affect remaindermen (*Trotman* v. *Flesher, Flesher* v. *Trotman* (1861), 3 Giff. 1, 10; *Blore* v. *Sutton* (1817), 3 Mer. 237).

(*s*) *McManus* v. *Cooke* (1887), 35 Ch. D. 681.

(*a*) *Lester* v. *Foxcroft* (1701), Colles, 108, H. L.; 2 White & Tud. L. C., 7th ed., 460; *Gregory* v. *Mighell* (1811), 18 Ves. 328; *Mundy* v. *Jolliffe* (1839), 5 My. & Cr. 167; *Surcome* v. *Pinniger* (1853), 3 De G. M. & G. 571, C. A.; *Shillibeer* v. *Jarvis* (1856), 8 De G. M. & G. 79, C. A.; *Benecke* v. *Chadwicke* (1856), 4 W. R. 687; *Farrall* v. *Davenport* (1861), 3 Giff. 363, affirmed, 8 Jur. (N. S.) 1043; *Reddin* v. *Jarman* (1867), 16 L. T. 449; *Phillips* v. *Alderton* (1875), 24 W. R. 8; see *Chappell* v. *Gregory* (1864), 34 Beav. 250; *Re Sullivan's Estate* (1889), 23 L. R. Ir. 255. The case for specific performance is stronger where the lessor has acquiesced in the expenditure; see *Dann* v. *Spurrier* (1802), 7 Ves. 231, 236; *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129; *Plimmer* v. *Wellington Corporation* (1884), 9 App. Cas. 699, P. C.; *Civil Service Musical Instrument Association* v. *Whiteman* (1899), 68 L. J. (CH.) 484; and see, generally, title SPECIFIC PERFORMANCE.

(*b*) *Wills* v. *Stradling* (1797), 3 Ves. 378, 381; *Boardman* v. *Mostyn* (1801), 6 Ves. 467, 470; *Morphett* v. *Jones* (1818), 1 Swan. 172; *Pain* v. *Coombs* (1857), 1 De G. & J. 34; *Wilson* v. *West Hartlepool Rail. Co.* (1864), 2 De G. J. & Sm. 475, 485, C. A.; see *Tofield* v. *Roberts* (1894), 10 T. L. R. 437.

(*c*) *Sutherland* v. *Briggs* (1841), 1 Hare, 26; see *Wills* v. *Stradling, supra; Frame* v. *Dawson, supra.* Expenditure by a sub-lessee, with the lessee's knowledge and approval, has the same effect (*Williams* v. *Evans* (1875), L. R. 19 Eq. 547).

(*d*) *Wills* v. *Stradling, supra; Nunn* v. *Fabian, supra; Howe* v. *Hall* (1870), 4 I. R. Eq. 242; *Humphreys* v. *Green* (1882), 10 Q. B. D. 148, 156, C. A. (but see *ibid., per* BRETT, L.J., at p. 160); *Conner* v. *Fitzgerald* (1883), 11 L. R. Ir. 106; *Miller and Aldworth, Ltd.* v. *Sharp*, [1899] 1 Ch. 622; though, in general, payment of money is not an act of part performance (*Frame* v. *Dawson, supra;*

first case the part performance is referable to an original agreement for a tenancy; in the second and third cases, to an agreement for a new tenancy. But mere retention of possession is not in itself sufficient (*e*); to allow it to operate as part performance there must be special circumstances showing that it is necessarily referable to an agreement for a lease (*f*); nor is the expenditure of money by the intending lessor a sufficient act of part performance (*g*).

SUB-SECT. 3.—*Stamps.*

Stamps on agreement for lease.

825. An agreement for a lease, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years, or for any indefinite term, is chargeable with the same duty as if it were an actual lease made for the term and consideration mentioned in the agreement (*h*); that is, the stamp is *ad valorem* on the rent and premium (if any) according to the scale applicable to leases (*i*). Where the term is definite and exceeds thirty-five years, the agreement requires a 6*d.* stamp if under hand, and 10*s.* if under seal (*k*). The foregoing applies to an agreement to grant a lease. An agreement to accept a lease, signed only by the lessee, requires a 6*d.* stamp (*l*).

In general

Where a parol agreement for a lease is made on the terms of a previous offer in writing, such offer is admissible in evidence without a stamp (*m*); but an acceptance in writing must be stamped (*n*), notwithstanding that the offer was verbal (*o*). Signature is not necessary to render a document liable to stamp duty. If a document has been treated by the parties as the record of their agreement, it is not admissible in evidence without a stamp, although it has not been signed (*p*); and, *à fortiori*, where it is a

Maddison v. *Alderson* (1883), 8 App. Cas. 467; *Thursby* v. *Eccles* (1900), 49 W. R. 282).

(*e*) *Wills* v. *Stradling* (1797), 3 Ves. 378, 381, 382; *Morphett* v. *Jones* (1818), 1 Swan. 172; *Brennan* v. *Bolton* (1842), 2 Dr. & War. 349; *Re National Savings Bank Association, Brady's Case* (1867), 15 W. R. 753; *Alderson* v. *Maddison* (1881), 7 Q. B. D. 174, C. A., *per* BAGGALLAY, L.J., at p. 178; but see *Lanyon* v. *Merton* (1884), 13 L. R. Ir. 297.

(*f*) *Dowell* v. *Dew* (1842), 1 Y. & C. Ch. Cas. 345 (referable to contract for renewal); *Hodson* v. *Heuland*, [1896] 2 Ch. 428 (continuation after parol contract of possession taken before); see *White* v. *Whitewood* (1897), 13 T. L. R. 409.

(*g*) *Whittick* v. *Mozley* (1883), Cab. & El. 86; but expenditure on alterations at the request of the lessee may be sufficient; see *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 75 (1). If there is a counterpart, this will either bear the same stamp as the agreement, or a 5*s.* stamp, whichever is less. The counterpart does not require a denoting stamp (*ibid.*, s. 72).

(*i*) See p. 396, *post*. As to stamp duty generally, see title REVENUE.

(*k*) That is, as an ordinary agreement under hand or a deed not described in the Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule.

(*l*) *Doe* d. *Marlow* v. *Wiggins* (1843), 4 Q. B. 367; see *Glen* v. *Dungey and Farrant* (1849), 4 Exch. 61.

(*m*) *Drant* v. *Brown* (1825), 3 B. & C. 665; see *Edgar* v. *Blick* (1816), 1 Stark. 464; *Laing* v. *Smith* (1862), 3 F. & F. 97.

(*n*) *Drant* v. *Brown*, *supra*.

(*o*) *Hegarty* v. *Milne* (1854), 14 C. B. 627.

(*p*) *Chadwick* v. *Clarke* (1845), 1 C. B. 700. But if the document is in effect a mere unaccepted proposal, and the tenant enters without any agreement on

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minute of terms of letting by auction and is signed by the auctioneer (*q*). Where an agreement refers to the terms of an abandoned lease, it is sufficient for the agreement only to be stamped (*r*), provided the lease has not been operative (*s*).

If there is an agreement in writing it must be given in evidence; the lessor cannot avoid doing so by suing for use and occupation generally (*t*), unless, perhaps, his own evidence does not disclose the existence of the agreement (*a*)

SECT. 3.—*Breach of Agreement for Lease.*

Specific performance.

826. Upon the refusal or omission of either party to an agreement for a lease to perform the agreement on his part the other is usually entitled to maintain an action for specific performance (*b*); but this being an equitable remedy (*c*), it is in the discretion of the court whether it shall be granted, and it will not be ordered if the agreement is uncertain in any material respect (*d*),

the footing of the proposal being in fact made, it is not necessary to produce the document in proceedings to recover possession, and hence it is no objection that it is not stamped (*Doe* d. *Bingham* v. *Cartwright* (1820), 3 B. & Ald. 326). A signed approval of a draft agreement is only evidence of an intention to agree, and can be given in evidence without a stamp (*Doe* d. *Lambourn* v. *Pedgriph* (1830), 4 C. & P. 312).

(*q*) *Ramsbottom* v. *Mortley* (1814), 2 M. & S. 445; but a written paper containing the terms of letting, delivered by the auctioneer to the bidder, but not signed by the auctioneer, has been held not to require a stamp (*Ramsbottom* v. *Tunbridge* (1814), 2 M. & S. 434).

(*r*) *Pearce* v. *Cheslyn* (1835), 4 Ad. & El. 225.

(*s*) *Turner* v. *Power* (1828), 7 B. & C. 625. And see further as to stamps on agreements, title CONTRACTS, Vol. VII., pp. 535 *et seq.*

(*t*) *Brewer* v. *Palmer* (1800), 3 Esp. 213. See *Cotterill* v. *Hobby* (1895), 4 B. & C. 465; and compare *Strother* v. *Barr* (1828), 5 Bing. 136.

(*a*) *Marston* v. *Dean* (1835), 7 C. & P. 13; *Fry* v. *Chapman* (1836), 5 Dowl. 265; *Watson* v. *King* (1846), 3 C. B. 608.

(*b*) See title SPECIFIC PERFORMANCE. Formerly it was the practice to ante date the lease when this was necessary to enable the parties to try their legal rights (*Lillie* v. *Legh* (1858), 3 De G. & J. 204, C. A.; *Poyntz* v. *Fortune* (1859), 27 Beav. 393; *Rankin* v. *Lay* (1860), 2 De G. F. & J. 65); and in Ireland the lease, it seems, is still ante dated; see *M'Ibroy* v. *Traill*, [1898] 1 I. R. 459. An agreement for a lease usually imposes obligations which form sufficient consideration; see also *Palmer* v. *Hamilton* (1763), 2 Ridg. Parl. Rep. 535, 549; *Moore* v. *Crofton* (1846), 3 Jo. & Lat. 438.

(*c*) See title EQUITY, Vol. XIII., pp. 11 *et seq.*

(*d*) *Price* v. *Assheton* (1835), 1 Y. & C. (EX.) 441; *Price* v. *Griffith* (1851), 1 De G. M. & G. 80, C. A.; *Jeffery* v. *Stephens* (1860), 8 W. R. 427; *Oxford Corporation* v. *Crow* (1893), 69 L. T. 228. In the following cases the objection of uncertainty was not sustained (*Powell* v. *Lovegrove* (1856), 8 De G. M. & G. 357, C. A.; *Parker* v. *Taswell* (1858), 2 De G. & J. 559; *Oxford* v. *Provand* (1868), L. R. 2 P. C. 135). An agreement under which the lessor is to put the house in decorative repair is not uncertain (*Samuda* v. *Lawford* (1862), 4 Giff. 42, distinguishing *Taylor* v. *Portington* (1855), 7 De G. M. & G. 328, C. A. (drawing room to be "handsomely decorated according to present style," too uncertain for specific performance)); nor is an agreement under which the lessee is "to do all repairs, painting, papering, decorating etc." uncertain (*Dear* v. *Verity* (1869), 38 L. J. (CH.) 297, 486, C. A.); or an agreement to take a house when "complete and fit for habitation" (*Faulkner* v. *Llewellin* (1863), 11 W. R. 1055; affirmed, 12 W. R. 193, C. A.). An agreement by the tenant to do certain specified "and other" works at a stated expense is not uncertain if the specified works in effect will cost the stated sum (*Baumann* v. *James* (1868), 3 Ch. App.

or if it involves hardship (*e*); nor will it be ordered if the performance can have no beneficial result, where, for instance, the agreed term has already expired (*f*), or where, if the plaintiff is the lessee, it appears that he will be unable, through insolvency, to perform the covenants of the lease (*g*); nor where the granting of the lease will involve forfeiture (*h*); nor, in general, will specific performance be ordered if it involves the performance of work the execution of which the court cannot superintend (*i*). Before the agreement is enforced any condition precedent must have been fulfilled (*k*); and a tenant who has gone into possession under the

508); compare *Thellusson* v. *Rendlesham* (*Lord*) (1846), 11 Jur. 29; *Gardner* v. *Fooks* (1867), 15 W. R. 388. As to evidence of the meaning of terms used in letters, see *Skinner* v. *M'Douall* (1848), 2 De G. & Sm. 265.

(*e*) The agreement must be "certain, fair and just in all its parts" (*Buxton* v. *Lister* (1746), 3 Atk. 383, *per* Lord HARDWICKE, L.C., at p. 386; *Walpole* (*Lord*) v. *Orford* (*Lord*) (1797), 3 Ves. 402, 420. Hence, if the covenants of the lease will involve the lessee in expenses which he did not anticipate, and if this result is due to the lessor's default, specific performance will not be ordered (*Tildesley* v. *Clarkson* (1862), 30 Beav. 419); but it is otherwise where the lessor is not in default, where, for instance, the lessee knowingly agrees to take a house in defective repair (*Cook* v. *Waugh* (1860), 2 Giff. 201); and the lessee who has taken possession and insisted on repairs being done cannot refuse to accept an underlease because it contains covenants taken from the head lease of which he was unaware (*Nash* v. *Cochrane* (1839), 3 Jur. 973). A mistake as to the legal effect of an agreement does not prevent specific performance (*Powell* v. *Smith* (1872), L. R. 14 Eq. 85, where the lessor understood that the effect of the lease being determinable at seven or fourteen years was to give him the option to determine it).

(*f*) *Walters* v. *Northern Coal Mining Co.* (1855), 5 De G. M. & G. 629, 638; *De Brassac* v. *Martyn* (1863), 11 W. R. 1020; see *Western* v. *Pim* (1814), 3 Ves. & B. 197; *Nesbitt* v. *Meyer* (1818), 1 Swan. 223; compare *Callaghan* v. *Pepper* (1840), 2 I. Eq. R. 399; and on the same ground an agreement for a yearly tenancy will not in general be specifically enforced (*Clayton* v. *Illingworth* (1853), 10 Hare, 451); though this will be done in a proper case (*Lever* v. *Koffler*, [1901] 1 Ch. 543; see *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 616); and as to letting for a single day to view a procession, see *Glasse* v. *Woolgar and Roberts* (1897), 41 Sol. Jo. 573, C. A.

(*g*) *Neale* v. *Mackenzie* (1837), 1 Keen, 474, 485; see *Buckland* v. *Hall* (1803), 8 Ves. 92. But the trustee in bankruptcy is entitled to a grant of the lease on entering into personal covenants (*Powell* v. *Lloyd* (1828), 2 Y. & J. 372).

(*h*) *Peacock* v. *Penson* (1848), 11 Beav. 355; see *Paxton* v. *Newton* (1854), 2 Sm. & G. 437, 440; compare *Helling* v. *Lumley* (1858), 3 De G. & J. 493, C. A.

(*i*) Consequently specific performance will not be ordered of a building agreement except under special circumstances (*Wolverhampton Corporation* v. *Emmons* (1901), 49 W. R. 553, C. A.); compare *Blackett* v. *Bates* (1865), 2 Hem. & M. 270; *Molyneux* v. *Richard*, [1906] 1 Ch. 34; but if the contract includes the granting of a lease, specific performance can be ordered of the agreement for a lease and damages given for breach of the building agreement (*Kay* v. *Johnson* (1864), 2 Hem. & M. 118; *Soames* v. *Edge* (1860), John. 669; see *Norris* v. *Jackson* (1860), 1 John. & H. 319; *Norris* v. *Jackson* (1862), 3 Giff. 396; *Middleton* v. *Greenwood* (1864), 2 De G. J. & Sm. 142, C. A.). But for this purpose the agreement must specify with sufficient clearness the work to be done; see *Wood* v. *Silcock* (1884), 50 L. T. 251. It is no objection to granting specific performance that the lease is to contain a covenant to repair (*Paxton* v. *Newton*, *supra*). As to a covenant to maintain a vista through trees, see *Armstrong* v. *Courtenay* (1863), 15 I. Ch. R. 138.

(*k*) *Abbot* v. *Blair* (1860), 8 W. R. 672; *Modlen* v. *Snowball* (1861), 4 De G. F. & J. 143, C. A.; *Williams* v. *Brisco* (1882), 22 Ch. D. 441, C. A.; and the lessee can resist performance on the ground of non-execution of repairs notwithstanding that he has taken possession, unless he is barred by acquiescence (*Lamare* v. *Dixon* (1873), L. R. 6 H. L. 414).

SECT. 3. Breach of Agreement for Lease.

agreement loses his right to specific performance if he commits breaches of the covenants which would be inserted in the lease, so that the landlord, if the lease had been granted, would have a right of re-entry (*l*). If the lessor cannot make a title to the whole of the property, the lessee is entitled to a lease of so much as the lessor can demise, with an abatement of rent (*m*). The remedy of specific performance must be claimed promptly (*n*) but delay on the part of the lessor may be excused where the lessee has been in possession (*o*), and probably also where the claim is by the lessee (*p*).

Where an agreement is enforced against executors, the lease will be so framed as to exempt them from personal liability (*q*).

Damages.

827. The party complaining of the breach of an agreement for a lease, instead of suing for specific performance, can bring an action to recover damages (*r*); but he is not entitled to both remedies at once (*s*); and where non-performance by the lessor is due to defective title, the lessee cannot recover damages for loss of his bargain (*t*), but only the actual expense to which he has been put (*a*); but, if the default on the part of the lessor is

(*l*) *Hill* v. *Barclay* (1811), 18 Ves. 56, 63; *Tunno* v. *Lewis* (1831), 1 L. J. (CH.) 177; *Gregory* v. *Wilson* (1852), 9 Hare, 683; *Pain* v. *Coombs* (1857), 3 Sm. & G. 449, 467. Similarly as to an intending underlessee who has committed acts which would be a forfeiture of the head lease (*Lewis* v. *Bond* (1853), 18 Beav. 85). In such a case the tenant is not entitled to relief under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (*Swain* v. *Ayres* (1888), 21 Q. B. D. 289, C. A.); *contra* where a breach is only apprehended (*Williams* v. *Cheney* (1796), 3 Ves. 59).

(*m*) *McKenzie* v. *Hesketh* (1877), 7 Ch. D. 675; *Burrow* v. *Scammell* (1881), 19 Ch. D. 175.

(*n*) See title EQUITY, Vol. XIII., p. 174; *Huxham* v. *Llewellyn* (1873), 21 W. R. 570, 766; and compare *Garrett* v. *Besborough* (*Earl*) (1839), 2 Dr. & Wal. 441; as to lease for lives, see *Ormond* (*Lord*) v. *Anderson* (1813), 2 Ball & B. 363, 370.

(*o*) *Shepheard* v. *Walker* (1875), L. R. 20 Eq. 659.

(*p*) See title EQUITY, Vol. XIII., p. 174, note (*s*); *Molloy* v. *Egan* (1845), 7 I. Eq. R. 590; *Burke* v. *Smyth* (1846), 3 Jo. & Lat. 193; *Cartan* v. *Bury* (1860), 10 I. Ch. R. 387; *Norris* v. *Jackson* (1862), 3 Giff. 396; *contra*, *Davenport* v. *Walker* (1876), 34 L. T. 168; *Powis* v. *Dynevor* (*Lord*) (1877), 35 L. T. 940. As to forfeiture of a right of renewal by delay or acquiescence, see *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295; *London Corporation* v. *Mitford* (1807), 14 Ves. 41; *Walker* v. *Jeffreys* (1842), 1 Hare, 341; *Mountnorris* (*Earl*) v. *White* (1814), 2 Dow, 459, H. L.; *Drew* v. *Norbury* (*Earl*) (1846), 3 Jo. & Lat. 267; *Morgan* v. *Gurley* (1851), 1 I. Ch. R. 482; and of the landlord's right to compel renewal, see *Pilson* v. *Spratt* (1889), 25 L. R. Ir. 5.

(*q*) *Phillips* v. *Everard* (1831), 5 Sim. 102; *Page* v. *Broom* (1840), 3 Beav. 36; *Stephens* v. *Hotham* (1855), 1 K. & J. 571.

(*r*) As to a breach of contract before the time of performance arrives, see title CONTRACT, Vol. VII., p. 438, note (*c*). As to proof of the plaintiff's readiness to perform the contract on his part, see *Collins* v. *Willmott* (1864), 11 L. T. 340. As to tender of a lease, see *Price* v. *Williams* (1836), 1 M. & W. 6; *Cantley* v. *Powell* (1876), I. R. 10 C. L. 200. As to damages for breach of warranty as to user of premises, see *Milch* v. *Coburn* (1911), 27 T. L. R. 372, C. A., and as to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*

(*s*) *Sainter* v. *Ferguson* (1849), 1 Mac. & G. 286; compare title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 496, note (*i*).

(*t*) This is in accordance with the rule as to contracts for sale of land (*Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158; see titles DAMAGES, Vol. X., pp. 337, 338; SALE OF LAND), which applies to agreements for leases (*Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519, 543; *Hyam* v. *Terry* (1881), 25 Sol. Jo. 371, C. A.).

(*a*) Such as costs incurred in investigating title, whether actually paid or not

wilful, the lessee can also recover damages directly resulting from the default (*b*). The lessor also can recover damages against the lessee for refusing to accept the lease (*c*).

Damages in lieu of specific performance.

Where an agreement for a lease is such that specific performance could be ordered, the court can give damages either in lieu of or in addition to specific performance (*d*); and this is so, notwithstanding that the plaintiff's only remedy is in equity, where, for instance, he cannot sue at law for want of a memorandum in writing, but can sue for specific performance on the ground of part performance (*e*). Conversely, although no case for specific performance exists, the court can give damages for breach of the contract (*f*), but for this purpose there must be a contract enforceable at law (*g*).

SECT. 4.—*Title to be shown by Lessor.*

Investigation of lessor's title.

828. A person who agrees to grant a lease of land impliedly agrees to grant a valid lease; and if at the time when the lease ought to be granted (*h*) he has no title to grant the lease, there is a breach of the agreement, and he is liable to an action at the suit of the intending lessee (*i*), though the damages recoverable in such an

(*Richardson* v. *Chasen* (1847), 10 Q. B. 756; *Hanslip* v. *Padwick* (1850), 5 Exch. 615); or expenses of repairs executed with the lessor's sanction (*Pulbrook* v. *Lawes* (1876), 1 Q. B. D. 284; and see *Bauman* v. *Matthews* (1861), 4 L. T. 783); or a premium paid (*Wright* v. *Colls* (1849), 8 C. B. 150). As to the intending lessee's lien for expenses on the lessor's interest in the premises, see *Middleton* v. *Magnay* (1864), 2 Hem. & M. 233, and title LIEN.

(*b*) *Ward* v. *Smith* (1822), 11 Price, 19; see *Jaques* v. *Millar* (1877), 6 Ch. D. 153; overruled by *Marshall* v. *Berridge* (1881), 19 Ch. D. 333, C. A., on another point; *Day* v. *Singleton*, [1899] 2 Ch. 320, C. A.; compare *Jones* v. *Gardiner*, [1902] 1 Ch. 191.

(*c*) *Oldershaw* v. *Holt* (1840), 12 Ad. & El. 590; *Marshall* v. *Mackintosh* (1898), 46 W. R. 580; and see *Foster* v. *Wheeler* (1888), 38 Ch. D. 130, C. A.

(*d*) See titles EQUITY, Vol. XIII., p. 12, note (*q*), p. 51, note (*m*); SPECIFIC PERFORMANCE; and, as to damages, compare *M'Nulty* v. *Hamill* (1815), Beat. 544.

(*e*) *Lavery* v. *Pursell* (1888), 39 Ch. D. 508, *per* CHITTY, J., at p. 519; see *Lewers* v. *Shaftesbury (Earl)* (1866), L. R. 2 Eq. 270.

(*f*) That is, because each division of the High Court can give all the remedies to which the parties are entitled (*Tamplin* v. *James* (1880), 15 Ch. D. 215, 222, C. A.; *Elmore* v. *Pirrie* (1887), 57 L. T. 333).

(*g*) *Rock Portland Cement Co.* v. *Wilson* (1882), 52 L. J. (CH.) 214; *Re Northumberland Avenue Hotel Co., Sully's Case* (1885), 54 L. T. 76; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A.

(*h*) *De Medina* v. *Norman* (1842), 9 M. & W. 820.

(*i*) *Stranks* v. *St. John* (1867), L. R. 2 C. P. 376; *Hoare* v. *Chambers* (1895), 11 T. L. R. 185, compare *Gwillim* v. *Stone* (1811), 3 Taunt. 433 (explained in *Stranks* v. *St. John, supra*); *Temple* v. *Brown* (1815), 6 Taunt. 60; or the intending lessee can rescind and recover any deposit he has paid, and this he may do before the time for completion if the lessor refuses to produce his title (*Roper* v. *Coombes* (1827), 6 B. & C. 534); but rescission of an executed agreement for a lease will not be ordered on the ground of innocent misrepresentation; see *Angel* v. *Jay*, [1911] 1 K. B. 666; title MISREPRESENTATION AND FRAUD; compare *Milch v. Coburn* (1910), 27 T. L. R. 170, reversed (1911), 27 T. L. R. 372, C. A. But by agreeing to let, the lessor does not impliedly undertake that the land can be used for any purpose without restriction (*Jackson* v. *Cobbin* (1841), 8 M. & W. 790; compare *Erskine* v. *Adeane* (1873), 8 Ch. App. 756). The lessee cannot insist on the lessor getting in all equitable interests before granting the lease; it is sufficient if the equitable owner concurs in the lease (*Reeves* v. *Gill* (1838), 1 Beav. 375). A defect in title will prevent the lessor from obtaining specific performance (*Baskcomb* v. *Phillips* (1859), 29 L. J. (CH.) 380; *Reeves* v. *Greenwich Tanning Co.* (1864), 2 Hem. & M. 54); but the agreement may be

SECT. 4. Title to be shown by Lessor.

action are limited in the manner already stated (*k*). It follows that, apart from statutory or conventional restrictions, an intending lessee is entitled to call for and investigate the title of the intending lessor (*l*).

How restricted by statute.

The right to call for the title to the freehold is, however, excluded by the Vendor and Purchaser Act, 1874 (*m*), and where the lessor is a leaseholder holding by sub-lease, the right to call for the superior leaseholder's title is excluded by the Conveyancing and Law of Property Act, 1881 (*n*). But these provisions do not touch the immediate title of an intending lessor who is himself a leaseholder, and, in accordance with the general rule, he is bound to produce the lease under which he holds and to show his title to it (*o*). The effect is that an intending lessor who claims to demise as freeholder need not show any title; if he proposes to demise as leaseholder, he is not bound to show the title of his immediate or any superior lessor, but only to show his own title to the lease under which he claims.

Limits on statutory restrictions.

The statutory provisions above referred to only apply in the absence of a stipulation to the contrary in the contract (*p*), and they do not prevent the intending lessee from showing *aliunde* that the title to the freehold or leasehold reversion is bad (*q*). Moreover, since the intending lessee can by agreement exclude the statutes, he is

conditional on the lessor's ability to grant the lease (*Abbot* v. *Blair* (1860), 8 W. R. 672). As to inability by a tenant for life to give a covenant binding his successors, see *Dawes* v. *Betts* (1848), 12 Jur. 709.

(*k*) See p. 380, *ante*.

(*l*) *Stranks* v. *St. John* (1867), L. R. 2 C. P. 376, 380, citing 2 Sugden's Vendors and Purchasers, 10th ed., 141 (14th ed., 367, note); see *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21; *Fildes* v. *Hooker* (1817), 2 Mer. 424, 427; *Purvis* v. *Rayer* (1821), 9 Price, 488; compare *Molloy* v. *Sterne* (1838), 1 Dr. & Wal. 585; *Londonderry* (*Marchioness*) v. *Baker* (1861), 3 L. T. 546. Since it is not universally customary to call for the lessor's title, slight circumstances will show that the right has been waived (*Simpson* v. *Sadd* (1854), 3 W. R. 118).

(*m*) 37 & 38 Vict. c. 78, s. 2, which provides that on a contract to grant a term of years, whether to be derived out of a freehold or leasehold estate, the intended lessee shall not to be entitled to call for the title to the freehold. This applies to a lease of an easement, such as a right of way (*Jones* v. *Watts* (1890), 43 Ch. D. 574, C. A.).

(*n*) 44 & 45 Vict. c. 41, s. 13, which provides that on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(*o*) The reversion referred to in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 13, is the reversion to the lease out of which the sub-lease is to be derived (*Gosling* v. *Woolf*, [1893] 1 Q. B. 39, 40).

(*p*) See the provisions referred to in notes (*m*) and (*n*), *supra*. They are excluded by a stipulation that the lessor shall deliver an abstract, and then the lessee is entitled to have the abstract verified in the usual way, and to have an acknowledgment or covenant for production of any deeds which will be required to show his own title subsequently (*Re Pursell and Deakin's Contract*, [1893] W. N. 152). In all cases where a lessee is intending to spend a substantial sum of money on the property, the statutory restriction on his right to call for the lessor's title should be excluded by express stipulation in the agreement.

(*q*) *Jones* v. *Watts*, *supra*. If the objection to title is specific and litigation results, the lessee can require the production of documents which are in the lessor's possession (*ibid.*).

treated, for the purpose of notice, as if he had the ordinary right to investigate title, and he will be affected with constructive notice of matters which he would have discovered, if he had made such investigation (*r*).

SECT. 4. Title to be shown by Lessor.

SECT. 5.—*Consents Necessary.*

Consents necessary.

829. If the property to be demised is copyhold, the licence of the lord of the manor is required in cases where the term of the lease exceeds one year, unless the special custom of the manor authorises a lease for a longer period without licence (*s*). If the property is held under a lease which contains a covenant against underletting without consent, the lessor's consent in writing must be obtained before the date when the underlease is to be granted (*t*). If this is not done, the intending underlessee can repudiate the agreement (*a*).

Part III.—Leases.

SECT. 1.—*Requisites for Creation of Leases.*

SUB-SECT. 1.—*Leases for Three Years and under.*

Creation of lease for three years or less.

830. A lease for a term not exceeding three years from the making of it, whereby there is reserved to the landlord during the term a rent of two third parts at least of the full improved value of the demised premises, may be made either verbally (*b*), or by writing under hand only (*c*). For this purpose the term is taken as not exceeding three years if at the time of the agreement it may last for less than that period, although it may also last for more (*d*).

(*r*) That is, his position is the same as if, before the statutes, he had agreed not to call for the title (*Patman* v. *Harland* (1881), 17 Ch. D. 353, 358 ; *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, 397, C. A. ; compare *Imray* v. *Oakshette*, [1897] 2 Q. B. 218, 225, C. A.).

(*s*) See p. 344, *ante*. For a form of licence see Encyclopædia of Forms and Precedents, Vol. V., p. 226.

(*t*) See p. 576, *post*. If liquidated damages are fixed in case the licence is refused, this does not give the underlessor the option of not applying for the licence (*Long* v. *Bowring* (1864), 33 Beav. 585).

(*a*) *Forrer* v. *Nash* (1865), 35 Beav. 167. If he has been in occupation he is under no liability to restore the premises to their original condition (*Fawkner* v. *Booth* (1893), 10 T. L. R. 83, C. A.).

(*b*) A verbal lease may be made by any words showing the intent to give exclusive possession for the term; compare *Maldon's Case* (1584), Cro. Eliz. 33 ; and see p. 337, *ante*.

(*c*) Statute of Frauds (29 Car. 2, c. 3), s. 2, which excepts leases of the nature mentioned in the text from the requirement of writing imposed by *ibid.*, s. 1 (see the text, *infra*). A lease for three years or less is within the exception, notwithstanding that it contains an agreement or option for a further term beyond the three years (*Rollason* v. *Leon* (1861), 7 H. & N. 73 ; *Hand* v. *Hall* (1877), 2 Ex. D. 355, C. A.).

(*d*) The Statute of Frauds (29 Car. 2, c. 3), s. 1, only applies where the tenancy, if good, must of necessity last more than three years (*Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, 458, C. A.).

SECT. 1. Requisites for Creation of Leases.

Hence yearly (*e*) and other periodic tenancies may be created by parol notwithstanding that, unless determined by notice, they will continue beyond three years. The three years are computed from the day of the making of the lease, and if the term does not commence at once (*f*), it must expire, or be capable of expiring, within three years from that day (*g*).

SUB-SECT. 2.—*Leases for over Three Years.*

Creation of lease for more than three years.

831. Under the Statute of Frauds (*h*) all leases of messuages, manors, lands, tenements, or hereditaments, must be in writing and signed by the parties making or creating the same, or their agents thereunto lawfully authorised in writing; otherwise they have the force and effect of leases at will only (*h*). Consequently, having regard to the exception from this provision already noticed (*i*), leases for any term exceeding three years were required to be in writing. The Real Property Act, 1845 (*k*), added the further provision that a lease required by law to be in writing should be void at law unless made by deed. Hence, to be effectual at law, a lease which will necessarily last for more than three years from its date, or which, though for a shorter term, does not reserve a rent equal to two-thirds of a rack-rent, must be under seal (*l*).

Leases of incorporeal hereditaments.

832. Where an incorporeal hereditament is appurtenant to a corporeal hereditament, it will pass under a demise of it, however made, and therefore, if the lease can be made by parol, it is effectual as regards the incorporeal hereditament (*m*). But where the incorporeal hereditament is demised by itself, the lease, to be valid at law, must be made by deed (*n*). Where the incorporeal hereditament

(*e*) *Hammond* v. *Farrow*, [1904] 2 K. B. 332, *per* WILLS, J., at p. 335.

(*f*) The exception referred to in note (*c*), p. 383, *ante*, is not confined to leases commencing at the time when they are made (*Ryley* v. *Hicks* (1725), 1 Stra. 651).

(*g*) *Rawlins* v. *Turner* (1700), 1 Ld. Raym. 736; *Foster* v. *Reeves*, [1892] 2 Q. B. 255, C. A., *per* Lord ESHER, M.R., at p. 257.

(*h*) 29 Car. 2, c. 3, s. 1.

(*i*) See note (*c*), p. 383, *ante*.

(*k*) 8 & 9 Vict. c. 106, s. 3.

(*l*) In practice an instrument under seal is always signed, but such an instrument is not within the Statute of Frauds (29 Car. 2, c. 3), and signature is not essential (*Aveline* v. *Whisson* (1842), 4 Man. & G. 801; *Cherry* v. *Heming* (1849), 4 Exch. 631; *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361, 368). See titles CONTRACT, Vol. VII., p. 361 (*m*); DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 384, note (*o*).

(*m*) *Beaudely* v. *Brook* (1607), Cro. Jac. 189, 190; *Skull* v. *Glenister* (1864), 16 C. B. (N. S.) 81; compare *Bridgland* v. *Shapter* (1839), 5 M. & W. 375; and see *Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875, 883.

(*n*) *Hewlins* v. *Shippam* (1826), 5 B. & C. 221, 229; *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, 842; see *Saunders* v. *Owen* (1698), 2 Salk. 467. As to rights of shooting, see *Bird* v. *Higginson* (1835), 2 Ad. & El. 696; affirmed (1837), 6 Ad. & El. 824, Ex. Ch.; several fishery (*Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875, 882); a ferry (*Mayfield* v. *Robinson* (1845), 7 Q. B. 486); tithes (*Swadling* v. *Piers* (1621), Cro. Jac. 613); tolls (*Partridge* v. *Ball* (1697), 1 Ld. Raym. 136; *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336, 338; *Bridgland* v. *Shapter*, *supra*, at p. 380); lease of warren without the land (*Somerset* (*Duke*) v. *Fogwell*, *supra*, at p. 883; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 246. If a statute requires the lease to be in writing, it need not also be under seal by virtue of the Real Property Act, 1845 (8 & 9 Vict. c. 106),

is demised with land to which it is not appurtenant by a lease not under seal, and the lease would be valid as to the land alone, it is not made void as to the land by the inclusion of the incorporeal hereditament (*o*); though if the rent reserved is an entire rent, no part of it is recoverable at law (*p*).

SUB-SECT. 3.—*Operation of Invalid Lease as an Agreement.*

Invalid lease operating: (i.) as agreement for lease;

833. A lease for a term exceeding three years or at a rent less than two-thirds of a rack-rent, if created otherwise than by deed, is construed as an agreement for a lease (*q*), and specific performance of the agreement will be ordered, provided that it is in other respects capable of this remedy (*r*); and where the lessee has entered, the right to specific performance is sufficient to give the parties respectively rights equivalent to the legal rights, and place them under obligations equivalent to the legal obligations, of lessor and lessee (*s*). In equity the lease is deemed to have been effectively granted, and for practical purposes the parties are in the same position as if the lease were valid at law (*t*).

(ii.) as tenancy from year to year.

Where the above equitable doctrine does not apply, the effect of entry under the void lease, if followed by payment of rent, is to create a tenancy from year to year upon the terms of the instrument so far as applicable to such a tenancy (*u*).

Invalid lease of incorporeal hereditaments.

A lease of an incorporeal hereditament by an instrument not under seal seems to be subject to the same considerations, and operates as a valid lease in equity, provided that the lessee has entered into enjoyment under it and that specific performance would be ordered (*a*). But apart from this doctrine, if the lessee has entered into enjoyment, and has thus received the consideration for his

s. 3 (*Shepherd* v. *Hodsman* (1852), 18 Q. B. 316; *Markham* v. *Stanford* (1863), 14 C. B. (N. S.) 376); see the Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 57 (as to which see the Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51), s. 3); and as to leases of ferries, see title FERRIES, Vol. XIV., p. 558.

(*o*) *R.* v. *Hockworthy* (*Inhabitants*) (1837), 7 Ad. & El. 492.

(*p*) *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336, 338; *Bird* v. *Higginson* (1835), 2 Ad. & El. 696; compare *Doe* d. *Griffiths* v. *Lloyd* (1800), 3 Esp. 78 (where premises are let at an entire rent, and a part of the premises cannot be legally demised, the whole demise is void).

(*q*) *Bond* v. *Rosling* (1861), 1 B. & S. 371; *Tidey* v. *Mollett* (1864), 16 C. B. (N. S.) 298; *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.) 421; compare *Burton* v. *Reevell* (1847), 16 M. & W. 307 (on the repealed stat. (1884) 7 & 8 Vict. c. 76).

(*r*) *Parker* v. *Taswell* (1858), 2 De G. & J. 559.

(*s*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, 14, C. A.; compare *Drury* v. *Macnamara* (1855), 5 E. & B. 612 (which probably would not now be followed).

(*t*) The result is that to a considerable extent the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, has been nullified; see *Furness* v. *Bond* (1888), 4 T. L. R. 457; but, as regards other persons than the lessor and lessee, the want of a legal estate in the lessee by reason of the invalidity of the demise might be important; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 378, note (*t*).

(*u*) *Clayton* v. *Blakey* (1798), 8 Term Rep. 3; 1 Smith, L. C., 11th ed., 127; and other cases cited at p. 441, *post*.

(*a*) See *Lowe* v. *Adams*, [1901] 2 Ch. 598.

SECT. 1. Requisites for Creation of Leases.

bargain, he is bound by the stipulations of the instrument so far as they apply to the period of his enjoyment (*b*).

SECT. 2.—*Contents and Operation of Lease.*

Contents of lease.

834. The usual contents of a lease by deed are the date, the names and descriptions of the parties, the consideration, the operative words, the parcels or description of the property demised, the exceptions and reservations, the habendum, the reddendum, the tenant's covenants, the landlord's covenants, and the conditions. The matters before the habendum are called the "premises" (*c*). They may also include recitals, but recitals are unusual in a lease. If any reference is necessary to a power under which the lease is granted, this is inserted in the operative words (*d*). The habendum defines the duration of the term, and the reddendum the amount of the rent (*e*). The contents of a lease by instrument under hand are in substance the same, but they are not so formally expressed (*f*).

Date.

835. A lease by deed takes effect from the date of delivery (*g*). *Primâ facie* the date which it bears is the date of delivery; but evidence is admissible to show that it was in fact delivered on a different date (*h*).

Consideration.

836. Where the only consideration for the lease consists in the rent and lessee's covenants, it is usual, though not necessary, to insert a reference to these in the premises; where there is an additional consideration, such as a fine or premium, it is essential to mention this in the premises (*i*).

(*b*) *Thomas* v. *Fredricks* (1847), 10 Q. B. 775; *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403; and compare *Wilkinson* v. *Torkington* (1837), 2 Y. & C. (EX.) 726 (as to recovery of rent).

(*c*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 381, 473. As to supplying a word, see *Wright* v. *Dicksons* (1813), 1 Dow, 141, 147, H. L. For various forms of leases, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 190 *et seq.*

(*d*) For forms of leases under statutory and other powers, see Encyclopædia of Forms and Precedents, Vol. VII., p. 641.

(*e*) In case of contradiction between the habendum and reddendum, the habendum prevails (*Matthews* v. *Smallwood*, [1910] 1 Ch. 777, 784).

(*f*) As to a reference to "covenants" in a lease not under seal, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 475. As to the effect of collateral parol agreement, see *ibid.*, p. 44. Evidence of custom is excluded where the lease is clear (*Re Stroud and the East and West India Docks and Birmingham Junction Rail. Co.* (1849), 8 C. B. 502, 531). As to the meaning of technical terms, see titles CUSTOM AND USAGES, DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 449, *ibid.*, p. 264. As to statutory meanings, see *Smith* v. *Wilson* (1832), 3 B. & Ad. 728, 733.

(*g*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 382, 445; Co. Litt. 46 b.

(*h*) *Steele* v. *Mart* (1825), 4 B. & C. 272, 279, 280.

(*i*) Both to insure the due operation of the deed and to satisfy the statutory provisions; see p. 396, *post*. If a lease prepared in pursuance of an agreement for a lease is tendered to the lessee for execution, he is not bound to execute it unless the consideration is truly stated (*Vonhollen* v. *Knowles* (1844), 12 M. & W. 602). As to lien for unpaid premium, see *Shepheard* v. *Beetham* (1877), 6 Ch. D. 597.

SECT. 2. Contents and Operation of Lease.

837. The relation of landlord and tenant is one of contract (*k*), but, so far as the lease vests in the tenant the right to the exclusive possession of the premises, it operates as a conveyance. The usual word for this purpose is "demise," but neither this word, nor any formal words of conveyance, are necessary. Provided the instrument shows the intent of the parties that the one shall divest himself of the possession and the other come into the possession for a determinate time, either immediately or in the future, it operates as a lease (*l*); and this is so whether it is in the ordinary form of a demise, or in the form of a covenant (*m*) or agreement (*n*), or in the form of an offer to let or take on certain terms and an acceptance appearing on correspondence (*o*).

Demise.

838. The property comprised in the lease, including easements, and the exceptions and reservations, the term of the lease, and the reservation of rent, are discussed elsewhere (*p*). The remainder of the lease consists of the tenant's and the landlord's covenants (*q*) and the conditions.

Covenants.

The tenant's covenants are intended to provide for payment of rent (*r*), rates, and taxes (*s*); for the maintenance (*t*) and insurance (*u*) of the premises; for any suitable restraint on the user of them (*v*); for restraint on assigning and subletting (*a*); and

(*k*) See p. 335, *ante*.

(*l*) *Morgan* d. *Dowding* v. *Bissell* (1810), 3 Taunt. 65, 67; *Wilkinson* v. *Hall* (1837), 3 Bing. (N. C.) 508, 533; *Duxbury* v. *Sandiford* (1898), 80 L. T. 552, C. A., and cases cited in noté (*c*), p. 367, *ante*. If exclusive possession is to be given, an instrument though in form a licence will operate as a lease (*Doe* d. *Pritchard* v. *Dodd* (1833), 5 B. & Ad. 689, 692; see *Hall* v. *Seabright* (1669), 1 Mod. Rep. 14; *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724, 739).

(*m*) *Whitlock* v. *Horton* (1605), Cro. Jac. 91; *Tisdale* v. *Essex* (1614), Hob. 34; *Drake* v. *Munday* (1631), Cro. Car. 207; *Richards* v. *Sely* (1676), 2 Mod. Rep. 79; *Right* d. *Basset* v. *Thomas* (1763), 3 Burr. 1441, 1446; see *Fenny* d. *Eastham* v. *Child* (1814), 2 M. & S. 255, 257.

(*n*) See *Lovelock* v. *Franklyn* (1846), 8 Q. B. 371. An agreement which is in effect an undertaking that tenants shall be found, and a guarantee of a sum equal to the proposed rents, does not create a tenancy (*Taylor* v. *Jackson* (1846), 2 Car. & Kir. 22).

(*o*) *Chapman* v. *Bluck* (1838), 4 Bing. (N. C.) 187; see *Jones* v. *Reynolds* (1841), 1 Q. B. 506.

(*p*) See pp. 411 *et seq.*, pp. 434 *et seq.*, pp. 464 *et seq.*, *post*.

(*q*) As to what words amount to a covenant, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 475; *Miles* v. *Tobin* (1867), 17 L. T. 432, 435. As to the effect of recitals, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 463. Where on the fair construction of the language of the lease an obligation is imposed on one party, this creates an express, and not merely an implied, covenant (*Re Cadogan and Hans Place Estate, Ltd., Ex parte Willis* (1895), 73 L. T. 387, C. A., *per* RIGBY, L.J., at p. 390); and as to the construction of covenants, see title DEEDS AND OTHER INSTRUMENTS, Vol X., pp. 441, 475 *et seq.*; *Ellis* v. *Kerr*, [1910] 1 Ch. 529; *Napier* v. *Williams*, [1911] 1 Ch. 361; and as to the construction being most strongly against the covenantor, see also *Love* v. *Pares* (1810), 13 East, 80, 87.

(*r*) See p. 467, *post*.

(*s*) See p. 488, *post*.

(*t*) See p. 505, *post*.

(*u*) See p. 519, *post*.

(*v*) See p. 515, *post*.

(*a*) See p. 575, *post*.

SECT. 2. Contents and Operation of Lease.

for the yielding up of the premises at the determination of the lease (*b*).

The landlord's covenants provide for quiet enjoyment (*c*); and for payment of rates and taxes, and for maintenance of the premises, so far as these obligations are to be borne by him.

The conditions include a power of re-entry on non-payment of rent or breach of covenant (*d*). Provisions for renewal of the lease (*e*), and for an option for the tenant to purchase (*f*), usually take the form of covenants by the landlord, and provision for determination of the lease during the currency of the term, if desired, is inserted among the conditions (*g*). In addition, special covenants may require to be inserted to suit the particular nature or circumstances of the demised property (*h*).

Usual covenants.

839. An agreement for a lease should specify the covenants and provisoes which are to be inserted in the lease (*i*); if it does not do so, or if it provides that the usual and proper covenants and provisions are to be inserted (*j*), the parties can require the insertion of such covenants and provisoes only as (1), in the case of ordinary property, are usual generally (*k*); or (2), in the case of special property, such as leases of public-houses, or mines, are usual in leases of similar property, either generally, or in the same district (*l*); or (3), in the

(*b*) See p. 556, *post*.
(*c*) See p. 523, *post*.
(*d*) See p. 530, *post*.
(*e*) See p. 393, *post*.
(*f*) See p. 390, *post*.
(*g*) See p. 393, *post*. A condition means something upon breach of which the interest may be determined before the appointed period (*Taylor* v. *Martindale* (1842), 1 Y. & C. Ch. Cas. 658, 662).

(*h*) As to implied covenants or covenants arising by construction, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 477; *Bealey* v. *Stuart* (1862), 7 H. & N. 753 (where an agreement by a lessor to supply material—chlorine still-waste—for use in a factory implied an obligation on the lessee to accept and pay for it). Where the licensee of a stall is to have the exclusive right of exhibiting and selling certain goods, this will be enforced by injunction (*Altman* v. *Royal Aquarium Society* (1876), 3 Ch. D. 228).

(*i*) As to an agreement for a lease, subject to such clauses as the lessor chooses to insert, see *Plunkett* v. *Dease* (1846), 10 I. Eq. R. 124; or, subject to conditions to be settled by a third person, see *Gourlay* v. *Somerset* (*Duke*) (1815), 19 Ves. 429. As to clauses to be inserted in renewal of leases, see *Ricketts* v. *Bell* (1847), 1 De G. & Sm. 335; *Vance* v. *Ranfurley* (*Earl*) (1850), 1 I. Ch. R. 321.

(*j*) Whichever form the agreement takes, the effect in this respect has been said to be the same (*Church* v. *Brown* (1808), 15 Ves. 258, 271; *Propert* v. *Parker* (1832), 3 My. & K. 280; *Blakesley* v. *Whieldon* (1841), 1 Hare, 176, 181); though if the agreement is silent as to covenants, it may be that the lessor is not entitled to limit his liability under the implied covenant for quiet enjoyment by inserting the usual express limited covenant (*Colhoun* v. *Foyle College* (*Trustees*), [1898] 1 I. R. 233, C. A.).

(*k*) *Church* v. *Brown*, *supra*, at p. 267; *Hampshire* v. *Wickens* (1878), 7 Ch. D. 555, 561. If the lease is to contain "proper covenants," those covenants only are to be inserted which will secure the full effect of the contract (*Jones* v. *Jones* (1806), 12 Ves. 186, 189; *Blakesley* v. *Whieldon*, *supra*). The question what are usual and proper covenants can be determined on a summons under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) (*Re Anderton and Milner's Contract* (1890), 45 Ch. D. 476).

(*l*) See as to public-houses, *Bennett* v. *Womack* (1828), 7 B. & C. 627; *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52, 59; *Hampshire* v. *Wickens*, *supra*. As to

case of a particular estate, are known to be always inserted (*m*). What these covenants and provisoes are is a question of fact to be decided upon an examination of the leading books of precedents (*n*), or upon the evidence of conveyancers and others familiar with the practice generally, or with the practice in the particular district (*o*), or on the particular estate (*m*). The covenants and provisoes which may be regarded as usual in all cases are (*p*):—covenants by the lessee to pay rent; to pay taxes, except such are ultimately charged by statute on the landlord (*q*); to keep and deliver up the premises in repair (*r*); and to allow the landlord to enter and view the state of repair (*s*); the usual qualified covenant by the landford for quiet enjoyment (*t*); and a proviso for re-entry on non-payment of rent (*a*).

Unusual covenants.

840. A covenant or proviso which tends to abridge or qualify the estate vested by the lease in the lessee is not allowed to be inserted as a usual covenant (*b*); and on this ground it has been held that a covenant against assigning or underletting without consent (*c*), and a proviso for re-entry on bankruptcy (*d*), or on

mines see *Hodgkinson* v. *Crowe* (1875), L. R. 19 Eq. 591; *Strelley* v. *Pearson* (1880), 15 Ch. D. 113. As to agricultural leases see *Bell* v. *Barchard* (1852), 16 Beav. 8.

(*m*) *Canadian Pacific Railway* v. *Toronto Corporation*, [1905] A. C. 33, P. C.

(*n*) *Hampshire* v. *Wickens* (1878), 7 Ch. D. 555, 561. Where by statute certain covenants are to be implied in every lease, unless otherwise expressly provided, it seems that these become "usual and proper"; see *Colhoun* v. *Foyle College (Trustees)*, [1898] 1 I. R. 233, C. A. (as to the unlimited covenant for quiet enjoyment implied by the Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict. c. 154), s. 41).

(*o*) *Hodgkinson* v. *Crowe*, *supra*; *Hart* v. *Hart* (1881), 18 Ch. D. 670, 695.

(*p*) See 5 Davidson, Precedents in Conveyancing, 3rd ed., Part I., 53; *Hampshire* v. *Wickens*, *supra*, at p. 561.

(*q*) See *Bennett* v. *Womack* (1828), 7 B. & C. 627 (where there was to be a "net rent" with usual covenants); *Parish* v. *Sleeman* (1860), 1 De G. F. & J. 326, 332 (rent "free of all outgoings"); *Canadian Pacific Railway* v. *Toronto Corporation*, *supra*.

(*r*) *Doe* d. *Dymoke* v. *Withers* (1831), 2 B. & Ad. 896, 903; *Sharp* v. *Milligan* (No. 2) (1857), 23 Beav. 419, 422. Compare *Burrel* v. *Harrison* (1691), 2 Vern. 231.

(*s*) And in a mining lease, reservation of liberty for the lessor and his agents to examine the workings (*Blakesley* v. *Whieldon* (1841), 1 Hare, 176).

(*t*) See *Colhoun* v. *Foyle College* (*Trustees*), *supra*.

(*a*) *Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622, 626.

(*b*) *Church* v. *Brown* (1808), 15 Ves. 258, 264; *Blakesley* v. *Whieldon*, *supra*, at p. 180; *Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622, 625. But originally it was a disputed point whether the covenant against assignment was "usual" or not (*Morgan* v. *Slaughter* (1793), 1 Esp. 8; *Folkingham* v. *Croft* (1796), 3 Anst. 700; *Vere* v. *Loveden* (1806), 12 Ves. 179; *Browne* v. *Raban* (1808), 15 Ves. 528; see *Blakesley* v. *Whieldon*, *supra*, at p. 181). The covenant will be inserted where the lease is in substitution for one containing a restriction on assignment (*Bell* v. *Barchard* (1852), 16 Beav. 8).

(*c*) *Henderson* v. *Hay* (1792), 3 Bro. C. C. 632; *Church* v. *Brown*, *supra*; *Hampshire* v. *Wickens*, *supra*; *Bishop* v. *Taylor & Co.* (1891), 60 L. J. (Q. B.) 556. It makes no difference that the agreement does not mention "assigns" of the lessee (*Buckland* v. *Papillon* (1866), L. R. 1 Eq. 477, 482; affirmed, 2 Ch. App. 67, 71). Similarly, in a lease to contain "proper covenants," a covenant against assigning or underletting will not be inserted (*Eadie* v. *Addison* (1882), 52 L. J. (CH.) 80); but a covenant against underletting with a proviso for re-entry is not unreasonable (*Haberdashers' Co.* v. *Isaac* (1857), 3 Jur. (N. S.) 611).

(*d*) *Hodgkinson* v. *Crowe* (1875), L. R. 19 Eq. 591; *Hyde* v. *Warden* (1877),

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breach of covenant generally, are not usual (*e*). The following covenants and provisoes have also been held to be unusual (*f*):—A covenant by lessee to rebuild and repair (*g*); exception from the covenant to repair of damage by fire or tempest (*h*); a covenant by the lessee to insure (*i*); or not to carry on a particular trade (*k*); a condition that assignments or underleases shall be registered with the lessor's solicitor and a fee paid to him (*l*); and a covenant by the lessor to rebuild in case of destruction by fire or tempest, with a condition that on default the rent should cease (*m*).

SECT. 3.—*Option to Purchase.*

Nature of option to purchase lessor's interest.

841. A lease may confer upon the lessee an option to purchase the interest of the lessor in the demised premises. This usually takes the form of a covenant by the lessor that, if the lessee within a specified period shall give to the lessor notice in writing of a specified

3 Ex. D. 72, 82, C. A. But an express proviso for re-entry on the bankruptcy of the lessee (*Roe* d. *Hunter* v. *Galliers* (1787), 2 Term Rep. 133), or on execution being levied against him (see *Davis* v. *Eyton* (1830), 7 Bing. 154), is lawful.

(*e*) *Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622. This has not been altered by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, notwithstanding that the danger of actual forfeiture has been thereby substantially diminished (*Re Anderton and Milner's Contract* (1890), 45 Ch. D. 476). The rule applies to leases of special property, such as mining leases (*Hodgkinson* v. *Crowe*, *supra*), and public-house leases (*Re Lander and Bagley's Contract*, [1892] 3 Ch. 41), as well as to ordinary leases. Formerly it was held that a proviso for re-entry on bankruptcy (*Haines* v. *Burnett* (1859), 27 Beav. 500) was a usual proviso in a lease of a public-house; and though a proviso for re-entry if any other business than a licensed victualler's is carried on is not "usual" on the grant of a lease, yet it may be treated as usual for the purpose of assignment (*Bennett* v. *Womack* (1828), 7 B. & C. 627).

(*f*) Since the question whether a particular covenant is usual is one of fact (see *Bennett* v. *Womack*, *supra*; *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52), it is possible for the accepted list of usual covenants to be varied (see *Hampshire* v. *Wickens* (1878), 7 Ch. D. 555, *per* JESSEL, M.R., at p. 561); but while this is so in theory, in practice it is difficult to procure the necessary evidence.

(*g*) *Doe* d. *Dymoke* v. *Withers* (1831), 2 B. & Ad. 896, 903.

(*h*) *Sharp* v. *Milligan* (No. 2) (1857), 23 Beav. 419; see *Kendall* v. *Hill* (1860), 6 Jur. (N. S.) 968. But in *Doe* d. *Ellis and Medwin* v. *Sandham* (1787), 1 Term Rep. 705, a covenant to repair with such an exception was found as a fact to be usual. Compare *Crosse* v. *Morgan* (1889), 60 L. T. 703 (where the words "or other casualty" were rejected as being uncertain, although the exception of damage by fire or tempest was admitted by the lessor).

(*i*) See *Cosser* v. *Collinge* (1832), 3 My. & K. 283; 5 Davidson, Precedents in Conveyancing, 3rd ed., Part I., 53, n.

(*k*) *Propert* v. *Parker* (1832), 3 My. & K. 280; *Van* v. *Corpe* (1834), 3 My. & K. 269; and certainly it is not usual in a neighbourhood where trade is usually carried on (*Wilbraham* v. *Livesey* (1854), 18 Beav. 206, 210). In *Doe* d. *Bute* (*Marquis*) v. *Guest* (1846), 15 M. & W. 160, a stipulation in the agreement that the premises should not be used except for a specified manufactory, and that usual covenants should be inserted, did not authorise the insertion of an affirmative covenant by the lessee that he would carry on the manufactory.

(*l*) *Brookes* v. *Drysdale*, *supra*.

(*m*) *Doe* d. *Ellis and Medwin* v. *Sandham*, *supra*; see *Medwin* v. *Sandham* (1789), 3 Swan. 685. As to covenants in leases of special kinds of property, see as to farming leases) p. 564, *post*; (as to public-house leases), p. 571, *post*. As to mining leases, see title MINES, MINERALS, AND QUARRIES.

length of his desire to purchase the fee simple, or other the interest of the lessor in the premises, the lessor will on payment of a specified purchase price, and of any arrears of rent, convey the demised premises to the lessee (*n*). The option, if exercised, will create an interest in the land in favour of the lessee or his assigns, and though the covenant giving the option is binding as between lessor and lessee without regard to the rule against perpetuities (*o*), yet, in order that the interest in the land may be effectively created as against the successors in title of the lessor, the option must be so framed as to be exercisable only within the time allowed by the rule, that is, if the term of the lease exceeds twenty-one years, the option must be restricted, if no life is mentioned, to twenty-one years, or otherwise, to the duration of a life or lives in being and twenty-one years after (*p*).

Conditions precedent to exercise of option.

842. Any matters which by the terms of the option are made conditions precedent to its exercise must be strictly observed. Thus the notice must be given within the specified period (*q*), and if payment of the purchase-money at the expiration of the notice is made a condition precedent, the payment must be duly made (*r*). But it is not essential that the lessee shall have performed all the stipulations of the lease, unless such performance is made a condition precedent (*s*). Provided that at the time when the option is exercised the lease is still current—that is, that it has not been already determined for breach of covenant—the exercise of the option creates the relation of vendor and purchaser. Pending completion, the rights and liabilities incident to the relation of landlord and tenant are suspended, and the lessor is not, subsequently to such exercise, entitled to terminate the lessee's rights as purchaser for breach of covenant (*t*). Where an option is given to the lessor to purchase the lessee's interest, a purchase of such

(*n*) See Encyclopædia of Forms and Precedents, Vol. VII., p. 198.

(*o*) *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12, C. A.; and the lessee is entitled to damages against the lessor and his estate for breach of the covenant to convey (*Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.

(*p*) *Woodall* v. *Clifton*, [1905] 2 Ch. 257, C. A.; compare *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 582, C. A.; and see title PERPETUITIES.

(*q*) *Riddell* v. *Durnford* (1893), 37 Sol. Jo. 267, where six calendar months' previous notice in writing was held to mean at least six months' notice expiring before the date of purchase; but the lessor may by conduct waive any delay (*Pegg* v. *Wisden* (1852), 16 Beav. 239).

(*r*) *Ranelagh* (*Lord*) v. *Melton* (1864), 2 Drew. & Sm. 278; *Weston* v. *Collins* (1865), 34 L. J. (CH.) 353; see *Dawson* v. *Dawson* (1837), 8 Sim. 346; *Brooke* v. *Garrod* (1857), 3 K. & J. 608; 2 De G. & J. 62 (an option of purchase in a will); *contra* if payment is not a condition precedent (*Mills* v. *Haywood* (1877), 6 Ch. D. 196, C. A.).

(*s*) Thus the option may be exercised notwithstanding that there has been a breach by the lessee of a covenant to insure (*Green* v. *Low* (1856), 22 Beav. 625). When the option is subject to a condition that the lessee shall in the meantime have "duly" paid his rent, "duly" does not mean punctually, and if all rent is paid up to the exercise of the option, a slight delay is immaterial (*Starkey* v. *Barton*, [1909] 1 Ch. 284).

(*t*) *Raffety* v. *Schofield*, [1897] 1 Ch. 937.

SECT. 3. Option to Purchase.

interest in a part of the premises will not prevent the subsequent exercise of the option as to the remainder (*a*).

How and by whom exercisable.

843. The terms of the option usually require that it shall be exercised in writing, but this requirement, even where not expressed, is implied, since it is the intention that the resulting contract shall be binding on both parties (*b*). If the option is given to the lessee and his assigns, it is only exercisable by the person in whom the term is vested, and consequently cannot be exercised by an equitable assignee of the term (*c*). On the death of the lessee the benefit of the option passes with the lease as part of his personal estate (*d*). Where the lease is granted by trustees, notice must be given to all the trustees or the survivors of them (*e*).

Effect of exercise of option.

844. When the option is duly exercised a contract arises for the sale and purchase of the demised premises, and the usual consequences of such a contract follow. Thus, if the lessor's interest is a freehold interest, it is treated in equity as converted into personal estate, and the conversion operates retrospectively as from the date of the lease, so that, if the lessor has died in the meantime, the purchase-money forms part of his personal estate (*f*). Consequently the exercise of the option, if followed by the completion of the purchase, deprives the lessor's heir or devisee of the property without compensation, but until completion the heir or devisee continues to be entitled to the rents and profits (*g*). This doctrine, however, applies only between the persons interested in the real and personal estate of the lessor. It is not to be extended, and it does not apply between lessor and lessee as vendor and purchaser, so as, in the event of the premises being burnt down before the exercise of the option, to give to the lessee the insurance moneys arising under a policy taken out by the lessor (*h*).

(*a*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 12, which overrules *Sparrow* v. *Cooper* (1833), Hayes & Jo. 404.

(*b*) *Birmingham Canal Co.* v. *Cartwright* (1879), 11 Ch. D. 421, 434; but the parties may waive this requirement: compare *Beatson* v. *Nicholson* (1842), 6 Jur. 620.

(*c*) *Friary Holroyd and Healey's Breweries, Ltd.* v. *Singleton*, [1899] 1 Ch. 86 (though the lessor may waive strict compliance with the terms of the option); reversed on facts, [1899] 2 Ch. 261, C. A.

(*d*) *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, C. A.

(*e*) *Sutcliffe* v. *Wardle* (1890), 63 L. T. 329. As to how far trustees can give an option of purchase, see p. 348, *ante*. As to companies and corporations, see *Clay* v. *Rufford* (1852), 5 De G. & Sm. 768; *Re Female Orphan Asylum* (1867), 17 L. T. 59. The notice may be served on the infant heir of the lessor (*Woods* v. *Hyde* (1862), 31 L. J. (CH.) 295).

(*f*) *Lawes* v. *Bennett* (1785), 1 Cox, Eq. Cas. 167, 171; *Collingwood* v. *Row* (1857), 26 L. J. (CH.) 649. It is the same whether the lessor dies testate or intestate, and notwithstanding that the option is only exercisable after his death (*Re Isaacs, Isaacs* v. *Reginall*, [1894] 3 Ch. 506).

(*g*) *Townley* v. *Bedwell* (1808), 14 Ves. 591. As to the effect of a specific devise of the property by the lessor, either before or after the date of the lease giving the option, see title EQUITY, Vol. XIII., p. 111.

(*h*) *Edwards* v. *West* (1878), 7 Ch. D. 858; but the lessee is entitled to the proceeds of a policy taken out by himself, and if, owing to the lessor having also taken out a policy, the loss is apportioned between the two policies, the lessor must account for what he receives to the lessee (*Reynard* v. *Arnold* (1875), 10 Ch. App. 386).

SECT. 4.—*Option to Renew Lease.*

SECT. 4. Option to Renew Lease.

Option for future lease.

845. A lease which creates a tenancy for a term of years may confer on the lessee an option to take a lease for a further time (*i*). The option will pass to the lessee's trustee in bankruptcy (*k*), and its exercise is not necessarily restricted to the duration of the original term (*l*). An assignee of the reversion takes with notice of the option and is bound by it (*m*); and, if the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, except as to the renewal (*a*).

SECT. 5.—*Option to Determine Lease.*

By whom option exercisable.

846. A lease for a term of years may contain an option for the parties (*b*) or one of them to determine the lease at a stated time or times before the expiration of the term (*c*). Usually such an option is expressly made exercisable by the lessee only, and if the lease is silent as to the person who is to exercise it, it can only be exercised by the lessee (*d*). If the lease has been assigned, the option is exercisable by the person in whom the term is for the time being vested (*e*). An option exercisable by the lessor passes

(*i*) *Moss* v. *Barton* (1866), L. R. 1 Eq. 474; see *Austin* v. *Newham*, [1906] 2 K. B. 167. Similarly a lease for a fixed term may contain an option for a further yearly tenancy with the same covenants (*Brown* v. *Trumper* (1858), 26 Beav. 11; *Jones* v. *Nixon* (1862), 1 H. & C. 48); and *vice versâ* (*Hersey* v. *Giblett* (1854), 18 Beav. 174 (where it was held that the term ran from the commencement of the yearly tenancy); but the right to the lease may be lost by delay (*Nunn* v. *Truscott* (1849), 3 De G. & Sm. 304). If the lessee continues in possession by himself or his undertenant after the original term without exercising his option, he is liable for the rent in an action for use and occupation (*Christy* v. *Tancred* (1840), 7 M. & W. 127: *Waring* v. *King* (1841), 8 M. & W. 571). If the lease does not state by whom the option is to be exercisable, it will be exercisable by the lessee only (*Lewis* v. *Stephenson* (1898), 67 L. J. (Q. B.) 296). For form of such option, see Encyclopædia of Forms and Precedents, Vol. VII., p. 197. As to covenants for renewal, see also p. 461, *post*.

(*k*) *Buckland* v. *Papillon* (1866), 2 Ch. App. 67.

(*l*) *Moss* v. *Barton*, *supra*.

(*m*) *Lewis* v. *Stephenson*, *supra*.

(*a*) *Lewis* v. *Stephenson*, *supra*; see *Austin* v. *Newham*, *supra*.

(*b*) A lease which is determinable "if the parties think fit" can be determined only by the consent of both parties (*Fowell* v. *Tranter* (1864), 3 H. & C. 458; see *Colton* v. *Lingham* (1815), 1 Stark. 39).

(*c*) If the option is exercisable by the lessor, and the lessee sells and assigns the lease with a stipulation that the purchase-money is to be returned if the lessor determines the lease and the assignee "leaves the house," the money is returnable if the tenancy is legally determined, notwithstanding that the assignee in fact remains in the house as a member of the family of the new tenant (*Lucas* v. *Rideout* (1868), L. R. 3 H. L. 153). For forms of option to determine tenancy, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 167, 269.

(*d*) *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, overruling on this point *Goodright* d. *Hall* v. *Richardson* (1789), 3 Term Rep. 462; see *Dann* v. *Spurrier* (1802), 7 Ves. 231, 236; *Doe* d. *Webb* v. *Dixon* (1807), 9 East, 15; *Price* v. *Dyer* (1810), 17 Ves. 356, 363; *Fallon* v. *Robins* (1865), 16 I. Ch. R. 422; compare *Powell* v. *Smith* (1872), L. R. 14 Eq. 85. A lease for three, six, or nine years is a lease for nine years determinable by the lessee at the end of three or six years (*Goodright* d. *Hall* v. *Richardson*, *supra*; compare *Ferguson* v. *Cornish* (1760), 2 Burr. 1032; 3 Term Rep. 463, n. (a)).

(*e*) Consequently if he cannot be found, neither the lessee nor a previous

SECT. 5. Option to Determine Lease.

with the reversion to his devisee, although expressed to be exercisable by either of the parties, "his executors or administrators" (*f*).

Conditions of option.

847. Since the exercise of the option by the lessee gets rid of the covenant to pay rent during the residue of the term, the requirements of the proviso conferring the option must be strictly observed (*g*). If the terms of the option require that the lessee shall have paid all arrears of rent and performed the covenants on his part, such payment and performance are a condition precedent to the exercise of the option (*h*). The period when the lease may be determined is to be reckoned from the commencement of the term, not from the date of the lease (*i*).

Crown lease.

In a Crown lease an option exercisable by the Commissioners of Woods and Forests can be exercised by any two of them (*k*).

Release of option.

848. If the option is contained in a lease under seal, it can only be released at law by an instrument under seal (*l*), but in equity the form of release is immaterial if it is made for value (*m*). Under a power to surrender and deliver up the premises at stated periods a formal surrender is not required (*a*), and, although the notice of surrender is required to be in writing, the surrender may be proved by oral admission of the tenant (*b*)

SECT. 6.—*Completion.*

SUB-SECT. 1.—*Counterpart and Duplicate.*

Lease and counterpart.

849. In order that each party may have access to the actual words of a lease it is usual for two copies to be executed (*c*). If each copy

assignee can determine the lease (*Seaward* v. *Drew* (1898), 67 L. J. (Q. B.) 322). A lessee who sublets for a term exceeding his own term cannot determine his own term in exercise of an option contained in his lease (*Phipos* v. *Callegari* (*G. & B.*) (1910), 54 Sol. Jo. 635).

(*f*) *Roe* d. *Bamford* v. *Hayley* (1810), 12 East, 464 (especially if the notice is to be given to the other party, his heirs, executors, or administrators); compare *Legg* d. *Scot* v. *Benion* (1738), Willes, 43 (where the option was exercisable only by the representatives of a party dying within the term).

(*g*) *Cadby* v. *Martinez* (1840), 11 Ad. & El. 720 (where notice was given for Midsummer instead of Michaelmas). If the notice determining the lease is to be in writing, notice by parol is not sufficient (*Legg* d. *Scot* v. *Benion, supra*); but the notice may be in the form of a notice to quit (see p. 449, *post*) referring to the determinable nature of the lease (*Giddens* v. *Dodd* (1856), 3 Drew. 485).

(*h*) *Porter* v. *Shephard* (1796), 6 Term Rep. 665; *Grey* v. *Friar* (1854), 4 H. L. Cas. 565. But where the option is exercisable, "the lessee having first paid the rent and performing"—not "having performed"—the covenants, apparently it will be sufficient if they are performed after the exercise of the option (*Seaward* v. *Drew, supra*). The lessor is entitled to sue for rent accrued and breach of covenant committed before the determination, notwithstanding that the lease is thereupon to be void (*Blore* v. *Giulini*, [1903] 1 K. B. 356).

(*i*) *Bird* v. *Baker* (1858), 1 E. & E. 12.

(*k*) *Coombes* v. *Dutton* (1839), 5 M. & W. 469; see title CONSTITUTIONAL LAW, Vol. VII., pp. 122, 153.

(*l*) *Goodright* d. *Nicholls* v. *Mark* (1815), 4 M. & S. 30.

(*m*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 416, 424.

(*a*) *Carleton* v. *Herbert* (1866), 14 W. R. 772.

(*b*) *Slatterie* v. *Pooley* (1840), 6 M. & W. 664; *Martin* v. *Doherty* (1880), 6 L. R. Ir. 194.

(*c*) As to the formalities of execution—signing, sealing, and delivery—see

SECT. 6 Completion.

is executed by both lessor and lessee, the lease is said to be executed in duplicate, and each part is as efficacious as the other (*d*); and this is frequently done in the case of a lease not under seal. Where the lease is under seal it is usual for one copy, called the lease, to be executed by the lessor alone and handed to the lessee; and for the other, called the counterpart, to be executed by the lessee alone and handed to the lessor (*e*). The counterpart thus executed by the lessee is primary evidence of the lease as against the lessee and

title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 382—386; as to execution by corporations, *ibid.*, p. 390; by agents, *ibid.*, p. 394. The lessor is not entitled to witness by himself or his agent the execution of the counterpart by the lessee (*Borradaile* v. *Smart* (1857), 5 W. R. 270; compare *Essex* v. *Daniell*, *Daniell* v. *Essex* (1875), L. R. 10 C. P. 538; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 8). As to delivery of a deed as an escrow, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 387—390. An agreement for a lease, though signed by the intending lessor, will not bind him if he does not sign with the intention of contracting or if he does not deliver the agreement to the intending lessee (*Pattle* v. *Hornibrook* [1897] 1 Ch. 25). Attestation, though not in general essential for the validity of a deed, is necessary where a deed requires to be registered (Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), Sched. I., r. 2, and Land Registry (Middlesex Deeds) Rules, 1892 (Stat. R. & O. Rev., Vol. VII., p. 128), r. 6; Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 6). The execution of the lease by the lessor is a condition precedent to the lessee becoming liable on the covenants (*Cardwell* v. *Lucas* (1836), 2 M. & W. 111; *Toler* v. *Slater* (1867), L. R. 3 Q. B. 42, 45; see *Cooch* v. *Goodman* (1842), 2 Q. B. 580, 598; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 402); unless the circumstances show that the lessee has assumed liability (*Babington* v. *O'Connor* (1887), 20 L. R. Ir. 246). But where a lease purports to be granted by a tenant for life and remainderman according to "their respective estates and interests," and the lessee enters, the tenant for life can sue him on the covenants notwithstanding that he alone has executed it (*How* v. *Greek* (1864), 3 H. & C. 391). As to alterations in deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 411; in leases under hand, *ibid.*, p. 431. An addition which expresses only what the law would imply is not necessarily treated as an alteration (*Doe* d. *Waters* v. *Houghton* (1827), 1 Man. & Ry. (K. B.) 208 (addition of "house and buildings" after "farm"). A memorandum added to a deed before execution is part of the deed (*Griffin* v. *Stanhope* (1617), Cro. Jac. 454, 456); and similarly if added after signature, but before sealing and delivery (*Lyburn* v. *Warrington* (1816), 1 Stark. 162). In *Frogley* v. *Lovelace* (*Earl*) (1859), John. 333, this effect of a memorandum was overlooked. Such a memorandum may vary the term as stated in the lease (*Weak* d. *Taylor* v. *Escott* (1821), 9 Price, 595); and as to a variation of the commencement of the term by an indorsed memorandum, see *Cowne* v. *Garment* (1834), 1 Bing. (N. C.) 318. A lease under which the lessee has entered, but which has been rendered void by a material alteration, may be used to show the terms of his occupation (*Hutchins* v. *Scott* (1837), 2 M. & W. 809). An alteration made in the term before execution—as from a yearly tenancy to a term of one year—will be treated as expunging covenants applicable only to the cancelled tenancy, unless, perhaps, in the event of the tenancy continuing beyond one year (*Strickland* v. *Maxwell* (1834), 2 Cr. & M. 539). As to rectification and cancelling of leases, see titles EQUITY, Vol. XIII., pp. 22 *et seq.*; MISTAKE.

(*d*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 381; *Colling* v. *Treweek* (1827), 6 B. & C. 394, 398.

(*e*) During the continuance of the term the lease belongs to the lessee, and the counterpart to the lessor (*Hall* v. *Ball* (1841), 3 Man. & G. 242, 253). After the term has come to an end, whether by effluxion of time, or surrender, or forfeiture, the lessee is entitled to retain the lease if it contains covenants by the lessor which have not been performed (*Hall* v. *Ball*, *supra*); and also, apparently, whether there are such covenants or not (*Elworthy* v. *Sandford* (1864), 3 H. & C. 330; *Knight* v. *Williams*, [1901] 1 Ch. 256).

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persons claiming through him (*f*), and as against strangers (*g*); and as against all persons it is presumptive evidence of the execution of a lease (*h*). If no counterpart has been executed, or if the counterpart cannot be found, the lessor is entitled to inspect and take a copy of the lease in the possession of the lessee (*i*). The lease is regarded as the principal instrument, and, in case of discrepancy between the lease and the counterpart, the provisions of the lease prevail, provided the lease is consistent with itself; if it is inconsistent, it can be corrected by reference to the counterpart (*k*).

When counterpart essential.

850. Powers of leasing, whether arising under statute or contained in a settlement, usually require that a counterpart of the lease shall be executed by the lessee. In the case of statutory powers it is generally also provided that the execution of the lease shall be sufficient evidence of the execution of the counterpart (*l*); where the power does not contain such provision, then, since the execution of the counterpart is essential to the validity of the lease, a memorandum of such execution should be indorsed on the lease and signed by the lessor (*m*). The lease and the counterpart need not be executed at the same time (*n*).

SUB-SECT. 2.—*Stamps.*

Scale applicable.

851. A lease of land must be stamped in accordance with the subjoined scale, the stamp being in general *ad valorem* on the rent and on any premium or other consideration (*o*). But the scale only

(*f*) *Roe* d. *West* v. *Davis* (1806), 7 East, 363, 364; *Pearse* v. *Morrice* (1832), 3 B. & Ad. 396; see *Munn* v. *Godbold* (1825), 3 Bing. 292, 294. Provided the counterpart is properly stamped, the lessee cannot object that the lease is not properly stamped (*Paul* v. *Meek* (1828), 2 Y. & J. 116).

(*g*) *Doe* d. *Egremont* (*Earl*) v. *Pulman* (1842), 3 Q. B. 622; *Homes* v. *Pearce* (1858), 1 F. & F. 283.

(*h*) *Hughes* v. *Clark* (1851), 10 C. B. 905; *Houghton* v. *Kœnig* (1856), 18 C. B. 235; see *Burleigh* v. *Stibbs* (1793), 5 Term Rep. 465.

(*i*) *Doe* d. —— v. *Slight* (1832), 1 Dowl. 163; *Elworthy* v. *Sandford* (1864), 34 L. J. (EX.) 42, *per* MARTIN, B., at p. 44. Formerly this was not allowed (*Woodcock* v. *Worthington* (1827), 2 Y. & J. 4; *Portmore* (*Lord*) v. *Goring* (1827), 4 Bing. 152). Similarly an occupier against whom an action of ejectment for forfeiture is brought, and who has no copy of the lease, is entitled to an order for inspection of the counterpart and to take a copy (*Doe* d. *Child* v. *Roe* (1852), 1 E. & B. 279, where, however, the report treats the lessors as holding the lease). See generally title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 67 *et seq.*

(*k*) Shep. Touch. 53; *Burchell* v. *Clark* (1876), 2 C. P. D. 88, 93, 97, C. A.; *Matthews* v. *Smallwood*, [1910] 1 Ch. 777. Where a lessee has been in receipt of rent from undertenants, and can produce the counterpart, this may be admitted in evidence without accounting for the absence of the lease (*Doe* d. *Manton* v. *Austin* (1832), 2 Moo. & S. 107).

(*l*) See, for instance, Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 4, 46, 48; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (4).

(*m*) Sugden on Powers, 8th ed., 826.

(*n*) *Fryer* v. *Coombs* (1840), 11 Ad. & El. 403.

(*o*) (1) For any definite term not exceeding a year—

	£	s.	d.
Of any dwelling-house or part of a dwelling-house at a rent not exceeding the rate of £10 per annum .	0	0	1

applies where the instrument actually operates as a lease or an agreement for a lease; hence a written acknowledgment by the

	£ s. d.
(2) For any definite term less than a year—	
(a) Of any furnished dwelling-house or apartments where the rent for such term exceeds £25 . .	0 5 0
(b) Of any lands or tenements except or otherwise than as aforesaid	The same duty as a lease for a year at the rent reserved for the definite term.
(3) For any other definite term or for any indefinite term—	
Of any lands or tenements:	
Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security:	
In respect of such consideration . . .	The same duty as a conveyance on sale for the same consideration.
Where the consideration, or any part of the consideration, is any rent—	
In respect of such consideration:	
If the rent, whether reserved as a yearly rent or otherwise, is at the rate or average rate:	

	If the term does not exceed 35 years, or is indefinite.	If the term exceeds 35 years, but does not exceed 100 years.	If the term exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding £5 per annum . .	0 1 0	0 6 0	0 12 0
Exceeding £5 and not exceeding £10 . .	0 2 0	0 12 0	1 4 0
£10 ,, ,, £15 . .	0 3 0	0 18 0	1 16 0
£15 ,, ,, £20 . .	0 4 0	1 4 0	2 8 0
£20 ,, ,, £25 . .	0 5 0	1 10 0	3 0 0
£25 ,, ,, £50 . .	0 10 0	3 0 0	6 0 0
£50 ,, ,, £75 . .	0 15 0	4 10 0	9 0 0
£75 ,, ,, £100 . .	1 0 0	6 0 0	12 0 0
£100— For every full sum of £50, and also for every fractional part of £50 thereof	0 10 0	3 0 0	6 0 0

	£ s. d.
(4) Of any other kind whatsoever not hereinbefore described	1 0 0

This is the scale in the Schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39), under heading "Lease or Tack," doubled, save in the case of the fixed duty of 1*d.*, in accordance with the Finance (1909-10) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 8), s. 75. The words "average rate" are intended to meet the case of a varying rent: see *Pearson* v. *Inland Revenue Commissioners* (1868), L. R. 3 Exch. 242. The *ad valorem* duty is chargeable on the rent where the amount of the rent, though not specified in the lease, is immediately ascertainable (*Parry* v. *Deere* (1836), 5 Ad. & El. 551). The duty is not increased by the reservation of an uncertain sum equivalent to the premium paid by the lessor for insurance: see *Wilson* v. *Smith* (1844), 12 M. & W. 401. A lease for a term of 99 years determinable with lives is a lease for a term which exceeds 35 years and not for an indefinite term (*Mount Edgcumbe* (*Earl*) v. *Inland Revenue Commissioners*, [1911] 2 K. B. 24). The fixed duty of 1*d.*, and the duty on a lease of a furnished dwelling-house or apartments for any definite term less than a year may be denoted by an adhesive stamp, which must be cancelled by the person by whom

SECT. 6. Completion.

How far scale applies.

tenant of an existing tenancy (*p*), or a written proposal made in the course of negotiations for a lease which can be made by parol (*q*), can be given in evidence without a stamp. Where, however, there is a lease in writing, the scale applies notwithstanding that the lease might have been made by parol (*r*). Where the lease is made subsequently to, and in conformity with, a duly stamped agreement for a lease for any term not exceeding thirty-five years, or for any indefinite term (*s*), it requires a 6*d.* stamp only (*t*).

Consideration: (i.) Lump sums; (ii.) Produce or other goods;

852. Where the consideration for the lease consists wholly or partly of a lump sum of money, the stamp in respect of that sum is the same as on a conveyance on sale for the same consideration (*a*), and it is immaterial whether the sum is payable to the lessor or to some other person (*b*). Where the consideration consists wholly or partly of produce or other goods, the *ad valorem* duty is charged on the value of the produce or goods (*c*); and where it is stipulated that the value shall amount at least to, or shall not exceed, a given sum, or where a permanent rate of conversion is fixed, the value of the produce or goods is to be estimated at the given sum or according to the permanent rate (*d*). For the purpose of the *ad*

the instrument is first executed (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 78 (1)). Where such an instrument (not being letters or correspondence) is not stamped at or before execution, every person who executes, or prepares or is employed in preparing it, is liable to a fine of £5; (*ibid.*, s. 78 (2)). The lease must be stamped in accordance with the law at the time of execution, not at the nominal date (*Clarke* v. *Roche* (1877), 3 Q. B. D. 170). As to stamping leases after the prescribed time for stamping has expired, and as to the effect of the want or insufficiency of the stamp, see title REVENUE. As to the exemption of Crown leases, see title CONSTITUTIONAL LAW, Vol. VII., pp. 154, 168.

(*p*) *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; see *Hill* v. *Ramm* (1843), 5 Man. & G. 789; and an instrument by which an occupier admits that he is in possession "upon sufferance only," and agrees to give up possession when required, does not require to be stamped (*Barry* v. *Goodman* (1837), 2 M. & W. 768).

(*q*) *Bethell* v. *Blencowe* (1841), 3 Man. & G. 119.

(*r*) *Prosser* v. *Phillips*, Buller, Law of Nisi Prius, 7th ed., 269.

(*s*) Such agreements require to be stamped as leases; see p. 377, *ante*.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 75 (2). The agreement stamped with the *ad valorem* stamp must be produced to the revenue officer for inspection, and the lease will then be stamped with a "duty-paid denoting stamp" under *ibid.*, s. 11. The denoting room at Somerset House, London, is No. 85, Inland Revenue Department.

(*a*) That is, 10*s.* per cent. where the consideration does not exceed £500, and £1 per cent. where it exceeds that sum (Stamp Act, 1891 (54 & 55 Vict. c. 39). Schedule "Conveyance or Transfer on Sale"; Finance (1909-10) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 8), s. 75; Revenue Act, 1911 (1 Geo. 5, c. 2), s. 15); the lease must contain a certificate that the transaction does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration other than rent exceeds £500; but if the rent exceeds £20 a year the duty on the premium is £1 per cent. whatever its amount (*ibid.*). For the full scale for conveyances on sale, see title SALE OF LAND. Formerly a lessee could recover a premium which he had paid, but which was not expressed in the lease; see *Gingell* v. *Purkins* (1850), 4 Exch. 720. At the present time a penalty is imposed for failure to state the true consideration (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 5).

(*b*) Where, *e.g.*, a lease, agreed to be granted to a builder, is at his direction granted to a purchaser of the house, who pays the ground rent to the lessor, and the price of the house to the builder (*A.-G.* v. *Brown* (1849), 3 Exch. 662).

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 76 (1).

(*d*) *Ibid.*, s. 76 (2).

valorem stamp duty, a statement in the lease of the value of the consideration is sufficient, unless it is shown to be incorrect (*e*).

(iii.) Value of improvements;

In general, where an instrument is made for a consideration which attracts *ad valorem* duty, and also for any further valuable consideration, it is to be stamped separately in respect of each consideration (*f*). But where, in a lease, the further consideration consists in the lessee having previously made, or of a covenant by him to make, any substantial improvement of or addition to the demised premises, or of any covenant relating to the matter of the lease, no duty is payable in respect of the further consideration (*g*), unless the covenant is one which, if contained in a separate deed, would be chargeable with *ad valorem* stamp duty, in which case the lease must bear this additional *ad valorem* stamp (*h*).

(iv.) Penal rents;

A lease requires no further stamp in respect of a penal rent, or increased rent in the nature of a penal rent, reserved or made payable under it; nor by reason of its being made in consideration of the surrender of an existing lease of the same premises (*i*).

(v.) Increased rents.

An instrument whereby the rent reserved by a duly stamped lease is increased is chargeable as a lease in consideration of the additional rent (*k*).

Collateral and incidental stipulations.

353. An instrument containing or relating to several distinct matters requires to be stamped as a separate instrument in respect of each of such matters (*l*); and this may happen, in the case of a lease, either because the instrument operates as separate leases of distinct premises to the same (*m*) or different persons (*n*); or

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 76 (3).

(*f*) *Ibid.*, s. 4 (b). Thus, a lease, such as a mining lease, which reserves a fixed rent, and also a varying rent, is chargeable *ad valorem* on the fixed rent, and with a further duty of 10*s.* on the varying rent. As to rent reserved to cover insurance, see p. 397, *ante*.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 77 (2). Apart from this provision, a covenant in the lease to complete buildings in course of erection would require a deed stamp in addition to the *ad valorem* stamp on the rent (*Re Bolton's Lease* (1870), L. R. 5 Exch. 82).

(*h*) Revenue Act, 1909 (9 Edw. 7, c. 43), s. 8. In *British Electric Traction Co.* v. *Inland Revenue Commissioners*, [1902] 1 K. B. 441, C. A., a tramway was demised at a rent, and the lessees covenanted to pay £4,000 a year for the supply of electric energy. It was held that the covenant related to the matter of the lease and did not attract further duty. The provision just referred to excludes a case of this kind from the Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 77 (2); but it does not impose further duty where there is a covenant to complete or erect buildings, even though the covenant requires the expenditure of a definite sum (54 Sol. Jo. 518).

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 77 (1).

(*k*) *Ibid.*, s. 77 (5).

(*l*) *Ibid.*, s. 4 (a).

(*m*) The mere inclusion in a lease to one lessee of separate premises at separate rents does not necessitate separate stamps, and it is sufficient if there is an *ad valorem* stamp on the aggregate amount of the rents (*Boase* v. *Jackson* (1822), 3 Brod. & Bing. 185; *Blount* v. *Pearman* (1834), 1 Bing. (N. C.) 408; *Parry* v. *Deere* (1836), 5 Ad. & El. 551); but if the remedies for each rent by distress and re-entry are restricted to the premises in respect of which the rent is reserved, the instrument probably operates as though it contained distinct leases, and attracts separate duties; see title REVENUE.

(*n*) *Doe* d. *Copley* v. *Day* (1811), 13 East, 241, 246. If such an instrument bears a stamp suitable only to one demise, evidence is admissible to show to

SECT. 6. Completion.

because, in addition to operating as a lease, it has a further operation not merely incidental to its operation as a lease; where, for instance, it includes a letting of furniture at a separate rent (*o*), or, if it is under seal, a contract for the sale of furniture or other chattels (*p*). An option to purchase property not included in the lease necessitates an agreement stamp (*q*); but an option to purchase the demised property is incidental to the lease, and requires no further stamp (*r*). Similarly, a guarantee in the lease for payment of rent requires no further stamp (*s*), but a guarantee for payment of penalties does (*t*).

Counterpart.

854. Where the stamp duty on a lease does not amount to 5*s.*, a counterpart or duplicate must bear the same stamp as the lease; in any other case it must bear a 5*s.* stamp (*a*). A duplicate must also bear a stamp, to be affixed on application to the Inland Revenue Commissioners, denoting that the original is duly stamped (*b*); but a counterpart of a lease does not require a denoting stamp (*c*).

Denoting stamp.

SUB-SECT. 3.—*Registration.*

(i.) *With Superior Landlord.*

Covenant to register assignments and underleases.

855. Leases for a long term frequently contain a covenant by the lessee, upon any assignment or underletting of the demised premises, or any part thereof, to give notice of the assignment or underlease to the lessor or his solicitor, with particulars of the assignee or underlessee, and to produce the instrument of assignment or underlease and pay a fee—usually of 10*s.* or 21*s.*—for registration of it (*d*); or the covenant may be so framed as to apply to assignments only.

which demise it was intended to apply (*ibid.*). A lease to joint tenants requires only a single stamp (*Cooper* v. *Flynn* (1841), 3 I. L. R. 472).

(*o*) *Coster* v. *Cowling* (1831), 7 Bing. 456. The instrument does not in strictness operate as a lease of the furniture, but as a security for the rent, and is chargeable with further duty accordingly; see p. 341, *ante*.

(*p*) *Corder* v. *Drakeford* (1811), 3 Taunt. 382. If it is not under seal the contract for sale of chattels requires no stamp; see *Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41; but if the instrument operates as a conveyance of the chattels, a conveyance stamp is necessary (*Horsfall* v. *Hey* (1848), 2 Exch. 778; compare *Garnett* v. *Inland Revenue Commissioners* (1899), 81 L. T. 633). Fixtures are not chattels so as to make an agreement for sale exempt from duty, and a lease with an agreement to purchase fixtures must be separately stamped in respect of the agreement; see *Wick* v. *Hodgson* (1827), 12 Moore (C. P.), 213.

(*q*) *Lovelock* v. *Franklyn* (1846), 8 Q. B. 371.

(*r*) *Worthington* v. *Warrington* (1848), 5 C. B. 635.

(*s*) *Price* v. *Thomas* (1831), 2 B. & Ad. 218.

(*t*) *Wharton* v. *Walton* (1845), 7 Q. B. 474.

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule, "Duplicate or Counterpart."

(*b*) *Ibid.*, s. 72; as to denoting stamps, see *ibid.*, s. 11.

(*c*) Counterparts of leases are expressly excepted from the provision of *ibid.*, s. 72, requiring counterparts as well as duplicates to bear a denoting stamp.

(*d*) The covenant is not a "usual covenant" (*Brookes* v. *Drysdale* (1877), 3 C. P. D. 52; and see p. 388, *ante*). But there is no objection to it in regard to validity. It is not affected by the provision of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3, with reference to exacting a fine

(ii.) *Registration in Local Registries.*

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856. When a lease is granted of lands situated in Middlesex a memorial (*e*) of the lease must be registered (*f*) at the Land Registry Office (*g*), except (1) when the lease is at a rack-rent; (2) where the term of the lease does not exceed twenty-one years, and the actual possession and occupation go with the lease; and (3) where the demised premises are chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery (*h*). In Middlesex.

When a lease is granted of lands situate in any of the three ridings of the county of York, including in the East Riding the town of Kingston-upon-Hull, a memorial of the lease must be registered, for the North Riding at Northallerton, for the East Riding at Beverley, and for the West Riding at Wakefield (*i*), except when the lease is for a term not exceeding twenty-one years and is accompanied by actual possession from the making of the lease (*k*). In Yorkshire.

Leases of lands in the Bedford Level require to be registered at the office of the Bedford Level Corporation at Ely, except where the lease is for seven years or under in possession (*l*), and In the Bedford Level.

for licence to assign. For form of such a notice, see Encyclopædia of Forms and Precedents, Vol. VII., p. 696.

(*e*) As to the form of the memorial, see Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), Sched. I.; Land Registry (Middlesex Deeds), Rules, 1892, and title REAL PROPERTY AND CHATTELS REAL. For form of memorial, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 282 *et seq.*

(*f*) The Middlesex Registry Act, 1708 (7 Ann. c. 20), s. 1. The registration of an assignment of the lease does not supply the want of registration of the lease itself (*Honeycomb* d. *Halpen* v. *Waldron* (1736), 2 Stra. 1064).

(*g*) The Middlesex Registry was transferred to the Land Registry Office (Lincoln's Inn Fields, London) by the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64).

(*h*) Middlesex Registry Act, 1708 (7 Ann. c. 20), s. 18. Probably a lease is not to be treated as being at a rack-rent if it contains a covenant by the lessee to build or to improve the property (2 Dart, Vendors and Purchasers, 6th ed., 469). For the purpose of the second exception receipt of rent is not sufficient. There must be actual occupation (*Fury* v. *Smith* (1822), 1 Hud. & B. 735, 751). Copyhold estates are excepted from the Middlesex Registry Act, 1708 (7 Ann. c. 20) (*ibid.*, s. 18), but a lease is not a copyhold interest, and leases of copyhold lands require to be registered in cases where this would be necessary if the lands were freehold (Sugden, Vendors and Purchasers, 14th ed., 732). The City of London is not within the Act (*ibid.*). Land which is registered under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65), is not subject to the Middlesex Registry Acts (Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 127); consequently leases of it need not be registered under the Middlesex Registry Acts.

(*i*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 4. As to the mode of registration and form of memorial, see *ibid.*, ss. 5, 6. For form of memorial see Encyclopædia of Forms and Precedents, Vol. XI., pp. 291 *et seq.* See also Yorkshire Registries Amendment Act, 1884 (48 & 49 Vict. c. 4), and Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26).

(*k*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 28. Copyholds also are excepted, but leases of copyholds must be registered; see note (*h*), *supra*. The city of York is a county by itself, and is not within any of the ridings, and is therefore not within the Yorkshire Registries Acts; nor is land registered under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65): Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 127).

(*l*) Stat. (1663) 15 Car. 2, c. 17, s. 8, according to which the lease is not "of force but from the time when it shall be entered on the registry." Failure

SECT. 6. Completion.

except where the land is situated in the North or Middle Level (*m*).

(iii.) *Registration at the Land Registry.*

Registration at Land Registry.

857. Where a lease is granted for a life or lives, or determinable on a life or lives, or for a term exceeding twenty-one years, the lessee is entitled to be registered as proprietor of the leasehold interest thereby created with absolute title, with good leasehold title, or with possessory title (*n*), unless the lease contains an absolute prohibition against alienation (*o*); and if the land is situated in a district where registration of title is compulsory, then a grant of a lease for a term of forty years or more, or for two or more lives, operates only as an agreement, and does not vest any legal estate in the lessee, until he is registered as proprietor of the lease (*p*).

Leases which need not be registered.

Registration of title to leasehold land is subject to leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, where there is an occupation under such tenancies (*q*), and consequently such leases and tenancies of registered land do not require to be protected by any entry on the register. But where the term of a lease is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with it, the lease can, and should, be protected by entry of notice of it on the register (*r*).

SUB-SECT. 4.—*Costs of Lease.*

(i.) *Liability for Costs.*

Costs of preparing lease.

858. It is the custom for the lessor's solicitor to prepare the lease, and for the lessee to pay the lessor's costs as well as his

to register, however, does not avoid the lease. It only renders it liable to be postponed to a subsequent assurance which is registered (*Hodson* v. *Sharpe* (1808), 10 East, 350); and the unregistered lessee is not entitled to the special privileges conferred by the statute (*Willis* v. *Brown* (1839), 10 Sim. 127). As to the office of registrar under the statute, see *R.* v. *Bedford Level Corporation* (1805), 6 East, 356.

(*m*) Excepted by the North Level Act, 1857 (20 & 21 Vict. c. cix), s. 45, and the Middle Level Act, 1862 (25 & 26 Vict. c. clxxxviii.), s. 10.

(*n*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 11, as varied under the authority of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 22 (6) (b), by the Land Transfer Rules, 1903, rr. 50—67. The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 12, 14, 15, 16, 36, 37, are repealed entirely, and *ibid.*, ss. 11 and 34, in part; see Land Transfer Rules, 1903, r. 67. Where the registration is effected subsequently to the grant of the lease, there must be twenty-one years of the term unexpired at the date of registration. As to registration of title under these Acts, see title REAL PROPERTY AND CHATTELS REAL.

(*o*) Where the lease contains a prohibition against alienation without licence, all interests, rights, and remedies arising upon or by reason of alienation without licence are excepted from the effect of registration (Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 11; Land Transfer Rules, 1903, r. 62). A term created by way of mortgage cannot be registered (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.).

(*p*) Land Transfer Rules, 1903, r. 69, made under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 22 (6) (g), as limited by *ibid.*, s. 24 (1).

(*q*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 18 (7); see *ibid.*, ss. 7, 13.

(*r*) *Ibid.*, s. 50; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.; Land Transfer Rules, 1903, rr. 201—206.

own (*s*). The lessee, by virtue of this custom, is liable to pay the lessor's costs, unless the liability has been excluded by agreement; and the lessor who has paid his own solicitor can recover the money from the lessee as money paid by the lessor to the use of the lessee (*t*). But if, as is usual, the lessor requires a counterpart, he pays the costs of this himself (*a*), unless the lessee has agreed to pay the costs both of lease and counterpart (*b*).

For what costs lessee is liable.

The costs for which the lessee is liable are restricted to those which are properly incident to the preparation and execution of the lease by the lessor, including fees of conveyancing counsel when properly employed (*c*), and of surveyors in respect of the preparation of a plan to be placed on the lease (*d*). The lessor is not entitled to the costs of an agreement or of preliminary negotiations, or of any matters antecedent to instructions for the lease, such as, in the case of a mining lease, the fees of a mining expert who has been consulted on behalf of the intending lessor (*e*), or in other leases, the fees of surveyors incurred by the lessor in negotiating the lease (*f*); nor, in the absence of agreement, is he entitled to charge against the lessee the costs of third parties whose concurrence is necessary for the granting of the lease (*f*). But under a covenant by the lessor to renew the lease at the cost of the lessee at a rent to be determined by a reference, the lessee must pay the costs of the reference and award (*g*).

(ii.) *Solicitor's Remuneration.*

Solicitor's remuneration.

859. The scale of remuneration payable to a lessor's or lessee's solicitor is dealt with elsewhere (*h*).

(*s*) *Grissell* v. *Robinson* (1836), 3 Bing. (N. C.) 10, 15.

(*t*) *Grissell* v. *Robinson, supra*; *Baker* v. *Meryweather* (1849), 2 Car. & Kir. 737; *Re Gray*, [1901] 1 Ch. 239, 243. The lessee will become directly liable to the lessor's solicitor if he instructs or authorises him to prepare the lease (*Webb* v. *Rhodes* (1837), 3 Bing. (N. C.) 732; *Smith* v. *Clegg* (1858), 27 L. J. (EX.) 300; and see title SOLICITORS). If the lease is to be prepared at the expense of the lessor, he both prepares it and pays for it (*Price* v. *Williams* (1836), 1 M. & W. 6, 13). The costs of the agreement include the costs of an inventory of fixtures properly appended to it (*Re Thomas* (1844), 8 Beav. 145).

(*a*) *Re Negus*, [1895] 1 Ch. 73, 81; *Re Gray*, *supra*, at p. 244; see *Jennings* v. *Major* (1837), 8 C. & P. 61; and title CUSTOM AND USAGES, Vol. X., p. 283. Where the scale fee applies, a sum in respect of the costs of the counterpart must be deducted from the payment to the lessor's solicitor (*Re Negus*, *supra*).

(*b*) *Re Newman* (1867), 2 Ch. App. 707; and see *ibid.* as to taxation of the costs at the instance of the lessee. As to taxation of costs generally, see title SOLICITORS.

(*c*) *Re Gray*, *supra*, at p. 244.

(*d*) See *Re Fletcher and Dyson*, [1903] 2 Ch. 688, 694.

(*e*) *Re Gray*, *supra*.

(*f*) *Re Fletcher and Dyson*, *supra*.

(*g*) *Fitzsimmons* v. *Mostyn* (*Lord*), [1904] A. C. 46. As to costs incident to the devolution of title to the reversion, see *Wortham* v. *Dacre* (*Lord*) (1856), 2 K. & J. 437; as to costs occasioned by the state of the lessee's title to renewal, see *Barrett* v. *Pearson* (1812), 2 Ball & B. 189.

(*h*) See title SOLICITORS.

SECT. 7. Entry under Lease.

SECT. 7.—*Entry under Lease.*

Effect of entry under lease.

860. In order to secure the full legal benefit of the lease, the lessee must perfect his title by entry. Until then he has no estate in the land, but only a right, which is known as an *interesse termini* (*i*). This right is assignable (*k*), and it can be released by the lessee to the lessor (*l*), but it has not the ordinary conveyancing incidents of an estate. An assignment of it to the lessor will not operate as a surrender, and since the lessee has no estate, a release to him by the lessor cannot operate by way of enlarging the estate (*m*), though it will extinguish the rent reserved on the lease (*n*). An *interesse termini* neither causes nor prevents a merger (*o*).

The lessee may perfect the lease by entry at any time during the term, and this is not prevented by the death of the lessor. If the lessee dies before entry, entry may be made by his personal representatives or his assigns (*p*).

SECT. 8.—*Concurrent and Future Leases.*

Concurrent leases: (i.) By deed;

861. After a lease has been granted, another lease of the same premises is sometimes granted, the term being either concurrent with or subsequent to that of the existing lease. A concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term (*q*). If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue, and afterwards to possession for the remainder (if any) of his own term. If the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term (*r*).

A concurrent lease not made by deed, and thus incapable of

(*i*) Littleton on Tenures, s. 58; Co. Litt. 46b, 270a; *Copeland* v. *Stephens* (1818),1 B. & Ald. 593, 605; *Doe* d. *Rawlings* v. *Walker* (1826), 5 B. & C. 111, 118; *Hyde* v. *Warden* (1877), 3 Ex. D. 72, 84, C. A.; *Gillard* v. *Cheshire Lines Committee* (1884), 32 W. R. 943, C. A.; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31, 47, C. A. The doctrine does not apply to a lease for life or lives, which is a freehold interest, and the grant of such a lease confers an estate before entry under it (Co. Litt. 270b; *Ecclesiastical Commissioners for England* v. *Treemer*, [1893] 1 Ch. 166, 171). Where a lease is made to two persons, and one is already in possession as tenant, his possession enures for the benefit of both, and the lease gives an immediate estate, and not an *interesse termini* (*Keyse* v. *Powell* (1853), 2 E. & B. 132). Where the tenant is not in actual occupation and the duration of the lease is uncertain, *e.g.*, where the lessor is only tenant for life and the lease is not granted under a power, the possession of the tenant comes to an end with the lease unless he shows an intention to continue it (*Brown* v. *Notley* (1848), 3 Exch. 219).

(*k*) Co. Litt. 46 b, 270 b.

(*l*) *Doe* d. *Rawlings* v. *Walker*, *supra*, *per* BAYLEY, J., at p. 118; *Lewis* v *Baker*, [1905], 1 Ch. 46, 52.

(*m*) *Doe* d. *Rawlings* v. *Walker*, *supra*. But where there is a lease for years, with remainder for years, and the first lessee has entered, the lessor can make a release to the remainderman so as to enlarge his estate (Co. Litt. 270 a).

(*n*) Co. Litt. 270 a.

(*o*) *Hyde* v. *Warden*, *supra*; see *Doe* d. *Rawlings* v. *Walker*, *supra*.

(*p*) Co. Litt. 46 b; *Copeland* v. *Stephens*, *supra*, at p. 606.

(*q*) Shep. Touch., ed. Preston, 276; *Palmer* v. *Thorpe* (1589), Cro. Eliz. 152; *Wordsley Brewery Co.* v. *Halford* (1903), 90 L. T. 89.

(*r*) Bac. Abr., tit. "Leases and Terms for Years" (N.); *Neale* v. *Mackenzie*

SECT. 8. Concurrent and Future Leases.

(ii.) By parol

operating as a grant of the reversion, if it is for a term exceeding the residue of the existing term, is void as to such residue, but confers an *interesse termini* for the excess of the concurrent term over the residue of the existing term, and the concurrent lessee, if he enters at the expiration of the existing term, will then obtain a perfect lease for the remainder of his own term: if, however, the parol concurrent lease is for a term which is less than the residue of the existing term, it is altogether void (*s*). If the original lease comprises only part of the premises demised by the concurrent lease, then, so long as the original term continues, no part of the rent reserved by the concurrent lease can be distrained for or recovered as rent. It cannot be apportioned, and, the lease being void during the first lease as to part of the premises, the reservation of rent is during the same time void. In such circumstances the concurrent lessee can refuse to enter at all; but if he enters on the part of the premises not comprised in the prior lease, he is liable to pay rent for that part in an action for use and occupation (*t*).

Future leases.

862. A lease made to commence at a future date necessarily confers on the lessee only an *interesse termini* until that date arrives and the lessee's title is completed by entry (*a*). The *interesse termini* thus arising is subject to the same rules as the similar right existing under a present lease not perfected by entry. It can be assigned to a third person, and it can be released to the lessor, but it cannot be enlarged into an estate by a release by the lessor (*b*). Where the future lease is to take effect on the termination of a present lease, the reversion and the right to distrain for the rent due under the present lease remain in the lessor (*c*); and although the present lease and the reversionary lease are vested in the same person, yet the estate under the former and the *interesse termini* under the latter remain distinct. The two

(1836), 1 M. & W. 747, 759—762, Ex. Ch. The transfer of the reversion carries the right to rent, and hence the lessor cannot during the second lease recover rent from the first lessee (*Harmer* v. *Bean* (1853), 3 Car. & Kir. 307). If the existing term is prematurely determined by surrender or otherwise, the concurrent lessee is immediately entitled to possession under his lease, by virtue of the estoppel arising under the deed (*Neale* v. *Mackenzie* (1836), 1 M. & W. 747, 762, Ex. Ch.).

(*s*) *Neale* v. *Mackenzie*, *supra*, at p. 760; *Doe* d. *Thomas* v. *Jenkins* (1832), 1 L. J. (K. B.) 190. The surrender of the first term does not accelerate the concurrent parol lease; but it seems that, if the first term is determinable upon an uncertainty, then upon its determination the concurrent parol lease, if then existing, would at once take effect (*Neale* v. *Mackenzie*, *supra*, at p. 761). But since leases for over three years must now be made by deed (see p. 384, *ante*), the doctrine in the text can rarely be of practical importance.

(*t*) *Neale* v. *Mackenzie*, *supra*, at pp. 762—764.

(*a*) See *Doe* d. *Rawlings* v. *Walker* (1826), 5 B. & C. 111, 118; *Smith* v. *Day* (1837), 2 M. & W. 684, 699; *Hyde* v. *Warden* (1877), 3 Ex. D. 72, 84, C. A.; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31, 47, C. A.; *Lewis* v. *Baker*, [1905] 1 Ch. 46, 51; *Llangattock* (*Lord*) v. *Watney*, *Combe*, *Reid & Co.*, *Ltd.*, [1910] 1 K. B. 236, 243, 246, C. A.; affirmed [1910] A. C. 394. As to the effect of the rule against perpetuities on an agreement for future leases for lives, see *Redington* v. *Browne* (1893), 32 L. R. Ir. 347.

(*b*) *Doe* d. *Rawlings* v. *Walker*, *supra*.

(*c*) *Smith* v. *Day*, *supra*.

SECT. 8. Concurrent and Future Leases.

terms are not added together so as to entitle the lessee to the same rights as though he had a present lease for the aggregate term (*d*).

SECT. 9.—*Underleases.*

Underlease for the whole term: (i.) By deed;

863. The lessee of property can, in the absence of agreement restricting his right, underlet it for any period less than the residue of his own term (*e*). But if he purports to underlet by deed for a term equal to (*f*), or greater than, the residue of his own term, this operates as an assignment of his term, and not as an underlease (*g*). Consequently, in such a case, no reversion remains in the underlessor, and he cannot distrain for rent reserved by the underlease (*h*), though he can sue for it as rent, and not merely as an independent sum (*i*). The underlessor, if he is himself an assignee,

(*d*) Thus they cannot be added together to ascertain the "unexpired term" for the purpose of the compensation charge under the Licensing Act, 1904 (4 Edw. 7, c. 23) (*Llangattock* (*Lord*) v. *Watney, Combe, Reid & Co., Ltd.*, [1910] 1 K. B. 236, C. A.); and if the lessee underlets for a period beyond the original term, but within the future term, the *interesse termini* in respect of the future term does not prevent the underlease from operating as an assignment of the original term (see the text, *infra*). An underlessee may obtain for his own benefit a reversionary lease from the head lessor (*Maunsell* v. *O'Brien* (1835), 1 Jo. Ex. Ir. 176).

(*e*) When an underlease is made for the whole term less one day, and the underlessor is trustee for the underlessee of the nominal reversion, the underlessee can on the underlessor's death intestate obtain administration limited to the outstanding day for the purpose of getting it in (*In the Goods of Kingwell* (1899), 81 L. T. 461). The underlease comes to an end with the head lease, and the underlessee does not, in the absence of fresh agreement, become tenant to the head lessor (*Simkin* v. *Ashurst* (1834), 1 Cr. M. & R. 261), or to the new lessee (*Freeman* v. *Jury* (1826), Mood. & M. 19); but, if the underlessor continues to hold as tenant, the yearly under-tenancy also continues (*Pearce* v. *Shard* (1828), 6 L. J. (o. s.) (K. B.) 354; see *Hayes* v. *Fitzgibbon* (1870), 4 I. R. C. L. 500). For a form of underlease, see Encyclopædia of Forms and Precedents, Vol. VII., p. 209.

(*f*) *Parmenter* v. *Webber* (1818), 8 Taunt. 593; *Beardman* v. *Wilson* (1868), L. R. 4 C. P. 57.

(*g*) *Hicks* v. *Downing* (1696), 1 Ld. Raym. 99; *Pluck* v. *Digges* (1829), 5 Bli. (N. S.) 31; *Thorn* v. *Woollcombe* (1832), 3 B. & Ad. 586, 595; *Fawcett* v. *Hall* (1833), Alc. & N. 248, 259, n.; *Wollaston* v. *Hakewill* (1841), 3 Man. & G. 297, 323; *Bryant* v. *Hancock & Co.*, [1898] 1 Q. B. 716, 719, C. A. A sublease by a tenant at will *ipso facto* determines the tenancy at will (*Birch* v. *Wright* (1786), 1 Term Rep. 378, 382), and hence it cannot operate as an assignment; but it creates a tenancy by estoppel as between the parties to the sub-lease (see *Doe* d. *Goody* v. *Carter* (1847), 9 Q. B. 863, 865): a tenant at sufferance can of course create no interest binding on the landlord; compare *Thunder* d. *Weaver* v. *Belcher* (1803), 3 East, 449, 451.

(*h*) *Parmenter* v. *Webber, supra*; *Preece* v. *Corrie* (1828), 5 Bing. 24; *Pascoe* v. *Pascoe* (1837), 3 Bing. (N. C.) 898; *Lewis* v. *Baker*, [1905] 1 Ch. 46. Nor is the rent a rent sec within the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5, so as to attach to it the power of distress given by that statute (—— v. *Cooper* (1768), 2 Wils. 375; *Langford* v. *Selmes* (1857), 3 K. & J. 220; *Lewis* v. *Baker, supra*; compare *Pluck* v. *Digges, supra*). There is no reversion by estoppel (see title ESTOPPEL, Vol. XIII., pp. 373, 403), nor does payment of the sum reserved as rent operate as an attornment so as to give a power of distress (*Hazeldine* v. *Heaton* (1883), Cab. & El. 40).

(*i*) *Baker* v. *Gostling* (1834), 1 Bing. (N. C.) 19, 27; *Clarke* v. *Coughlan* (1841), 3 I. L. R. 427, 431; *Cremen* v. *Johnson* (1846), 9 I. Eq. R. 143, 145, 147; *Pennefather* v. *Stephens* (1847), 11 I. Eq. R. 61, 62; see *Loyd* v. *Langford* (1677), 2 Mod. Rep. 174; *Newcomb* v. *Harvey* (1690), Carth. 161; *Williams* v.

ceases, by virtue of the new assignment effected by the underlease, to be liable on the covenants contained in the original lease, and the underlessee becomes liable (*k*). The underlessee is also, by virtue of the express contract, liable to the underlessor on the covenants in the underlease; but if the underlessor subsequently purports to make an assignment of the original term, these covenants are not enforceable by the assignee (*l*).

(ii.) By parol

If the underlease is one which, considered as an underlease, can be made by parol, and is so made, it cannot operate as an actual assignment for want of a deed (*m*). Possibly it operates as an assignment at law, so that a deed is not required (*n*), or it may be that, since it cannot operate as an assignment, the above doctrine is excluded, and then, in order to give effect to the intention of the parties, it would operate as a lease according to its tenor (*o*). The true effect is, however, doubtful (*p*). The transaction probably operates neither as a lease, nor as an assignment, but the underlessor can sue for the rent on the contract (*q*), or in an action for use and occupation (*r*).

Tenancy from year to year.

864. A tenancy from year to year is regarded, for the purpose of this doctrine, as a tenancy continuing until it is in fact determined, and the tenant can grant an underlease from year to year or for a term of years. So long as the original tenancy lasts it is potentially longer than the underlease, and the underlessor has a reversion by virtue of which he can distrain for the rent reserved on the underlease (*s*).

Liability of underlessee to lessor.

865. There is neither privity of contract nor privity of estate between the head lessor and the underlessee (*t*), and hence the

Hayward (1859), 1 E. & E. 1040; and compare *Smith* v. *Mapleback* (1786), 1 Term Rep. 441.

(*k*) *Beardman* v. *Wilson* (1868), L. R. 4 C. P. 57; see *Palmer* v. *Edwards* (1783), 1 Doug. (K. B.) 187, n.

(*l*) Even if there is a reversion on the underlease by estoppel, the covenants attached to it would not pass by an assignment of the original term (*Norris* v. *Craig* (1895), 43 W. R. 480).

(*m*) See p. 582, *post*.

(*n*) See *Preece* v. *Corrie* (1828), 5 Bing. 24, 27.

(*o*) *Poultney* v. *Holmes* (1720), 1 Stra. 405; *Pollock* v. *Stacy* (1847), 9 Q. B. 1033.

(*p*) *Preece* v. *Corrie*, *supra*, appears to be the only case in which it is suggested that the assignment, being by operation of law, need not be in writing under the Statute of Frauds (29 Car. 2, c. 3), or, since the Real Property Act, 1845 (8 & 9 Vict. c. 106), by deed. Other cases, such as *Pollock* v. *Stacy*, *supra*, assume that it must be by deed; and *Poultney* v. *Holmes*, *supra*, was disapproved in the Court of Exchequer (*Barrett* v. *Rolph* (1845), 14 M. & W. 348, 352), though approved in the Queen's Bench (*Pollock* v. *Stacy*, *supra*). Similarly a parol assignment, void under the statutes, will not be treated as an underlease (*Barrett* v. *Rolph*, *supra*). The point formerly at issue between the Exchequer and the Queen's Bench seems not to have been decided (see *Beardman* v. *Wilson*, *supra*; 2 Wms. Saund. (ed. 1871), p. 834, n.; 1 Smith, L. C., 11th ed., 102).

(*q*) *Preece* v. *Corrie*, *supra*.

(*r*) *Pollock* v. *Stacy*, *supra*; *Beardman* v. *Wilson*, *supra*.

(*s*) *Mackay* v. *Mackreth* (1785), 4 Doug. (K. B.) 213; *Curtis* v. *Wheeler* (1830), Mood. & M. 493; *Pike* v. *Eyre* (1829), 9 B. & C. 909; *Oxley* v. *James* (1844), 13 M. & W. 209, 214; and the principle applies to other periodic tenancies (*Peirse* v. *Sharr* (1828), 2 Man. & Ry. (K. B.) 418).

(*t*) *Berney* v. *Moore* (1791), 2 Ridg. Parl. Rep. 310, 331; and the underlessee

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underlessee is not personally liable for the rent reserved by (*u*), nor on the covenants contained in, the head lease (*a*); but, unless he is protected by the Law of Distress Amendment Act, 1908 (*b*), his goods upon the demised premises are liable to distress for the rent reserved by the head lease (*c*); and, if the head lease contains a proviso for re-entry on breach of covenant, he is liable to be evicted for such a breach (*d*). Moreover, it is the duty of the underlessee, before taking his lease, to inform himself of the covenants which are contained in the head lease, and, if he enters and takes possession of the property, he is bound in equity to observe such of these covenants as are of a negative character (*e*), on the ground that he takes with notice, and he is liable to be restrained by injunction from committing a breach of them (*f*). But the lessee, although personally liable on the covenant, will not be included in the injunction (*g*), unless he has caused or facilitated the breach—where, for instance, he is prohibited by the lease from underletting (*g*), or where he has represented to the underlessee that the act complained of might be done (*h*).

Covenants by underlessee to observe covenants in head lease.

866. Upon the granting of an underlease the obligations of the head lease in respect of the payment of rent and the observance of the covenants, in respect of any of the property in the head lease

has no equity to enforce the provisions of the underlease against the head lessor (*Taylor* v. *Gillott* (1875), L. R. 20 Eq. 682).

(*u*) See *Holford* v. *Hatch* (1779), 1 Doug. (K. B.) 183.

(*a*) *Berney* v. *Moore* (1791), 2 Ridg. Parl. Rep. 310, 323, 331. Originally it was thought that the underlessee might be liable upon the insolvency of the underlessor (*Goddard* v. *Keate* (1682), 1 Vern. 87); but this is not so.

(*b*) 8 Edw. 7, c. 53; see title DISTRESS, Vol. XI., p. 143.

(*c*) The liability of an undertenant is the same in this respect as of a stranger whose goods are on the demised premises at the time when a distress is levied; see title DISTRESS, Vol. XI., p. 132. If the undertenant pays the head rent under threat of distress, he can deduct this from his own rent (see title DISTRESS, Vol. XI., pp. 157, 200); but he cannot claim contribution from an underlessee of another part of the premises demised by the head lease, since the underlessees are not subject to a common demand (*Hunter* v. *Hunt* (1845), 1 C. B. 300; see *Johnson* v. *Wild* (1890), 44 Ch. D. 146); *contra Webber* v. *Smith* (1689), 2 Vern. 103; *Allison* v. *Jenkins*, [1904] 1 I. R. 341 (where contribution was based on salvage)).

(*d*) See *Spencer* v. *Marriott* (1823), 1 B. & C. 457. As to relief of an undertenant against forfeiture, see p. 543, *post*; and as to cases where the undertenant has a remedy against his immediate lessor for breach of the covenant for quiet enjoyment, see p. 523, *post*.

(*e*) *Cosser* v. *Collinge* (1832), 3 My. & K. 283, 287; see *Lewis* v. *Bond* (1853), 18 Beav. 85.

(*f*) See *Wilson* v. *Hart* (1866), 1 Ch. App. 463; *Tritton* v. *Bankart* (1887), 56 L. T. 306; compare *Hall* v. *Ewin* (1887), 37 Ch. D. 74, C. A.; and see *Abbey* v. *Gutteres* (1911), 55 Sol. Jo. 364. The rule applies to the case of an underlease to a tenant from year to year (*Tritton* v. *Bankart, supra*); and, since the underlessee is supposed to examine the title to the head lease, as well as the lease itself, he is also affected with notice of, and is bound in equity by, negative covenants contained in an assignment of the head term, although not contained in the lease itself (*Clements* v. *Welles* (1865), L. R. 1 Eq. 200). These rules as to notice are not abrogated by the statutory restrictions on the underlessee's right to call for his lessor's title (*Patman* v. *Harland* (1881), 17 Ch. D. 353; see p. 382, *ante*).

(*g*) *Moses* v. *Taylor* (1862), 11 W. R. 81.

(*h*) *Tritton* v. *Bankart, supra*.

which is not comprised in the underlease, are usually imposed by express covenant on the underlessor, while the underlessee covenants for payment of his own rent and enters into covenants in respect of the sub-demised property corresponding to those in the head lease; and on either side the covenants may be accompanied by an express covenant of indemnity (*i*).

Covenant to indemnify lessee.

Where the underlessor gives a covenant of indemnity against non-payment of the head rent, payment by the underlessee of his own rent is not a condition precedent to an action by him on the covenant of indemnity (*k*).

For payment of rent.

The question of indemnity is important with reference to the covenant to repair. An independent covenant to repair in the underlease, following the terms of the corresponding covenant in the head lease, is not by itself construed as a covenant of indemnity, and the underlessor cannot recover under it the costs which he has incurred by reason of the underlessee's default, such as costs of defending an action of ejectment and procuring relief against forfeiture (*l*). This result is due to the fact that the operation of the two covenants is different, the measure of damages under each depending on the date of commencement of the head term and sub-term respectively (*m*). If, however, the underlease does not contain an independent covenant to repair, but binds the underlessee to perform the covenant in the head lease, a contract of indemnity is implied, and the underlessor can recover the costs of an action which he has reasonably defended (*n*). It seems that in any case he can recover the expenses of repairs which have been properly effected by him to avoid a forfeiture (*o*); and he can recover substantial damages for breach of the underlessee's covenant to repair, notwithstanding that the head lessor has re-entered for non-payment of the head rent (*p*).

To repair.

867. An intending underlessee should examine the head lease in order to ascertain that the term of the underlease can be validly granted, and that the head lease contains no unduly onerous covenants. If the sub-term is, in fact, longer than the original term, the underlessee cannot, after the underlease has

Necessity for underlessee to inspect head lease.

(*i*) See *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, 382, C. A. A mortgagee by sub-demise, who has gone into possession, may be liable to the mortgagor for forfeiture of the lease (*Perry* v. *Walker* (1855), 24 L. J. (CH.) 319). If an underlessee has caused a forfeiture both of his own and of the head lease he is not entitled to the benefit of a waiver of the forfeiture of the head lease (*Hillier* v. *Parkinson* (1831), 9 L. J. (o. s.) (CH.) 156).

(*k*) *Briant* v. *Pilcher* (1855), 16 C. B. 354.

(*l*) *Penley* v. *Watts* (1841), 7 M. & W. 601; *Walker* v. *Hatton* (1842), 10 M. & W. 249; *Logan* v. *Hall* (1847), 4 C. B. 598, 624; *Clare* v. *Dobson*, [1911] 1 K. B. 35; compare *Short* v. *Kalloway* (1839), 11 Ad. & El. 28. *Neale* v. *Wyllie* (1824), 3 B. & C. 533, *contra*, is overruled.

(*m*) *Walker* v. *Hatton*, *supra*. Consequently the underlessor cannot bring in the underlessee as a third party so as to claim indemnity under R. S. C., Ord. 16, rr. 48, 52 (*Pontifex* v. *Foord* (1884), 12 Q. B. D. 152).

(*n*) *Hornby* v. *Cardwell* (1881), 8 Q. B. D. 329, C. A.

(*o*) *Colley* v. *Streeton* (1823), 2 B. & C. 273.

(*p*) *Davies* v. *Underwood* (1857), 2 H. & N. 570; compare *Clow* v. *Brogden* (1840), 2 Man. & G. 39.

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been granted, obtain compensation (*q*), unless the agreement for the underlease so provides (*r*). After an agreement for an underlease has been entered into, the underlessee, whether he has had a chance of inspecting the head lease or not, cannot refuse to accept the underlease on the ground of the existence of any ordinary covenants (*s*); but he can refuse to accept it on the ground of the existence of unusual and onerous covenants, unless before the agreement he had a fair opportunity of ascertaining for himself the provisions of the lease (*t*).

Agreement for underlease to contain like covenants to those of lease.

868. Where the agreement for an underlease provides that the underlease shall contain the like provisions in all respects as are contained in the head lease, the provisions of the head lease are to be taken as models for those in the underlease, and must be introduced therein with the proper alterations of names and other matters. Consequently a provision against assigning without the consent of the head lessor will become in the underlease a provision against assigning without the consent of the underlessor (*u*); but the frame of the agreement may indicate that certain covenants, such as the covenant against assignment without consent, are to be introduced without modification, and then the consent of the head lessor will be required (*a*). Where a lessee grants an underlease containing a covenant by the underlessee to deliver up the premises and all landlord's fixtures at the end of the sub-term, this does not amount to a representation that he will be at liberty to remove trade fixtures; and hence if the head lease contains a covenant for

(*q*) *Besley* v. *Besley* (1878), 9 Ch. D. 103; *Clayton* v. *Leech* (1889), 41 Ch. D. 103, C. A., where it was pointed out that *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, C. A., went too far in treating *Besley* v. *Besley*, *supra*, as erroneous.

(*r*) *Palmer* v. *Johnson*, *supra*. The fact that other premises are included in the head lease is, if the intending underlessee has not been informed of it, a fatal objection to the underlessor's title (*Fildes* v. *Hooker* (1818), 3 Madd. 193; *Warren* v *Richardson* (1830), You. 1; *Leathem* v. *Allen* (1850), 1 I. Ch. R. 683).

(*s*) *Flight* v. *Barton* (1832), 3 My. & K. 282. "Usual covenants" in this connection means ordinary covenants, not merely "usual covenants" in the strict technical sense; see p. 388, *ante*; compare *Bennett* v. *Womack* (1828), 7 B. & C. 627. For form of agreement for underlease, see Encyclopædia of Forms and Precedents, Vol. VII., p. 171.

(*t*) *Hyde* v. *Warden* (1877), 3 Ex. D. 72, 80, C. A. The same rule applies between vendor and purchaser of leasehold property (*Reeve* v. *Berridge* (1888), 20 Q. B. D. 523, C. A.; *Re White and Smith's Contract*, [1896] 1 Ch. 637; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666, 669; *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487, C. A.); and see title SALE OF LAND. If the agreement for the underlease provides for the insertion of a particular restrictive covenant, this amounts to a representation that the underlessor is entitled to grant a lease with that restriction only, and he is not at liberty to insist on the insertion of a wider covenant contained in the head lease (*Van* v. *Corpe* (1834), 3 My. & K. 269, 277). But although an underlessor may not be able to have specific performance of an agreement for the underlease, by reason of the covenants in the head lease debarring him from granting the underlease in accordance with the agreement, yet if he is ready to grant the underlease, and the underlessee refuses to accept it, he has an action for breach of the agreement, and the underlessee on the other hand, if his enjoyment is interfered with, should have a remedy on the covenant for quiet enjoyment (*Hayward* v. *Parke* (1855), 16 C. B. 295); and see p. 527, *post*.

(*u*) *Williamson* v. *Williamson* (1874), 9 Ch. App. 729.

(*a*) *Haywood* v. *Silber* (1885), 30 Ch. D. 404, C. A.

delivery up of trade fixtures, and the head lessor enforces this by preventing the underlessee from removing them, the latter is without remedy (*b*). SECT. 9. Under-leases.

Part IV.—Premises included in the Demise.

SECT. 1.—*Description.*

869. The parcels in a lease describe the demised property (*c*), and this may be done either by giving a name or some denoting mark to the property—where, for instance, a house in a town is described by the street and number, and then extrinsic evidence is necessary in order to ascertain what is intended by the description (*d*); or it may be denoted by measurements or abuttals (*e*), or by reference to a plan (*f*); and while extrinsic evidence to identify the property is still required, yet the identification is assisted by these descriptions. Where the property is described in more than one of these ways, it is possible that part of the description may be inconsistent with the rest. In this case it becomes necessary to determine which part is to be accepted, and which is to be rejected as a *falsa demonstratio* (*g*). Description of parcels.

870. The word "land," when used in a lease or other assurance, includes, if there is nothing to restrict its technical meaning, all kinds of land, whether arable, meadow, or otherwise (*h*), and Meaning of "land," "woods," and "water."

(*b*) *Porter* v. *Drew* (1880), 5 C. P. D. 143.

(*c*) As to alteration of the description of the premises in a renewed lease, see *Boyle* v. *Olpherts* (1841), 4 I. Eq. R. 241.

(*d*) Similarly, where the property is described by reference to the occupation, the occupation must be ascertained by extrinsic evidence (*Magee* v. *Lavell* (1874), L. R. 9 C. P. 107, 114; see *Paddock* v. *Fradley* (1830), 1 Cr. & J. 90).

(*e*) Abuttals are not necessarily construed strictly, unless the description by abuttals, if correct, would increase the value of the property, and would be an inducement to the lessee to take it (*Roberts* v. *Karr* (1809), 1 Taunt. 495). But where measurements are qualified by the words "more or less," and the abuttals also are given, the abuttals, if supported by the actual occupation, will show the extent of the property (*Neale* d. *Leroux* v. *Parkin* (1794), 1 Esp. 229, 230). Words such as "more or less" (*Cross* v. *Eglin* (1831), 2 B. & Ad. 106, 110) or "thereabouts" (*Davis* v. *Shepherd* (1866), 1 Ch. App. 410, 416, 418) only authorise variations which bear a very small proportion to the amount named (*Day* v. *Fynn* (1609), Owen, 133; *Neale* d. *Leroux* v. *Parkin, supra*; *Davis* v. *Shepherd, supra*). A doubt as to what is intended to be comprised in the parcels may be removed by reference to a recital (*Doe* d. *White* v. *Osborne* (1840), 4 Jur. 941, also reported 9 L. J. (C. P.) 313, 318).

(*f*) As to the effect of a plan, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 467.

(*g*) As to the rule of *falsa demonstratio*, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 465 *et seq.* As to rectifying mistakes in the parcels, see *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363; *Paget* v. *Marshall* (1884), 28 Ch. D. 255.

(*h*) Co. Litt. 4 a; Shep. Touch., ed. Preston, 91; *Cooke* v. *Yates* (1827), 4 Bing.

SECT. 1. Description.

also everything on or under the soil; all buildings erected on it, and all mines and minerals beneath it (*i*). A lease of woods includes not only the trees, but the land whereon they grow (*k*). Words which are appropriate for granting part of the profits of the land do not carry the land itself—for instance, a grant to dig turves (*k*), or a grant of water, which ordinarily gives only the fishery in the water (*l*). Where the soil under the water is intended to pass the expression "land covered with water" should be used (*m*). But a grant of all the profits of land is equivalent to a grant of the land itself (*n*).

Meaning of "house," "messuage," "appurtenances,"

By a lease of a "house," stables and outbuildings occupied with and necessary for the convenient occupation of the house will pass (*o*), and also a courtyard, garden, and orchard (*p*). The word "messuage" has the same meaning as "house" (*q*). In the expression "house and premises," the word "premises" refers only to matters intimately connected with the house (*r*). The words

90. If a particular kind of land is mentioned, such as meadow or marsh land, only that kind will pass (Co. Litt. 5 a).

(*i*) *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133, 142, C. A. An enclosed piece of land is technically a "close," and similarly this term carries the soil and what lies beneath it; see *Cox* v. *Glue* (1848), 5 C. B. 533, 551. "Farm" includes the farmhouse, farm buildings, and land used therewith (Shep. Touch., ed. Preston, 93); and also woodlands (*Goodtitle* d. *Paul* v. *Paul* (1760), 2 Burr. 1089; *Portman* v. *Mill* (1839), 3 Jur. 356). The expression "farming buildings" in a will includes farmhouses (*Cooke* v. *Cholmondeley* (1858), 4 Drew. 326).

(*k*) Co. Litt. 4 b. As to a grant of control of an adjoining plantation, see *Nicholson* v. *Rose* (1859), 4 De G. & J. 10, C. A.

(*l*) Co. Litt. 4 b. So a grant of a "warren for conies" only passes a franchise to be exercised over the soil, though a grant of a "warren" in the grantor's own ground may carry the soil (*Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223, 236, 255; Co. Litt. 5 b; see Shep. Touch., ed. Preston, 90); but a several fishery raises a presumption of ownership of the soil (see title FISHERIES, Vol. XIV., pp. 577, 578); and apparently a lease of a several fishery in a river will, in the absence of contrary indication, carry the bed of the river (*R.* v. *Old Alresford* (*Inhabitants*) (1786), 1 Term Rep. 358; see *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, 565; affirmed, [1898] 2 Ch. 358, C. A. As to a lease of riparian land, see title FISHERIES, Vol. XIV., p. 584.

(*m*) Co. Litt. 4 b; but a grant of a "pool" carries the soil (Co. Litt. 5 b).

(*n*) Co. Litt. 4 b.

(*o*) See *Doe* d. *Clements* v. *Collins* (1788), 2 Term Rep. 498, 502; *Steele* v. *Midland Rail. Co.* (1866), 1 Ch. App. 275, 289; and this is also so by virtue of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 2 (v.), 6. As to a covenant giving the lessee the use of a pump while it remains in an adjoining yard, see *Rhoda* v. *Ballard* (1806), 7 East, 116.

(*p*) Co. Litt. 5 b, 56 b; Shep. Touch., ed. Preston, 94; *Bettisworth's Case* (1591), 2 Co. Rep. 31b; notes to *Smith* v. *Martin* (1672), 2 Wms. Saund., ed. 1871, 802, 806. See *Carden* v. *Tuck* (1588), Cro. Eliz. 89 (devise of a messuage without saying "with the appurtenances"); *Grosvenor* (*Lord*) v. *Hampstead Junction Rail. Co.* (1857), 1 De G. & J. 446, C. A.; *Hewson* v. *London and South Western Rail. Co.* (1860), 8 W. R. 467; *Cole* v. *West London and Crystal Palace Rail. Co.* (1859), 27 Beav. 242 (cases on "part of a house" in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 71 *et seq.*); and as to curtilage, see *Marson* v. *London, Chatham, and Dover Rail. Co.* (1868), L. R. 6 Eq. 101.

(*q*) *Doe* d. *Clements* v. *Collins*, *supra*.

(*r*) Hence it will not include an adjoining meadow (*Minton* v. *Geiger* (1873), 28 L. T. 449); see, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X.,

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"with the appurtenances" do not extend the demise so as to include land or buildings which are used with the demised property, but are not parcel of it (*s*); nor do they include a part of the building which has been separated from it, and has not been occupied with it for many years previous to the demise (*t*). But the words "lands appertaining to" or "belonging to" are more easily extended to lands usually occupied with the demised premises (*a*).

"tenements," and "hereditaments."

The words "tenements" and "hereditaments" primarily denote, the one whatever can be the subject of tenure, the other whatever is capable of devolving upon death, whether as real property to real representatives, or as personal property to personal representatives or legatees (*b*). But they are used in a general sense to include both the corporeal things—houses and land—which are the subject of property, and the rights which arise out of them (*c*). When these rights extend to the exclusive possession of the thing which is the subject of property, they are called corporeal hereditaments—a term which is used to denote both the thing itself and the right of property in the thing; when they fall short of this, they are called incorporeal hereditaments (*d*).

Parcels depend on circumstances of the property.

871. The question whether any particular property is included in the lease depends on the words of the lease as applied to the circumstances of the property (*e*), evidence being admissible to show the state and condition of the property at the time the lease was granted; and though *primâ facie* particular property would be included, yet this will not be so if the circumstances show a contrary intention (*f*). Where the lease comprises part only of the

p. 465, note (*s*). As to the meaning of "mines" and "minerals," see title MINES, MINERALS, AND QUARRIES.

(*s*) *Bettisworth's Case* (1591), 2 Co. Rep. 31 b; *Bryan* v. *Wetherhead* (1625), Cro. Car. 17; *Maitland* v. *Mackinnon* (1862), 1 H. & C. 607, 614 (where, however, it was suggested that there might be cases where such words would add to the parcels). Where there is a demise of a house and of upper floors in an adjoining house without the staircase, the staircase does not pass under "appurtenances" because it is afterwards required (*Chappell* v. *Mason* (1894), 10 T. L. R. 404, C. A.; see *Wilmote* v. *Carn* (1603), Cro. Eliz. 918; and as to the same words in a will, see title WILLS; *Hearn* v. *Allen* (1627), Cro. Car. 57; *Doe* d. *Lempriere* v. *Martin* (1767), 2 Wm. Bl. 1148; *Buck* d. *Whalley* v. *Nurton* (1797), 1 Bos. & P. 53; *Evans* v. *Angell* (1858), 26 Beav. 202, 205).

(*t*) *Kerslake* v. *White* (1819), 2 Stark. 508.

(*a*) See *Ongley* v. *Chambers* (1824), 1 Bing. 483; *Doe* d. *Gore* v. *Langton* (1831), 2 B. & Ad. 680; *Evans* v. *Angell*, *supra*.

(*b*) See Co. Litt. 6 a: "Hereditament is the largest word of all in that kind." Compare *Re Gosselin*, *Gosselin* v. *Gosselin*, [1906] 1 Ch. 120. Formerly the descent was to heirs or devisees: as to the change in devolution, see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.

(*c*) See, as to tenements, Co. Litt. 19 b; *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223, 241.

(*d*) See title REAL PROPERTY AND CHATTELS REAL.

(*e*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 465, note (*s*).

(*f*) *Doe* d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701, 703, 704 (where a cellar was held not to be included in the demise). In general the lease is construed with reference to the circumstances existing at the time of execution, but where it is clear that it had reference to previous circumstances—such as those existing at the time of the agreement for the lease—the earlier circumstances would apparently determine the construction; see *Crisp* v. *Price* (1814), 5 Taunt.

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rooms in a house, but these constitute a separate dwelling, the lease includes the outer walls so far as they are solely appropriate to the rooms let (*g*).

Roads.

872. Where the premises are referred to as bounded by a public road, and the soil of the road is vested in the lessor, the lease will *primâ facie* include the soil *ad medium filum viæ* (*h*); and if there is a small quantity of uninclosed land between the highway and the demised premises, this also, if vested in the lessor, will be presumed to be included in the demise (*i*). But the presumption can be rebutted (*k*).

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Easements.

873. A lease of land, or of land and buildings thereon, made since the 31st December, 1881, includes, without express mention, all easements appertaining to the demised property, or at the time of the lease occupied or enjoyed therewith or with any part thereof; so far as a contrary intention is not expressed in the lease (*l*). Hence, in the absence of such contrary intention (*m*), the lease

547; *Mappin Brothers* v. *Liberty & Co., Ltd.*, [1903] 1 Ch. 118, 127; compare *Broomfield* v. *Williams*, [1897] 1 Ch. 602, 616, C. A.

(*g*) *Carlisle Café Co. and Todd* v. *Muse Brothers & Co.* (1897), 46 W. R. 107; but the lessee can only use them in a reasonable way (*ibid.*).

(*h*) *Haynes* v. *King*, [1893] 3 Ch. 439, 448; see *Tidswell* v. *Whitworth* (1867), L. R. 2 C. P. 326, 333; *Hodges* v. *Lawrance* (1854), 18 J. P. 347; titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 468; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 52. The rule applies to streets in a town as well as to highways in the country (*Re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659, 664; *Central London Rail. Co.* v. *City of London Land Tax Commissioners*, [1911] 1 Ch. 467; affirmed, 27 T. L. R. 561, C. A.; but see *Mappin Brothers* v. *Liberty & Co., Ltd., supra*, at p. 128). Similarly, where the premises are described as bounded by a river they include half the bed of the river (*Dwyer* v. *Rich* (1871), 6 I. R. C. L. 144, Ex. Ch.)

(*i*) *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304, 307; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 53.

(*k*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 53.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 51), s. 6; "conveyance" in the statute includes "lease" (*ibid.*, s. 2 (v)); and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 250.

(*m*) Such a contrary intention may be indicated by the use of the words "with the appurtenances," since these operate as an express grant of rights strictly appurtenant (*Birmingham, Dudley, and District Banking Co.* v. *Ross* (1888), 38 Ch. D. 295, 308, C. A.; *Re Peck and London School Board's Contract*, [1893] 2 Ch. 315; see *Beddington* v. *Atlee* (1887), 35 Ch. D. 317, 331); though, where necessary to give effect to the intention of the parties, the word will have a wider meaning (*Dobbyn* v. *Somers* (1860), 13 I. C. L. R. 293). But the mere marking of adjacent land as "building land" on a plan will not show an intention to exclude a right of light over it (*Broomfield* v. *Williams*, [1897] 1 Ch. 602, C. A.; *Pollard* v. *Gare*, [1901] 1 Ch. 834). Further, in considering whether the statutory words apply, regard must be had to the title to the *quasi*-servient tenement and to the surrounding circumstances at the time of the lease, and the statute will not pass rights *de facto* enjoyed with the demised premises if, as a matter of title, the lessor cannot lawfully convey these rights (*Beddington* v. *Atlee, supra; Godwin* v. *Schweppes, Ltd.*, [1902] 1 Ch. 926, 932; *Quicke* v. *Chapman*, [1903] 1 Ch. 659, C. A.); nor rights which are merely temporary (*Burrows* v. *Lang*, [1901] 2 Ch. 502); or which could not reasonably be expected to continue (*Godwin* v. *Schweppes, Ltd., supra*); but a lease may, by virtue of the statute,

includes not only easements and other rights which are strictly appurtenant to the property (*n*), but also such *quasi*-easements as would pass under the words "used and enjoyed therewith or with any part thereof" (*o*); that is, easements which formerly existed, but which have been extinguished by unity of possession (*p*), if actually used at the date of the lease (*q*); and also continuous and apparent *quasi*-easements (*r*) used at that date, although they have

pass rights which at its date are permissive only (*International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165). See also title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 251, 274, note (*k*).

(*n*) Formerly the words "with the appurtenances" were frequently used (see *Thorpe* v. *Brumfitt* (1873), 8 Ch. App. 650 (right of way)); but they were in general superfluous, for they referred only to rights strictly appurtenant to the demised property (*Bolton* v. *Bolton* (1879), 11 Ch. D. 968, 971), and such rights passed by the demise without these words (Co. Litt. 121 b.; Shep. Touch., ed. Preston, 89; *Skull* v. *Glenister* (1864), 16 C. B. (N. S.) 81, 91); hence the words did not pass an easement formerly existing which had been extinguished by unity of possession (*Plant* v. *James* (1833), 5 B. & Ad. 791, 794; *Worthington* v. *Gimson* (1860), 2 E. & E. 618; see *Baring* v. *Abingdon*, [1892] 2 Ch. 374, 394, C. A.); and the words "with all ways thereunto appertaining" were similarly restricted to ways legally appurtenant to the demised premises (*Harding* v. *Wilson* (1823), 2 B. & C. 96, 100; *Barlow* v. *Rhodes* (1833), 1 Cr. & M. 439, 448; *Brett* v. *Clowser* (1880), 5 C. P. D. 376, 383). But such words received a wider construction if there was apparent an intention to pass rights not strictly appurtenant; where, for example, there was no way strictly appurtenant to which the words could apply (*Morris* v. *Edgington* (1810), 3 Taunt. 24), or where such an intention appeared from the lease itself (*Barlow* v. *Rhodes*, *supra*; *James* v. *Plant* (1836), 4 Ad. & El. 749, Ex. Ch.). In such cases the word "appurtenant" might be taken in a secondary sense as equivalent to "used and enjoyed" with the demised premises (*Hill* v. *Grange* (1556), Plowd. 164, 170; *Thomas* v. *Owen* (1887), 20 Q. B. D. 225, 232, C. A.; see *Hinchcliffe* v. *Kinnoul* (*Earl*) (1838), 5 Bing. (N. C.) 1, 25). Under the words "with the appurtenances" there will pass, as appurtenant to a house (Co. Litt. 121 b), a right of turbary (*Solme* v. *Bullock* (1684), 3 Lev. 165; *Dobbyn* v. *Somers* (1860), 13 I. C. L. R. 293, 300); and where a right would not by itself pass without a deed the words may show that the right is treated as appurtenant so as to pass by the lease, although not by deed (see *Hurleston* v. *Woodroffe* (1619), Cro. Jac. 519 (a sheep walk)); and probably a right of common can pass as appurtenant without a deed; but see *Beaudley* v. *Brook* (1607), Cro. Jac. 189, 190; and see p. 384, *ante*). Moreover, rights necessary for the enjoyment of the demised property, which the lessor can confer, will pass without express mention; see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 470, note (*i*); EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 254, 288, 289; but a lease of land and buildings with a pond and the streams leading thereto does not entitle the lessee to water which would percolate to the pond through other land of the lessor (*M'Nab* v. *Robertson*, [1897] A. C. 129).

(*o*) As to the words "or with any part thereof," see *Kooystra* v. *Lucas* (1822), 5 B. & Ald. 830; and as to what are *quasi*-easements, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 242.

(*p*) *Barlow* v. *Rhodes*, *supra*, at p. 448; *Langley* v. *Hammond* (1868), L. R. 3 Exch. 161, *per* KELLY, C.B., at p. 168. As to the effect of such words in reserving a right of common, see *Bradshaw* v. *Eyre* (1597), Cro. Eliz. 570; *Doidge* v. *Carpenter* (1817), 6 M. & S. 47; *Hall* v. *Byron* (1877), 4 Ch. D. 667.

(*q*) See *Roe* v. *Siddons* (1888), 22 Q. B. D. 224, C. A. But the easement will not pass if the particular convenience for which it existed depended upon the continuous occupation of both tenements by the same person (*Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360, 366; *Thomson* v. *Waterlow* (1868), L. R. 6 Eq. 36, 41).

(*r*) See *Pyer* v. *Carter* (1857), 1 H. & N. 916, 922; *Watts* v. *Kelson* (1870), 6 Ch. App. 166, 173; *Ford* v. *Metropolitan and Metropolitan District Rail. Cos.* (1886), 17 Q. B. D. 12, 27, C. A.

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never had an actual existence as legal easements (*s*). Of this nature is a right of way over a formed road (*t*).

Easements of necessity.

874. Apart from express words referring to easements used with the demised premises, or from similar words implied by statute, there will pass to the lessee of one of two tenements both belonging to the lessor all those continuous and apparent *quasi*-easements which are required for the reasonable enjoyment of the demised tenement and which are, at the date of the lease, used for its benefit over the other tenement. If the lessor intends to reserve to himself any such right over the demised tenement, he must do so expressly in the lease (*a*), save in the case of a continuous easement of necessity, such as a necessary right of way (*b*). An express reservation to the lessor of the right to build on his adjoining land will prevent the lessee from gaining a title to light and air by prescription (*c*).

SECT. 3.—*Fixtures.*

Ownership of fixtures.

875. Articles which are affixed to the premises at the date of the lease, so as to be parcel of them, pass under the demise (*d*),

(*s*) *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360, 367; *Barkshire* v. *Grubb* (1881), 18 Ch. D. 616; *Bayley* v. *Great Western Rail. Co.* (1884), 26 Ch. D. 434, 454, C. A.

(*t*) *Watts* v. *Kelson* (1870), 6 Ch. App. 166, 174; *Kay* v. *Oxley*, *supra*; *Barkshire* v. *Grubb*, *supra*; *Baring* v. *Abingdon*, [1892] 2 Ch. 374, 390, C. A.

(*a*) *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, 49, C. A.; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490; see *Phillips* v. *Low*, [1892] 1 Ch. 47; and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 254, 255. The principle stated in the text applies to leases as well as to other grants made upon the severance of two tenements, one being retained by the grantor; see *Warner* v. *McBryde* (1877), 36 L. T. 360; *Birmingham, Dudley, and District Banking Co.* v. *Ross* (1888), 38 Ch. D. 295, C. A.; *Pollard* v. *Gare*, [1901] 1 Ch. 834; title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 252. The implied grant of an easement is limited to the actual continuance of the lease (*Beddington* v. *Atlee* (1887), 35 Ch. D. 317, 323). It may include the right to access of light and air over the adjoining property (see *Betts* (*Frederick*), *Ltd.* v. *Pickfords, Ltd.*, [1906] 2 Ch. 87); but the light must be enjoyed through particular windows, and the air through a definite aperture in the nature of a window in the demised property, or through a definite channel over adjoining property (*Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437, 446). The right of the lessee, however, may be more extensive if required for particular purposes for which the premises are let (*ibid.*); and, on the other hand, it is excluded if the circumstances at the time of the granting of the lease show that it was not intended that he should have it (*Birmingham, Dudley, and District Banking Co.* v. *Ross*, *supra*; see *Broomfield* v. *Williams*, [1897] 1 Ch. 602, C. A.). As to an implied right of support, see *Rigby* v. *Bennett* (1882), 21 Ch. D. 559, C. A.

(*b*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 253.

(*c*) *Haynes* v. *King*, [1893] 3 Ch. 439. It is not sufficient for the lessor merely to except rights, if any, restricting the free use of his adjoining land (*Mitchell* v. *Cantrill* (1887), 37 Ch. D. 56, C. A.). As to the meaning of "adjoining," see *Haynes* v. *King*, *supra*; *Re Bateman* (*Baroness*) *and Parker's Contract*, [1899] 1 Ch. 599; *Ind, Coope & Co.* v. *Hamblin* (1900), 48 W. R. 238; *White* v. *Harrow*, *Harrow* v. *Marylebone District Property Co.* (1902), 50 W. R. 259, C. A.

(*d*) See *Colegrave* v. *Dias Santos* (1823), 2 B. & C. 76; *Longstaff* v. *Meagoe* (1834), 2 Ad. & El. 167. The lessee does not, by accepting the lease, come under an implied contract to pay for fixtures (*Goff* v. *Harris* (1843), 5 Man. & G. 573).

unless expressly or impliedly excluded (*e*). Articles so affixed by the lessee during the term become part of the demised premises; and cannot be severed by him, and must be delivered up to the lessor on the determination of the tenancy unless the tenant is entitled to remove them by virtue of some special rule of law in his favour or of express agreement (*f*). This is in accordance with the two rules that whatever is fixed to the freehold of land becomes part of the freehold or inheritance, and that whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of waste (*g*).

Test to determine what are fixtures.

876. In determining whether a chattel has been so affixed to land or buildings as to become a fixture, regard must be had to the mode and the object of the annexation (*h*), though the mode of annexation is not always the most important consideration, and its relative importance is probably not now what it was in simpler times (*i*). A chattel which rests upon the ground by its own weight merely (*k*), notwithstanding that it sinks into the ground (*l*), or which rests by its own weight on foundations (*m*), or in a place

(*e*) Thus the express mention of certain fixtures may show an intention to exclude others (*Hare* v. *Horton* (1833), 5 B. & Ad. 715).

(*f*) See *Gibson* v. *Hammersmith and City Rail. Co.* (1862), 2 Drew. & Sm. 603, 608. The tenant is not entitled to any allowance for new buildings unless this has been agreed on; see *Sinclair* v. *Manson* (1821), 3 Bli. 21, H. L.

(*g*) *Bain* v. *Brand* (1876), 1 App. Cas. 762, *per* Lord CAIRNS, L.C., at p. 767; *Wake* v. *Hall* (1880), 7 Q. B. D. 295, C. A., *per* Lord SELBORNE, L.C., at p. 301; see *Elwes* v. *Maw* (1802), 3 East, 38, 51; *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54, 58; and as to the rule *Quicquid plantatur solo, solo cedit*, see *Wake* v. *Hall* (1883), 8 App. Cas. 195, *per* Lord BLACKBURN, at p. 203.

(*h*) *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, 334, Ex. Ch.; see the rule laid down in *Hellawell* v. *Eastwood* (1851), 6 Exch. 295, *per* PARKE, B., at p. 312, the effect of which statement is given in title DISTRESS, Vol. XI., p. 137. *Hellawood* v. *Eastwood*, *supra*, is itself of questionable authority (*Reynolds* v. *Ashby & Son*, [1904] A. C. 466, 473; see title DISTRESS, Vol. XI., p. 137, note (*q*)). The difficulty arises as to the application of the words "merely for a temporary purpose or the more complete enjoyment and use of it as a chattel," used by PARKE, B., in *Hellawell* v. *Eastwood*, *supra*. But subject to the meaning placed on these words by the later cases, the rule is a correct statement of the law (*Holland* v. *Hodgson*, *supra*, at p. 337; see *Parsons* v. *Hind* (1866), 14 W. R. 860).

(*i*) *Leigh* v. *Taylor*, [1902] A. C. 157, *per* Lord MACNAGHTEN, at p. 162. The exact length of the screws or nails used is immaterial (*Re De Falbe*, *Ward* v. *Taylor*, [1901] 1 Ch. 523, 531, C. A.).

(*k*) *E.g.*, cisterns standing merely by their own weight (*Mather* v. *Fraser* (1856), 2 K. & J. 536, 559); or a barn placed upon pattens and blocks of timber lying on the ground (*Culling* v. *Tuffnal* (1694), Buller, Law of Nisi Prius, 7th ed., 34).

(*l*) *Wood* v. *Hewett* (1846), 8 Q. B. 913, 919; *Huntley* v. *Russell* (1849), 13 Q. B. 572, 577, n. (a).

(*m*) *E.g.*, a wooden barn or windmill erected on a foundation of brick and stone, the foundation being let into the ground, but the erection resting upon it by its weight alone (*Rex* v. *Londonthorpe* (*Inhabitants*) (1795), 6 Term Rep. 377; *R.* v. *Otley, Suffolk* (*Inhabitants*) (1830), 1 B. & Ad. 161; *Wansbrough* v. *Maton* (1836), 4 Ad. & El. 884; and see title AGRICULTURE, Vol. I., p. 272); a wooden granary, similarly supported, having a tile roof (*Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674, 688); brewers' vats resting on brickwork and timber, or on wooden frames (*Horn* v. *Baker* (1808), 9 East, 215, 222, 238); similar articles in a distillery, attached only by communicating pipes to the walls, or to the piers on which they stand (*Chidley* v. *West Ham* (*Churchwardens*) (1874), 32 L. T. 486). But

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prepared for it in the ground (*n*), is not, in general, a fixture (*o*). Mere juxtaposition is not enough to make a chattel a fixture: there must be some degree of attachment to the soil or building (*p*). This, however, is not essential if the intention is to make the article a part of the land, as where blocks of stone are used without mortar or cement to form a stone wall (*q*), or where sculptured figures or vases are part of the architectural scheme of a house (*r*); or where movable dog-grates are substituted for fixed grates (*s*); and such articles become fixtures, although resting only by their own weight. Further, an article will be treated as a fixture, if it is essential to the use of the land or building, although it is temporarily removed from it (*t*), or although it exists as a mere chattel (*a*).

staddles, or stone pillars for supporting ricks, which are mortared to a brick foundation, are fixtures (*Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674, 688).

(*n*) *E.g.*, a weighing machine placed in a hole dug in the earth and lined with brickwork, so as to make the weighing plate level with the surface of the ground (*Re Richards, Ex parte Astbury, Ex parte Lloyd's Banking Co.* (1869), 4 Ch. App. 630, 638).

(*o*) "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land; the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel" (*Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, 335, Ex. Ch.). Ultimately the question is whether the chattel is intended to form part of the building (*Wake* v. *Hall* (1883), 8 App. Cas. 195, 205; *Leigh* v. *Taylor*, [1902] A. C. 157, 161; *Re Hulse* (*Sir Edward*), *Bart.*, *Beattie* v. *Hulse*, [1905] 1 Ch. 406, 411), though the circumstances which can be relied on to show the intention of the annexation are such as exist at the time and are patent for all to see. They do not include the existence of a hire purchase agreement with a third party relating to the article (*Hobson* v. *Gorringe*, [1897] 1 Ch. 182, 193, C. A.). An agreement between the parties interested in the land that an article shall not be a fixture does not, however, prevent its becoming *de facto* a fixture, though the agreement may give a right to remove it (*ibid.*, at p. 195; see *Wood* v. *Hewett* (1846), 8 Q. B. 913).

(*p*) *Bain* v. *Brand* (1876), 1 App. Cas. 762, 772; *Turner* v. *Cameron* (1870), L. R. 5 Q. B. 306, 311. Tram lines fastened to sleepers merely laid upon the ground are not fixtures, notwithstanding that they have sunk into the ground by the pressure of the waggons passing over them (*Beaufort* (*Duke*) v. *Bates* (1862), 3 De G. F. & J. 381, C. A.); nor are straightening plates laid on the ground in an iron foundry and partly penetrating the ground (*Metropolitan Counties etc. Society* v. *Brown* (1859), 26 Beav. 454, 461); but railways laid in ballast are fixtures (*Turner* v. *Cameron, supra*; see *Re Armytage, Ex parte Moore and Robinson's Banking Co.* (1880), 14 Ch. D. 379); and so are straightening plates let into the floor of a foundry so as to become part of the permanent floor (*Re Richards, Ex parte Astbury, Ex parte Lloyd's Banking Co., supra*, at p. 638); similarly a flagstone let into the ground is a fixture (*ibid.*).

(*q*) *Holland* v. *Hodgson, supra*, at p. 335.

(*r*) *D'Eyncourt* v. *Gregory* (1866), L. R. 3 Eq. 382, 396.

(*s*) *Monti* v. *Barnes*, [1901] 1 K. B. 205, C. A.

(*t*) *E.g.*, a millstone taken away for repair (*Liford's Case* (1614), 11 Co. Rep. 46 b, 50 a, b; *Place* v. *Fagg* (1829), 4 Man. & Ry. (K. B.) 277; *Mather* v. *Fraser* (1856), 2 K. & J. 536, 551; *Moody* v. *Steggles* (1879), 12 Ch. D. 261, 267; see *D'Eyncourt* v. *Gregory, supra*).

(*a*) *E.g.*, the keys of a house (*Liford's Case, supra*; *Elliott* v. *Bishop* (1854),

Mode of annexation.

877. Where an article is to some extent attached to the land or to a building it is *primâ facie* a fixture, and if it cannot be removed without great damage to the land or building this test is conclusive, and it is unnecessary to inquire into the object of the annexation (*b*); and so, too, where the article, though removable by digging, has become in fact a part of the land, such as advertisement hoardings fixed to the soil in a very substantial manner (*c*). But frequently the attachment is such that, although the chattel is firmly affixed, yet it can be removed without great damage to the land or building; *e.g.*, where a greenhouse is fastened by mortar on walls built to support it (*d*); or a gas-engine is fastened by bolts and screws to iron plates embedded in concrete (*e*); or a boiler is fixed in brickwork (*f*), or is bolted to a wooden framework embedded in mortar laid on brickwork (*g*); or looms in a cotton mill are fastened by nails through the loom-feet to wooden plugs (*h*), or to beams (*i*), in the floor; or machinery is fastened to buildings by bolts and nuts (*k*); or a threshing machine is fixed by bolts and screws to posts let into the ground (*l*); or machinery is fastened by bolts and nuts to concrete beds, and worked by steam power transmitted from a steam engine by shafts, wheels, and gearing (*m*). In such cases the article is a

10 Exch. 496, 509; *Bishop* v. *Elliott* (1855), 11 Exch. 113, 119, Ex. Ch.; *Moody* v. *Steggles* (1879), 12 Ch. D. 261, 267). As to the signboard of an inn, see *Re Thomas, Ex parte Willoughby D'Eresby* (*Baroness*) (1881), 44 L. T. 781, C. A.; *Moody* v. *Steggles, supra.*

(*b*) *Wake* v. *Hall* (1883), 8 App. Cas. 195, 204. As to unfinished buildings, see *Smith* v. *Render* (1857), 27 L. J. (EX.) 83. Possibly the tenant might remove an uncompleted building if the materials were provided by himself, but not if provided by the landlord (*ibid.*).

(*c*) *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, [1909] 2 K. B. 344, C. A.

(*d*) *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54; *Jenkins* v. *Gething* (1862), 2 John. & H. 520; *Mears* v. *Callender*, [1901] 2 Ch. 388; see *West* v. *Blakeway* (1841), 2 Man. & G. 729.

(*e*) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, C. A.; *Crossley Brothers, Ltd.* v. *Lee*, [1908] 1 K. B. 86. Similarly where an engine and steam hammer are fastened by screws to stone fixed in the ground (*Metropolitan Counties etc. Society* v. *Brown* (1859), 26 Beav. 454, 458); or a steam crane is screwed to blocks of stone cramped together and laid on a prepared bed of mortar, and is supported by guys (*Re Armytage, Ex parte Moore and Robinson's Banking Co.* (1880), 14 Ch. D. 379).

(*f*) *Metropolitan Counties etc. Society* v. *Brown, supra*, at p. 459; *Climie* v. *Wood* (1868), L. R. 3 Exch. 257; affirmed (1869), L. R. 4 Exch. 328, Ex. Ch.; *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713, C. A.; similarly, as to stills set in brickwork and let into the ground (*Horn* v. *Baker* (1808), 9 East, 215, 222, 238). In *Climie* v. *Wood, supra*, there was also an engine screwed to thick planks lying on the ground, and both engine and boiler were held to be fixtures; but apparently the engine by itself would not have been a fixture.

(*g*) *Cross* v. *Barnes* (1877), 46 L. J. (Q. B.) 479.

(*h*) *Boyd* v. *Shorrock* (1867), L. R. 5 Eq. 72; *contra*, where the looms are not fixed at all, but are merely steadied by the legs being let into "loom-feet" or cylinders dropped into holes in the floor (*Hutchinson* v. *Kay* (1857), 23 Beav. 413).

(*i*) *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, Ex. Ch.

(*k*) *Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115; *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123; see *Mather* v. *Fraser* (1856), 2 K. & J. 536 (where the mode of attachment of the steam-engines, boilers, and mill gear fastened in the mill is not stated).

(*l*) *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674; see *Holland* v. *Hodgson, supra*, at p. 339.

(*m*) *Reynolds* v. *Ashby & Son*, [1904] A. C. 466.

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fixture if it is placed in its position permanently and in order to make the land or building more valuable for the special purpose for which it is used. It is not a fixture if it is placed in position temporarily or for the purpose of the more convenient use of the chattel as a chattel (*n*); or if it is a mere convenience, and not a necessity, for the manufacture carried on in the factory (*o*).

Object of annexation.

878. For the purpose of determining whether an article is a fixture under the above rule, it is treated as permanently attached to the premises, if the intention is that it shall remain there during the continuance of the term (*p*), though it is not essential that it should remain in the same position. It may, if of a suitable nature, be taken down and fastened in another part of the premises (*q*). Further, although the immediate object of fastening the article—such as a loom—may be to steady it, and make it more convenient to use as a loom, yet, if the presence of such article is an essential feature of the land or building, when the land or building is used for its intended purpose, the article makes the land or building more valuable for this purpose, and is regarded as constituting an improvement of or addition to the land or building: consequently they are fixtures. Hence articles and machinery useful for the purposes of land as agricultural land (*r*), or of a factory as a factory (*s*), and attached to it in the manner already

(*n*) For a summary of the cases which establish this principle, see *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, 190, C. A. *Davis* v. *Jones* (1818), 2 B. & Ald. 165 (where jibs slightly fixed in a warehouse were held not to be fixtures), might not now be followed.

(*o*) *Parsons* v. *Hind* (1866), 14 W. R. 860. A switchback railway is erected for its more convenient use as machinery and not to enhance the value of the land, and it is not a fixture (*Chamberlayne* v. *Collins* (1894), 70 L. T. 217, C. A.).

(*p*) *Boyd* v. *Shorrock* (1867), L. R. 5 Eq. 72, at p. 79; *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, 337, Ex. Ch. A carpet, though affixed to the floor, is repeatedly removed, independently of the existence of the term, and is not a fixture (*Boyd v. Shorrock, supra*). Moreover, it is fastened down with a view to its use as a carpet, not to improve the house (*Holland* v. *Hodgson, supra*, at pp. 335, 337).

(*q*) *Boyd* v. *Shorrock, supra.*

(*r*) *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674; *Holland* v. *Hodgson, supra*, at p. 339.

(*s*) *Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115, 131; *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123, 138 (where the mode of attachment of numerous machines is very fully stated); *Holland* v. *Hodgson, supra* (in effect an appeal against *Longbottom* v. *Berry*); *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, C. A.; *Reynolds* v. *Ashby & Son*, [1904] A. C. 466; *Crossley Brothers, Ltd.* v. *Lee*, [1908] 1 K. B. 86; see *Mather* v. *Fraser* (1856), 2 K. & J. 536; *Climie* v. *Wood* (1868), L. R. 3 Exch. 257; affirmed (1869), L. R. 4 Exch. 328, Ex. Ch. These cases overrule the application of the rule as to fixtures (see p. 417, *ante*), made in *Hellawell* v. *Eastwood* (1851), 6 Exch. 295; and *Waterfall* v. *Penistone* (1856), 6 E. & B. 876, in which *Hellawell* v. *Eastwood, supra*, was followed, is overruled also. In *Lincolnshire Finance Co.* v. *Farrant* (1886), 2 T. L. R. 248, an engine and machinery were held not to be fixtures, but it is not stated how they were erected. See also *Fisher* v. *Dixon* (1845), 12 Cl. & Fin. 312, 329, H. L. Retorts, boilers, gas-holders, and other machinery in gas works are fixtures, though not the meters fixed on the consumers' premises (*R.* v. *Lee* (1866), L. R. 1 Q. B. 241 (a rating case)). As to the removal of buildings and machinery erected by miners working under customs entitling them to the use of surface land, see *Wake* v. *Hall* (1883), 8 App. Cas. 195. As to taking trade fixtures as part of a manufactory under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92, see *Gibson* v. *Hammersmith and*

described, are fixtures notwithstanding that they could be removed without substantial damage to the freehold.

Fixtures with removable parts.

879. Where machinery is a fixture, portions of it which are removable, but which are an essential part of it, are also fixtures (*t*). Doors and windows are an essential part of a house and are fixtures (*a*), but not tapestry (*b*), pictures, and other articles slightly affixed to the walls for the purpose of ornamentation (*c*). Gas fittings are not in practice treated as fixtures (*d*); and chairs screwed to the floor of a place of public entertainment have been held not to be fixtures (*e*).

Trade fixtures.

880. Although an article has been attached to the demised premises by the lessee so as to become a fixture and to be a part of the premises, yet if it has been affixed for the purpose of trade or of ornament the lessee is entitled, in the absence of agreement to the contrary, to sever it from the premises and to remove it (*f*).

City Rail. Co. (1862), 2 Drew. & Sm. 603; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 36.

(*t*) *Mather* v. *Fraser* (1856), 2 K. & J. 536, 559; *Metropolitan Counties etc. Society* v. *Brown* (1859), 26 Beav. 454, 459; *Re Richards, Ex parte Astbury, Ex parte Lloyd's Banking Co.* (1869), 4 Ch. App. 630, 635; *Sheffield and South Yorkshire Permanent Benefit Building Society* (1884), 15 Q. B. D. 358, C. A.; see *Fisher* v. *Dixon* (1845), 12 Cl. & Fin. 312, 330, H. L.

(*a*) *Climie* v. *Wood* (1869), L. R. 4 Exch. 328, 329, Ex. Ch.; see Co. Litt. 55 a; *Herlakenden's Case* (1589), 4 Co. Rep. 62 a, 64 a.

(*b*) *Leigh* v. *Taylor*, [1902] A. C. 157, overruling on this point *D'Eyncourt* v. *Gregory* (1866), L. R. 3 Eq. 382. But tapestry fixed as part of a general scheme of decoration may be a fixture (*Re Whaley, Whaley* v. *Roehrich*, [1908] 1 Ch. 615; see also *Norton* v. *Dashwood*, [1896] 2 Ch. 497). Stuffed birds and other specimens in cases, which are easily removable, are not fixtures, though forming the contents of a museum in a settled mansion-house (*Hill* (*Viscount*) v. *Bullock*, [1897] 2 Ch. 55).

(*c*) *Hellawell* v. *Eastwood* (1851), 6 Exch. 295, 313; *Climie* v. *Wood*, *supra*.

(*d*) Though they may be included on a sale of a house with "fixtures" (*Sewell* v. *Angerstein* (1868), 18 L. T. 300).

(*e*) *Lyon & Co.* v. *London, City and Midland Bank*, [1903] 2 K. B. 135; see *Reynolds* v. *Ashby & Son*, [1904] A. C. 466, 474.

(*f*) Questions of the right to remove fixtures arise in three cases:—(1) Between the heir or devisee and the executor of an absolute owner (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 220, 221); (2) between the remainderman and the executor of a tenant for life or in tail (see *ibid.*); and (3) between landlord and tenant. It is doubtful whether there is any relaxation of the strict rule in the first case (see *ibid.*). The property is taken in the condition in which the absolute owner has left it (*Fisher* v. *Dixon* (1845), 12 Cl. & Fin. 312, H. L.; *Bain* v. *Brand* (1876), 1 App. Cas. 762; *Climie* v. *Wood*, *supra*, at p. 330; *Re Hulse* (*Sir Edward*), *Bart.*, *Beattie* v. *Hulse*, [1905] 1 Ch. 406, 410; see *Lawton* v. *Salmon* (1782), 1 Hy. Bl. 259, n. (a)). In the second and third cases there is clearly a relaxation, in the second in favour of the executor of the limited owner, and in the third in favour of the tenant; and it has been said that the relaxation is greater in the third than in the second; see *Lawton* v. *Lawton* (1743), 3 Atk. 13, 15; *Elwes* v. *Maw* (1802), 3 East, 38, 51; 2 Smith, L. C., 11th ed., 188; *Grymes* v. *Boweren* (1830), 6 Bing. 437, 440). But probably the relaxation is the same in each case (*Re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523, 530, 539, C. A.; *Re Hulse* (*Sir Edward*), *Bart.*, *Beattie* v. *Hulse*, *supra*). However this may be, it is clear that authorities in favour of the right of removal in the second case are also authorities in its favour in the third case. Sometimes the term "fixtures" has been confined to articles affixed to the freehold which are removable at the will of him who affixed them (*Hallen* v. *Runder* (1834), 1 Cr. M. & R. 266;

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As regards trade fixtures, this relaxation of the ordinary rule that what is once affixed to the soil is the property of the owner of the soil has been allowed in favour of trade and to encourage industry (*g*); but though the reason applies equally to agricultural fixtures, the relaxation has not been extended to them (*h*), and such fixtures are only removable by virtue of some statutory relaxation of the rule (*i*).

Ornamental fixtures.

Objects which have been affixed to the freehold by way of ornament fall, in this respect, in the same category as articles affixed for the purpose of trade, and are removable (*k*). Moreover,

Elliott v. *Bishop* (1854), 10 Exch. 496, 508; *Re Gawan, Ex parte Barclay* (1855), 5 De G. M. & G. 403, 410; *Re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523, 538, C. A.); but this seems to be a misuse of the word. The questions whether an article has become a fixture—that is, a part of the freehold—at all, and, if so, whether it can be removed by any other than the absolute owner of the freehold, are separate questions. When an article has once become a fixture, the distinction as to removability is indicated by the terms "landlord's fixtures" (though this was regarded in *Elliott* v. *Bishop*, *supra*, as inaccurate) and "tenant's fixtures." It has also been said that, in cases where the right of removal exists, the chattel has never become a part of the freehold (*Re Hulse* (*Sir Edward*), *Bart.*, *Beattie* v. *Hulse*, [1905] 1 Ch. 406, 411); but this, it is conceived, is erroneous. The chattel becomes affixed to the freehold and loses for the time its chattel nature; but by virtue of the exception allowed in favour of tenants and limited owners, it may be severed and restored to its original condition; see *Bain* v. *Brand* (1876), 1 App. Cas. 762, at pp. 770, 772; *Minshall* v. *Lloyd* (1837), 2 M. & W. 450, 459; *Gibson* v. *Hammersmith and City Rail. Co.* (1862), 2 Drew. & Sm. 603, 609. As between mortgagor and mortgagee, there is no relaxation of the common law rule, and articles affixed to the freehold pass to the mortgagee as part of his security. This is so whether they are affixed before (*Mather* v. *Fraser* (1856), 2 K. & J. 536; *Climie* v. *Wood* (1868), L. R. 3 Exch. 257; affirmed (1869), L. R. 4 Exch. 328, Ex. Ch.; *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, Ex. Ch.), or after, the mortgage (*Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115; *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123); and whether the mortgage is of freehold or leasehold premises, and is legal or equitable (*Meux* v. *Jacobs* (1875), L. R. 7 H. L. 481; *Boyd* v. *Shorrock* (1867), L. R. 5 Eq. 72). As to mortgage by sub-demise, see *Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch. D. 64, C. A. Where the chattels belong to a third party, and have been affixed by the mortgagor after the mortgage under an agreement—such as a hire-purchase agreement—giving the third party the right in certain events to remove them—this right, if exercisable at all (*Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713, C. A.), can only be exercised before the mortgagee takes possession (*Hobson* v. *Gorringe*, [1897] 1 Ch. 182, C. A.; *Reynolds* v. *Ashby & Son*, [1904] A. C. 466); *Ellis* v. *Glover and Hobson, Ltd.*, [1908] 1 K. B. 388, C. A.). See title MORTGAGE.

(*g*) *Poole's Case* (1703), 1 Salk. 368; *Penton* v. *Robart* (1801), 2 East, 88, 90; *Elwes* v. *Maw* (1802), 3 East, 38, 52. Thus a lessee can remove vats used for soap boiling (*Poole's Case*, *supra*); salt pans (*Lawton* v. *Salmon* (1782), 1 Hy. Bl. 259, n. (a)); engines for working collieries (*Lawton* v. *Lawton* (1743), 3 Atk. 13; *Dudley* (*Lord*) v. *Warde* (*Lord*) (1751), Amb. 113; *Ward* v. *Dudley* (*Countess*) (1887), 57 L. T. 20); and generally such machinery as is referred to in the cases cited in notes (*d*)—(*m*), p. 419, *ante*; see *Climie* v. *Wood* (1869), L. R. 4 Exch. 328, 330, Ex. Ch.

(*h*) *Elwes* v. *Maw*, *supra*.

(*i*) See title AGRICULTURE, Vol. I., pp. 272—274.

(*k*) The right of removal applies to articles affixed "for the more convenient or luxurious occupation [of the premises], or for the purpose of trade" (*Elliott* v. *Bishop*, *supra*). The articles of ornament dealt with in the older cases were ornamental chimney-pieces, pier-glasses, tapestry and other hangings, and wainscot fixed only by screws (*Elwes* v. *Maw*, *supra*, at p. 53; *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54, 58); as to marble chimney-pieces, see *Allen* v. *Allen* (1729), Mos. 112; *Lawton* v. *Lawton*, *supra*, at p. 15[;

the relaxation in favour of the tenant is extended generally to articles of domestic convenience and utility (*l*), provided that when fixed they do not become an essential part of the house (*m*).

Removal must be without serious damage.

881. In order that a fixture may be removable by the tenant, it must be possible to remove it without material damage to the building or land to which it is affixed (*n*). The right to remove a fixture affixed for convenience and utility arises only where the

Ex parte Quincy (1750), 1 Atk. 477; *Dudley (Lord)* v. *Warde (Lord)* (1751), Amb. 113; *Lawton* v. *Salmon* (1782), 1 Hy. Bl. 259, n. (a); *Elliott* v. *Bishop* (1854), 10 Exch. 496, 510; *Bishop* v. *Elliott* (1855), 11 Exch. 113, 119, Ex. Ch.; as to pier-glasses, see *Beck* v. *Rebow* (1707), 1 P. Wms. 94; as to tapestry, see *Squier* v. *Mayer* (1701), Freem. (CH.) 249; *Harvey* v. *Harvey* (1740), 2 Stra. 1141; *Beck* v. *Rebow, supra; Re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523, C. A.; as to wainscot fixed with screws, see *Lawton* v. *Lawton* (1743), 3 Atk. 13; *Ex parte Quincy, supra*. The relaxation of the rule requires that the article should not be an ordinary accessory to the house, but that it should be specifically ornamental (*Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54, 58; *Leach* v. *Thomas* (1835), 7 C. & P. 327); a marble chimney-piece, now that such chimney-pieces have become common, is not necessarily ornamental; and a chimney-piece may be ornamental though not made of marble (*Bishop* v. *Elliott, supra*, at p. 121); so a cornice, if ornamental, is removable (*Avery* v. *Cheslyn* (1835), 3 Ad. & El. 75). As to the removability of fixtures on the ground that they are ornamental, see, generally, *Re De Falbe, Ward* v. *Taylor*, at pp. 530, 539.

(*l*) *Climie* v. *Wood* (1869), L. R. 4 Exch. 328, Ex. Ch.; *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, 333, Ex. Ch. Under this head the following articles are removable:—Stoves and grates, fixed with brickwork in the chimney-places, which can be removed without doing injury to the chimney-places (*R.* v. *St. Dunstan, Kent (Inhabitants)* (1825), 4 B. & C. 686, 691; *Grymes* v. *Boweren* (1830), 6 Bing. 437, 439; *Re Gawan, Ex parte Barclay* (1855), 5 De G. M. & G. 403, 410; *R.* v. *Lee* (1866), L. R. 1 Q. B. 241, 254; see *Squier* v. *Mayer, supra*); kitchen ranges, ovens, and coppers (*Grymes* v. *Boweren, supra; Darby* v. *Harris* (1841), 1 Q. B. 895; see *Winn* v. *Ingilby* (1822), 5 B. & Ald. 625); cupboards which stand on the ground and are supported by holdfasts, and are removable without other injury to the walls than the marks of a few nails (*R.* v. *St. Dunstan, Kent (Inhabitants), supra; Re Gawan, Ex parte Barclay, supra*); pumps (*Grymes* v. *Boweren, supra*); bells (*Lyde* v. *Russell* (1830), 1 B. & Ad. 394; *Pugh* v. *Arton* (1869), L. R. 8 Eq. 626, 629). The extension of the relaxation of the strict common law to articles of convenience seems to have been overlooked in *Wilde* v. *Waters* (1855), 16 C. B. 637, where a ladder and crane were held not to be removable; but in fact this was unnecessary for the decision of the case, since they had not been removed during the plaintiff's tenancy, and, whether fixtures or not, were not removable afterwards (see the text, *infra*).

(*m*) This seems to be a correct qualification of the exception in favour of removing articles of domestic utility. Thus doors and windows cannot be removed (*Bishop* v. *Elliott, supra*, at p. 119; *Climie* v. *Wood, supra*, at p. 329; and see p. 421, *ante*); but the qualification is difficult to reconcile with the cases which allowed of the removal of grates (see note (*l*), *supra*). In *Poole's Case* (1703), Salk. 368, it was held that hearths and chimney-pieces put in to complete the house were not removable, but this is not so in the case of ornamental chimney-pieces (see note (*k*), p. 422, *ante*).

(*n*) *Trappes* v. *Harter* (1833), 2 Cr. & M. 153, 181; *Avery* v. *Cheslyn, supra; Re Gawan, Ex parte Barclay, supra; Gibson* v. *Hammersmith and City Rail. Co.* (1862), 2 Drew. & Sm. 603, 608; see *Wake* v. *Hall* (1883), 8 App. Cas. 195, 205; but trifling damage to the freehold is not regarded (*Martin* v. *Roe* (1857), 7 E. & B. 237, 244); and where the removal causes injury to brickwork, the brickwork need not be restored to a perfect state as though the article it was intended to support were still there, but may be left in such a state as to be most useful to the lessor or the next tenant (*Foley* v. *Addenbrooke* (1844), 13 M. & W. 174, 196).

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article is slightly affixed and can be removed entire (*o*); and, as regards trade fixtures and objects of ornament, although they may have to be taken to pieces in the removal, yet in general it is essential that they shall be capable of being put together in the same form in some other place (*p*). Hence buildings substantially erected, though for the purpose of trade, are not removable (*q*), and glasshouses, when erected for ornament and pleasure, are not removable (*r*). But in fact they can be re-erected in substantially the same form elsewhere, and they are removable when they have been erected by a market gardener for the purpose of his business (*s*); and slight buildings, erected for the purpose of trade (*t*), and buildings which are accessory to removable machinery, are removable (*a*). In all cases of removal of buildings the removal must be with a view to re-erection elsewhere, and not merely for the purpose of destruction (*b*).

Time for removal.

882. Where fixtures are removable by a tenant he is only entitled to exercise this right during the term (*c*), and if he omits to do so they become the absolute property of the reversioner (*d*), save that if the tenant remains in possession after the term in such circumstances that he is entitled still to consider himself as tenant, his right to remove fixtures continues as long as this state of things lasts (*e*);

(*o*) *Grymes* v. *Boweren* (1830), 6 Bing. 437, 440; see *Leach* v. *Thomas* (1835), 7 C. & P. 327 (pillars of brick and mortar built on a dairy floor to hold milkpans).

(*p*) See *Whitehead* v. *Bennett* (1858), 27 L. J. (CH.) 474.

(*q*) *Whitehead* v. *Bennett*, *supra*; *Wake* v. *Hall* (1880), 7 Q. B. D. 295, 301, C. A.; affirmed (1883), 8 App. Cas. 195 (see note (*s*), p. 420, *ante*).

(*r*) *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54; *Jenkins* v. *Gething* (1862), 2 John. & H. 520; but the boiler and pipes which form the heating apparatus are removable (*ibid.*).

(*s*) See title AGRICULTURE, Vol. I., p. 272; probably the brickwork should be left, though this has been treated as doubtful (*Syme* v. *Harvey* (1861), 24 Dunl. (Ct. of Sess.) 202).

(*t*) Such as wooden buildings erected on a foundation of brick (*Penton* v. *Robart* (1801), 2 East, 88; see *Fitzherbert* v. *Shaw* (1789), 1 Hy. Bl. 258, *per* GOULD, J., at p. 259; *Dean* v. *Allalley* (1799), 3 Esp. 11; *Elwes* v. *Maw* (1802), 3 East, 38, 55.

(*a*) *Wake* v. *Hall* (1883), 8 App. Cas. 210. In *Whitehead* v. *Bennett*, *supra*, KINDERSLEY, V.-C., considered that only a slight building, such as a shed, could be removed as being accessory to machinery.

(*b*) *Oakley* v. *Monck* (1866), L. R. 1 Exch. 159, 167, Ex. Ch.; see *Watherell* v. *Howells* (1808), 1 Camp. 227.

(*c*) *Poole's Case* (1703), 1 Salk. 368; *Ex parte Quincy* (1750), 1 Atk. 477, *Dudley* (*Lord*) v. *Warde* (*Lord*) (1751), Amb. 113; *Lyde* v. *Russell* (1830), 1 B. & Ad. 394, 395; *Menshall* v. *Lloyd* (1837), 2 M. & W. 450, 459; *Gibson* v. *Hammersmith and City Rail. Co.* (1862), 2 Drew. & Sm. 603, 608.

(*d*) *Poole's Case*, *supra*; *Meux* v. *Jacobs* (1875), L. R. 7 H. L. 481, 490.

(*e*) *Weeton* v. *Woodcock* (1840), 7 M. & W. 14, 19. The tenant's right to remove fixtures continues during his original term and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant (*Minshall* v. *Lloyd*, *supra*; *Roffey* v. *Henderson* (1851), 17 Q. B. 574, 586); or "during his term, or during what may, for this purpose, be considered as an excrescence on the term" (*Mackintosh* v. *Trotter* (1838), 3 M. & W. 184, *per* PARKE, B., at p. 186); see *Leader* v. *Homewood* (1858), 5 C. B. (N. S.) 546; *Re Roberts*, *Ex parte Brook* (1878), 10 Ch. D. 100, 109, C. A.; *Leschallas* v. *Woolf*, [1908] 1 Ch. 641, 652. This extension of time does not apply if notice to quit has been given and the tenant remains in possession without any ground for assuming consent by the landlord (*Deeble* v. *M'Mullen* (1857),

and if he is a tenant holding on an uncertain tenancy, then his right to remove fixtures continues for a reasonable time after the determination of the tenancy (*f*). This rule applies in whatever manner the term comes to an end, whether by effluxion of time or by surrender (*g*) or forfeiture (*h*); save that, in case of surrender (*i*) or forfeiture (*j*), a third party, such as a mortgagee of the fixtures from the tenant, is entitled to a reasonable time (*k*) within which to remove them. A tenant, who is entitled to remove fixtures under the stipulations of the lease, can remove them within a reasonable time after the determination of the term (*l*).

Effect of new lease.

883. From the principle that the tenant is not at liberty to remove fixtures after the determination of the term, including a determination by surrender, it follows that where there is an actual surrender, followed by the grant of a new lease to the same lessee, the new lease includes the former tenant's fixtures as part of the demised premises, and, in the absence of express stipulation, any right which he had to remove them is gone (*m*). But where the surrender is a surrender by operation of law on the taking of the new lease the result may be different, and the circumstances may be such as to justify the inference that the new demise does not include the tenant's fixtures, but that the rights in respect of these are left unaffected (*n*).

8 I. C. L. R. 355, 365); where, for instance, the landlord has commenced proceedings to recover possession (*Barff* v. *Probyn* (1895), 11 T. L. R. 467); see *Fitzherbert* v. *Shaw* (1789), 1 Hy. Bl. 258; *Heap* v. *Barton* (1852), 12 C. B. 274; *contra*, *Penton* v. *Robart* (1801), 2 East, 88 (where it was considered that the right of removal continued as long as the tenant remained in possession); see *Re Maryport Hematite Iron and Steel Co., Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415, 426.

(*f*) *Oakley* v. *Monck* (1866), L. R. 1 Exch. 159, 164, Ex. Ch.; *Re Roberts, Ex parte Brook* (1878), 10 Ch. D. 100, 109, C. A. In *Climie* v. *Wood* (1869), L. R. 4 Exch. 328, 329, Ex. Ch., it was suggested that any tenant was allowed a reasonable time after the expiration of his term, but this concession is only made in favour of tenancies which are uncertain in their duration and which are determined without notice.

(*g*) *Re Roberts, Ex parte Brook, supra*, at p. 110.

(*h*) *Pugh* v. *Arton* (1869), L. R. 8 Eq. 626; see *Weeton* v. *Woodcock* (1840), 7 M. & W. 14, 19; *contra* as to fixtures which by the express terms of the lease are to be the property of the lessee (*Re Walker, Ex parte Gould* (1884), 13 Q. B. D. 454).

(*i*) *London and Westminster Loan and Discount Co.* v. *Drake* (1859), 6 C. B. (N. S.) 798; *Saint* v. *Pilley* (1875), L. R. 10 Exch. 137.

(*j*) *Re Glasdir Copper Works, Ltd., English Electro-Metallurgical Co., Ltd.* v. *Glasdir Copper Works, Ltd.*, [1904] 1 Ch. 819. As to removal by a trustee in bankruptcy who disclaims the lease, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (3); *Re Moser* (1884), 13 Q. B. D. 738; compare *Re Roberts, Ex parte Brook, supra*; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 193, 194.

(*k*) See *Moss* v. *James* (1878), 38 L. T. 595, C. A. But the assignee of growing crops can only take them subject to payment of the rent and expenses of cultivation since the surrender (*Clements* v. *Matthews* (1883), 11 Q. B. D. 808, C. A.).

(*l*) *Pugh* v. *Arton, supra*, at p. 630; see *Stansfeld* v. *Portsmouth Corporation* (1858), 4 C. B. (N. S.) 120; *Sumner* v. *Bromilow* (1865), 34 L. J. (Q. B.) 130.

(*m*) *Leschallas* v. *Woolf*, [1908] 1 Ch. 641.

(*n*) *Leschallas* v. *Woolf, supra*; see *Re Thomas, Ex parte Willoughby D'Eresby (Baroness)* (1881), 44 L. T. 781, C. A., where the point was not decided; and compare *Thorpe* v. *Milligan* (1857), 5 W. R. 336. If the new lease contains a covenant to repair, this will apply to trade fixtures affixed during the former lease (*Thresher* v. *East London Water Works Co.* (1824), 2 B. & C. 608).

SECT. 3. Fixtures.

Licence to remove fixtures.

884. In order that a licence by the landlord for the removal of fixtures after the determination of the tenancy may be available against the succeeding tenant it should be under seal (*o*). But a parol agreement by the landlord to take fixtures which the tenant could remove, since it does not relate to an interest in land, is enforceable (*p*).

Contract to leave fixtures

885. The lessee's right to remove trade or other fixtures is subject to the terms of the contract between the lessor and himself, and will be lost if he has covenanted to yield up the demised premises with the fixtures in such language as to make it imperative to construe "fixtures" as including fixtures removable by a tenant (*q*). But for the lease to take away the ordinary legal right

(*o*) *Roffey* v. *Henderson* (1851), 17 Q. B. 574; nor can fixtures be removed under such an agreement as against a mortgagee taking without notice of the agreement (*Thomas* v. *Jennings* (1896), 45 W. R. 93).

(*p*) *Hallen* v. *Runder* (1834), 1 Cr. M. & R. 226; *Lee* v. *Gaskell* (1876), 1 Q. B. D. 700; see *Lee* v. *Risdon* (1816), 7 Taunt. 188; title AGRICULTURE, Vol. I., p. 274. Where the tenant has not removed fixtures during the term he cannot maintain trover for them afterwards (*Lee* v. *Risdon*, *supra*; *Colegrave* v. *Dias Santos* (1823), 2 B. & C. 76; *Minshall* v. *Lloyd* (1837), 2 M. & W. 450); *contra*, if the articles in fact remain personal chattels throughout (*Davis* v. *Jones* (1818), 2 B. & Ald. 165; and see title TROVER AND DETINUE).

(*q*) Thus the word "fixtures," if it stands in the covenant by itself, will apparently include both landlord's and tenant's fixtures (*Leschallas* v. *Woolf*, [1908] 1 Ch. 641); but if the covenant enumerates a series of specific items, all of which are of the nature of landlord's fixtures, and then concludes with general words such as "all other fixtures," the general words will be construed, according to the *ejusdem generis* rule, as including only landlord's fixtures, and the tenant will retain his ordinary right to remove tenant's fixtures. Thus the words "together with all locks, keys, bars, bolts, marble and other chimney-pieces, footpaces, slabs, and other fixtures and articles in the nature of fixtures" have been held to include only landlord's fixtures, the words "marble and other chimney-pieces" being taken for this purpose to refer only to such as are not ornamental (*Bishop* v. *Elliott* (1855), 11 Exch. 113, Ex. Ch.; see *Dumergue* v. *Rumsey* (1863), 2 H. & C. 777, 788, Ex. Ch.; *Sumner* v. *Bromilow* (1865), 34 L. J. (Q. B.) 130); and to restrict the general words in this manner it is sufficient that the specific words should refer only to articles which ordinarily are not removable by the tenant (*Lambourn* v. *McLellan*, [1903] 2 Ch. 268, C. A.). But if the specific words are not assignable exclusively to "landlord's fixtures," then the general words will have their full effect and will prevent the removal of tenant's fixtures (*Wilson* v. *Whateley* (1860), 1 John. & H. 436; *Bidder* v. *Trinidad Petroleum Co.* (1868), 17 W. R. 153, where also "erections" was held to be a wider term than "buildings," and to include cisterns and boilers embedded in brickwork). A covenant to deliver up buildings erected during the term includes trade buildings (*Naylor* v. *Collinge* (1807), 1 Taunt. 19; *Thresher* v. *East London Water Works Co.* (1824), 2 B. & C. 608, 614); see *Foley* v. *Addenbrooke* (1844), 13 M. & W. 174 (where buildings had to be delivered up, but not machinery). A covenant to deliver up a watermill with "all fixtures and improvements" includes new millstones set up by the lessee, although according to the custom of the country he could have removed them (*Martyr* v. *Bradley* (1832), 9 Bing. 24); a covenant to yield up "erections and improvements" extends to a greenhouse (*West* v. *Blakeway* (1841), 2 Man. & G. 729, 754); to a verandah (*Penry* v. *Brown* (1818), 2 Stark. 403); and to a plate glass front (*Haslett* v. *Burt* (1856), 18 C. B. 893); and a covenant to yield up specified machinery extends to substituted machinery (compare *Sunderland* v. *Newton* (1830), 3 Sim. 450). But the analogy of these cases is not to be pressed too far, and the covenant will not necessarily extend to new machinery of an improved kind which was not contemplated at the date of the lease (*Cosby* v. *Shaw* (1888), 23 L. R. Ir. 181, C. A.). A covenant in a lease of salt works to

of a tenant to remove "tenant's fixtures," the intention to this effect must be clearly expressed (*r*).

SECT. 4.—*Exceptions and Reservations.*

Nature of exceptions.

886. An exception is always of part of the thing granted, and refers, therefore, to a thing *in esse* (*s*). Thus there may be a grant of a house except certain rooms, or of a farm except certain fields, or of land except the timber growing on it or the minerals underneath it (*t*). All these are true exceptions; they withdraw a physical part from that which is first mentioned as passing (*a*), the result being that the thing excepted is no part of the parcels (*b*).

Nature of reservations.

887. The term "reservation" may be used in a wide sense as meaning any benefit in respect of the subject-matter of the grant which is kept by the grantor for himself. Thus it may imply a keeping back of a physical part of the thing, in which case it is equivalent to an exception, and, accordingly, when the context requires it, the word "reserving" is construed as making an exception (*c*);

leave the works in good repair prevents the removal of salt pans which have been erected so as to be fixtures (*Mansfield* (*Earl*) v. *Blackburne* (1840), 6 Bing. (N. C.) 426); but a covenant to yield up "works" does not extend to articles which are not fixtures (*Beaufort* (*Duke*) v. *Bates* (1862), 3 De G. F. & J. 381, 388, C. A.).

(*r*) *Beaufort* (*Duke*) v. *Bates*, *supra*, at p. 390; see *Mowats, Ltd.* v. *Hudson Brothers, Ltd.* (1911), 131 L. T. Jo. 317, C. A. The covenant to yield up in repair usually contains an express exception of "tenant's fixtures." When it expressly includes "all fixtures, whether tenant's or trade fixtures, or otherwise," the intention to prevent removal of any fixtures is equally clear (see *Dumergue* v. *Rumsey* (1863), 2 H. & C. 777, Ex. Ch.). A covenant in a head lease for delivery up of trade fixtures will prevent an underlessee from removing such fixtures (*Porter* v. *Drew* (1880), 5 C. P. D. 143); and see p. 411, *ante*.

(*s*) Co. Litt. 47 a; Shep. Touch., ed. Preston, 80.

(*t*) An exception of "all mosses and turbaries" has been held to except all places in which turf, or matter in the course of becoming turf, is found (*Quinn* v. *Shields* (1877), 11 I. R. C. L. 254).

(*a*) But an exception of the whole of what has been granted is repugnant and void; *e.g.*, a lease of all the lessor's lands in a certain place, except specified lands which are in fact all that he has there (*Dorrell* v. *Collins* (1582), Cro. Eliz. 6); and similarly, the exception is void if it is of something specifically mentioned in the parcels, though not the whole of them; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 471, note (*n*); compare *Miller* v. *Pratt* (1605), Dyer, 264 b, note (40)); unless the thing has been mentioned merely as assisting in the description of the whole, and not by way of grant (*Ellis* v. *Lord Primate* (1864), 16 I. Ch. R. 184, C. A.; *Cochrane* v. *M'Cleary* (1869), 4 I. R. C. L. 165, Ex. Ch.). Where the terms of the lease prevent an apparent exception from operating as such, it may operate as a re-demise of the part purporting to be excepted (*Moroney* v. *Macnamara* (1872), 20 W. R. 905). As to uncertainty in an exception, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 441, 471. Premises excepted out of an exception pass as part of the premises demised (*Leigh* v. *Shaw* (1595), Cro. Eliz. 372). As to whether premises are to be treated as demised or reserved, see *Hebbert* v. *Thomas* (1835), 1 Cr. M. & R. 861.

(*b*) *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, 289, 290, P. C.; see *Fancy* v. *Scott* (1828), 6 L. J. (O. S.) (K. B.) 305. The exception is construed most strongly against the lessor and in favour of the lessee; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 441. An exception of "bogs and turf-mosses" excepts the soil (*Boyle* v. *Olpherts* (1841), 4 I. Eq. R. 241).

(*c*) Co. Litt. 143 a; see *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705, 745; but the word "reservation" will not be construed as meaning "exception" if

SECT. 4. **Exceptions and Reservations.**

or the word may imply that the grantor reserves to himself some equivalent for the use of the land, such as rent or services in the nature of rent, and this is the only meaning of "reservation" when used in its strict legal sense (*d*).

Reservation operating as regrant.

The word "reservation," again, may mean that the grantor keeps for himself some right of user or of taking the profits of the land, and in conveyancing practice the words "except and reserving" usually introduce the creation in favour of the lessor of an easement, or of a *profit à prendre*. But in this case the clause operates as the regrant of an incorporeal hereditament by the grantee to the grantor (*e*). To give the regrant legal validity the instrument must be executed by the grantee, and in the case of a lease this requirement is satisfied by the lessee's execution of the counterpart (*f*). There may be a reservation out of a parol demise (*g*). The reservations in leases which operate by way of regrant are usually of the free running of water and soil coming from adjacent buildings (*h*) and the right to make and maintain sewers under the demised premises (*i*), rights of way and other easements over the demised premises (*k*), and rights of sporting (*l*).

effect can be given to the instrument by construing it in its technical sense (*Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705, 745, 746).

(*d*) *Doe* d. *Douglas* v. *Lock*, *supra*, at p. 743.

(*e*) *Ibid.*; "What relates to the privilege of hawking, hunting, fishing, and fowling, is not either a reservation or exception in point of law; and it is only a privilege or right granted to the lessor, though words of reservation and exception are used." For this purpose an easement and a *profit à prendre* are on the same footing (*Wickham* v. *Hawker* (1840), 7 M. & W. 63, 67; *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Q. B. 940, 967, Ex. Ch.: a right of way "is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception and the latter to a reservation"). See also titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 249; FISHERIES, Vol. XIV., p. 584; GAME, Vol. XV., pp. 218, 219. But Sir E. COKE'S definition of a reservation (Co. Litt. 47 a), that it is "always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised," suits the reservation of an easement as much as the reservation of a rent; compare *Houstoun* v. *Sligo* (*Marquis*) (1886), 55 L. T. 614, H. L.

(*f*) *Durham and Sunderland Rail Co.* v. *Walker*, *supra*, at pp. 967, 968. But even without execution by the grantee, the grant may operate as evidence of an agreement to regrant the easement or *profit à prendre* (*May* v. *Belleville*, [1905] 2 Ch. 605; and see *Thellusson* v. *Liddard*, [1900] 2 Ch. 635, 645).

(*g*) *Bridgland* v. *Shapter* (1839), 5 M. & W. 375.

(*h*) Such a reservation extends to water and soil coming from the adjacent premises, whether it first arises there or not, but does not ordinarily extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation (*Chadwick* v. *Marsden* (1867), L. R. 2 Exch. 285, 289).

(*i*) See *Lee* v. *Stevenson* (1858), E. B. & E. 512.

(*k*) As to the effect as a regrant of a proviso securing rights of way to the lessor, see *Dynevor* (*Lord*) v. *Tennant* (1886), 33 Ch. D. 420, C. A.; affirmed (1888), 13 App. Cas. 279; as to the reservation of a watercourse, see *Doe* d. *Egremont* (*Earl*) v. *Williams* (1848), 11 Q. B. 688; and as to watercourses, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 310 *et seq.*; WATERS AND WATERCOURSES. As to the liability of the lessor to maintain a culvert which he has reserved, see *Anderson* v. *Cleland*, [1910] 2 I. R. 334, C. A. As to the reservation of power to the lessor to alter a road, see *Butt* v. *Imperial Gas-Light Co.* (1866), 15 W. R. 92.

(*l*) See *Wickham* v. *Hawker*, *supra*; see titles FISHERIES, Vol. XIV., p. 584; GAME, Vol. XV., p. 218.

888. It follows, also, that the reservation may operate in favour of a person who is not a party to the deed (*m*).

For whose benefit reservation operates.

A reservation of a right of sporting in favour of the lessor and his assigns, where the right is exercisable concurrently with the lessee, is not available for licensees of the lessor (*n*); but it is otherwise where the lessor excepts a part of the premises with right of access thereto, and the lessor can authorise licensees to use the excepted part (*o*).

SECT. 5.—*Trees and Underwood.*

Tenant's right to timber.

889. The respective rights of landlord and tenant as to trees vary according as the trees are timber trees or not (*p*). All trees pass as parcel of the demised premises unless they are excepted (*q*), and the lessee has a special property in timber trees so long as they are annexed to the land, and by virtue of this he is entitled to all such benefit—such as fruit or shade—as may be derived from them while so annexed (*a*). He is also entitled to fell timber for the purpose of repairing buildings and fences so as to keep them as he found them, and to mend implements, and also for fuel if there is not sufficient dead wood available (*b*). If the house falls by tempest or other act of God, the tenant may take timber to rebuild it (*c*). But when timber trees are dead—that is, are dotards—the tenant is entitled to cut them down and take them (*d*), and such trees also belong to him

Dotards.

(*m*) *Wickham* v. *Hawker* (1840), 7 M. & W. 63, 67. When a lease of a farm is subject to the use of a golf course, with liberty for the golf club to keep the course free from long grass, the question what is long grass is to be determined from the golfer's point of view (*Woodward* v. *Heywood* (1910), 27 T. L. R. 123).

(*n*) *Reynolds* v. *Moore*, [1898] 2 I. R. 641; and see title GAME, Vol. XV., pp. 216 *et seq.*

(*o*) *Mitcalfe* v. *Westaway* (1864), 17 C. B. (N. S.) 658.

(*p*) Co. Litt. 53 a; *Aubrey* v. *Fisher* (1809), 10 East, 446, 455; *Dunn* v. *Bryan* (1872), 7 I. R. Eq. 143; compare *Whitty* v. *Dillon* (*Lord*) (1860), 2 F. & F. 67. As to what trees are timber, see title AGRICULTURE, Vol. I., p. 296; *Chandos* (*Duke*) v. *Talbot* (1731), 2 P. Wms. 601, 606; and see title CUSTOM AND USAGES, Vol. X., p. 259.

(*q*) *Mervyn* v. *Lyds* (1553), Dyer, 90 a; see *Barret* v. *Barret* (1627), Het. 34.

(*a*) *Herlakenden's Case* (1589), 4 Co. Rep. 62 a, b.

(*b*) Co. Litt. 53 b. The use of timber for such purposes is called "housebote," "plowbote," and "firebote" (*ibid.*), or "estovers" (Co. Litt. 41 b). Compare *Courtenay* v. *Fisher* (1826), 4 Bing. 3. But, although the tenant may fell timber for necessary botes, he must at his own peril select such trees as are fit for the purpose, and employ them accordingly (*Simmons* v. *Norton* (1831), 7 Bing. 640, 649); and the tenant cannot sell the timber and use the proceeds in the purchase of other material for the repair of buildings (Co. Litt. 53 b), nor may he cut down timber in advance so as to be used for repairs as occasion requires (*Gorges* v. *Stanfield* (1597), Cro. Eliz. 593). The tenant does not acquire a right of sale by the landlord's long acquiescence (compare *Courtown* (*Lord*) v. *Ward* (1802), 1 Sch. & Lef. 8). Similarly, a tenant may cut turf for fuel, but not for sale (*Courtown* (*Lord*) v. *Ward*, *supra*; *De Salis* (*Count*) v. —— (1809), 2 Mol. 516; *Waterpark* (*Lord*) v. *Austen* (1822), 1 Jo. Ex. Ir. 627, n.; *Pollard* v. *Smith* (1826), 1 Hog. 391; *White* v. *Walsh* (1829), 1 Jo. Ex, Ir. 626, n.), unless nothing but bog is demised and it is not capable of use except by being cut for sale, or if it was cut for sale at the time of demise (*Coppinger* v. *Gubbins* (1846), 3 Jo. & Lat. 397, 410). As to estovers, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 466.

(*c*) *Herlakenden's Case*, *supra*, at p. 63 a.

(*d*) Co. Litt. 53 a; see further title AGRICULTURE, Vol. I., p. 295.

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if they are blown down (*e*). If the tenant cuts down timber under any other circumstances or tops it, or does any act by which it may decay, this is waste (*f*).

Landlord's right to timber.

890. The general property in timber trees is in the landlord (*g*), and if the tenant or any other person severs them from the land, or if they are blown down, the special property of the tenant is determined, and the landlord may take them as parcel of his inheritance; similarly, if the house is pulled down, the timber belongs at once to the landlord (*h*).

Young timber trees.

891. Where trees have not attained the age necessary to make them timber trees, their prospective value as timber trees prevents the tenant from cutting them down, save in a proper course of thinning, and if he does so he commits waste (*i*); and so also if he suffers the young plants or germens to be destroyed (*k*); though if he does this in a due course of cultivation, and for the purpose of improving the growth of adjacent timber trees, he is entitled to the proceeds (*l*). There may also be a coppice of timber trees, that is, where the trees are felled and shoots are allowed to grow from the stumps (*m*), these being cut at intervals of fifteen years and upwards. The tenant in such case is entitled to continue the same cutting at the proper time, and to take the proceeds without regard to the age of the trees (*n*).

Tenant's general property in trees not being timber.

892. The general property in trees which are not timber and in underwood is in the tenant (*o*), and he may cut them down, provided that they are not planted for ornament or for the protection of the house or of banks, or for shade to animals at pasture (*p*); and provided, further, that the cutting does not change the nature of the property demised. Thus the tenant may not cut down apple-trees in a garden or orchard, or cut down a quick-set hedge (*q*), or plough up strawberry beds in full bearing (*r*). Where the tenant

(*e*) *Herlakenden's Case* (1589), 4 Co. Rep. 62 a, 63 a.

(*f*) Co. Litt. 53 c. For form of covenant to preserve trees, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 243 *et seq.*

(*g*) *Berriman* v. *Peacock* (1832), 9 Bing. 384, 386

(*h*) *Herlakenden's Case, supra*, at p. 62 a; *Ward* v. *Andrews* (1772), 2 Chit. 636. See *Edwards* v. *Heather* (1724), Cas. *temp.* King, 3. Hence a tenant for years cannot maintain trespass for timber cut down (*Evans* v. *Evans* (1810), 2 Camp. 491).

(*i*) *Phillipps* v. *Smith* (1845), 14 M. & W. 589, 594; *Honywood* v. *Honywood* (1874), L. R. 18 Eq. 306, 310; see *Anon.* (1581), Godb. 4.

(*k*) Co. Litt. 53 a.

(*l*) *Honywood* v. *Honywood, supra*, at p. 312.

(*m*) *I.e., silva cædua* (*Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 362, C. A.).

(*n*) *Phillipps* v. *Smith, supra*, at p. 594; *Bagot* v. *Bagot, Legge* v. *Legge* (1863), 32 Beav. 509, 517; *Dashwood* v. *Magniac, supra, per* CHITTY, J., at pp. 330, 392; see *Hood* (*Lord*) v. *Kendall* (1855), 17 C. B. 260.

(*o*) *Berriman* v. *Peacock, supra*, at p. 387; as to non-timber trees and underwood, see *R.* v. *Ferrybridge* (*Inhabitants*) (1823), 1 B. & C. 375, 383.

(*p*) Co. Litt. 53 a; *Phillipps* v. *Smith, supra*; *Honywood* v. *Honywood, supra*, at p. 310.

(*q*) Co. Litt. 53 a; *Phillipps* v. *Smith, supra*, at p. 594; *Berriman* v. *Peacock, supra*, at p. 387.

(*r*) *Watherell* v. *Howells* (1808), 1 Camp. 227.

properly cuts down trees or underwood, he is entitled to the proceeds (*s*), and so, too, where they are cut down by a stranger and the tenant adopts his act. But the tenant can only cut down the trees or underwood in a seasonable manner (*t*), and so as not to prevent them from growing again (*a*); he cannot take up a growing tree (*b*), or stub up the stools from which the young shoots will spring (*c*); and if he exceeds his right he is liable to an action for waste (*d*).

Rights of adjoining owners to trees.

893. A tree partly on the land of one person and partly on that of another, so that the roots derive nourishment from the soil of both, belongs to the owner of the soil where it was first sown or planted (*e*).

Exception of trees from lease.

894. The common law rights of landlord and tenant in respect of trees growing on the demised land may be varied by the contract of the parties, and this is done either by exception, or by covenant or agreement. An exception of "trees" refers *primâ facie* to trees which are useful for their wood, and hence it does not extend to fruit trees (*f*). In an exception of timber and other trees, underwood, "bushes and thorns, other than such bushes and thorns as shall be necessary for the repair of the fences," the final words do not specify any particular bushes and thorns, and hence they do not operate as an exception from the exception. All the bushes and thorns are excepted, subject to the right of the lessee to take such as are necessary for the repair of fences (*g*).

How far it includes soil.

An exception of "timber and other trees" refers only to the trees themselves, and does not except the soil, but only sufficient nutriment out of the land to sustain the life of the trees (*h*), and it

(*s*) *Berriman* v. *Peacock* (1832), 9 Bing. 384, 386.

(*t*) *Brydges* v. *Stephens* (1821), Madd. & G. 279.

(*a*) See *Anon.* (1581), Godb. 4.

(*b*) *Empson* v. *Soden* (1833), 4 B. & Ad. 655, 657; but a market gardener is entitled to remove trees and shrubs in the course of his trade (*Penton* v. *Robart* (1801), 2 East, 88, 90; *Wyndham* v. *Way* (1812), 4 Taunt. 316); compare *Wardell* v. *Usher* (1841), 3 Scott (N. R.), 508; and see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 42; titles AGRICULTURE, Vol. I., p. 272; SMALL HOLDINGS AND SMALL DWELLINGS.

(*c*) Co. Litt. 53 a; *Phillipps* v. *Smith* (1845), 14 M. & W. 589, at p. 594; *Dunn* v. *Bryan* (1872), 7 I. R. Eq. 143; see *Gage and Smith's Case* (1613), Godb. 209.

(*d*) *Berriman* v. *Peacock*, *supra*.

(*e*) *Holder* v. *Coates* (1827), Mood. & M. 112.

(*f*) *London* v. *Southwell* (*Collegiate Church*) (1618), Hob. 303; *Wyndham* v. *Way* (1812), 4 Taunt. 316, 318, n. (a). It is the same, although the exception is of "all timber and other trees, but not the annual fruit thereof," for the term "fruit" is not in legal acceptation confined to trees which are popularly known as fruit trees, but applies to the produce of oak, elm and walnut trees (*Bullen* v. *Denning* (1826), 5 B. & C. 842, *per* BAYLEY, J., at p. 847). The exception will extend to trees at any time growing on the land during the demise; but as to leases in Ireland, see *Galwey* v. *Baker* (1840), 7 Cl. & Fin. 379, H. L.

(*g*) *Jenney* v. *Brook* (1844), 6 Q. B. 323, Ex. Ch. If the lessor has covenanted to provide stakes and bushes for repair, it seems that he must assign the bushes before the tenant can cut them (*ibid.*, at p. 339).

(*h*) *Liford's Case* (1614), 11 Co. Rep. 46 b, 50 a; *Whilster* v. *Paslow* (1618), Cro. Jac. 487; *contra*, *Rolls* v. *Rock* (1729), 2 Selwyn, Law of Nisi Prius,

SECT. 5. Trees and Underwood.

is the same where the exception is of "saleable woods" (*i*). But an exception of "plantations" (*j*), or "woods and underwoods" (*k*), refers also to the soil, and excepts the soil on which the trees grow. If the exception is of "timber and other trees, wood, and underwood," the former words control the latter, and the soil of land covered with growing wood does not pass (*l*).

Right to enter and cut.

895. An exception of timber or other trees is usually accompanied by a reservation of the right to enter and to cut and carry them away; but this is not essential. An exception of trees carries with it the right to do all things necessary for getting and disposing of them, and consequently, without express reservation, the lessor may enter to show the trees to an intending purchaser, and either he or the purchaser can cut them down and carry them away (*m*), unless, indeed, the timber is ornamental, and the lessor has so acted as to make it inequitable that he should fell it, where, for example, he has consented to the lessee spending money in improving the grounds (*n*). In the absence of express agreement, the excepted trees are at the risk of the lessor, and the lessee is not bound to protect them from his cattle (*o*).

Effect of covenants as to trees.

896. Covenants relating to trees are usually intended, when entered into by the lessor, to provide for the delivery of timber for repairs, and, when entered into by the lessee, to restrain interference with the trees, whether they are included in the demise or excepted. Under a covenant by the lessor to deliver timber growing on the premises sufficient for the repairs thereof, he must deliver timber sufficient in quality as well as in quantity (*p*).

When trees excepted.

897. When trees are excepted out of a demise, the cutting of them is not waste, since waste can only be committed of the thing demised (*q*); and, although it is actionable as trespass, it is usual to support the exception by an express covenant on the part of the lessee not to fell, lop, or top them (*r*). But such a covenant will

13th ed., 1244. For forms of demise excepting trees, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 528, 550.

(*i*) *Pincomb* v. *Thomas* (1619), Cro. Jac. 524.

(*j*) *Simpson* v. *Brook* (1855), 19 J. P. 436.

(*k*) *Ive* v. *Sams* (1596), Cro. Eliz. 521; *Whilster* v. *Paslow* (1618), Cro. Jac. 487.

(*l*) *Legh v. Heald* (1830), 1 B. & Ad. 622.

(*m*) *Liford's Case* (1614), 11 Co. Rep. 46 b, 52 a; and it is not necessary that the lease should be under seal; if it is under hand only, the lessor enters as licensee of the lessee (*Hewitt* v. *Isham* (1851), 7 Exch. 77). See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 471.

(*n*) *Jackson v. Cator* (1800), 5 Ves. 688.

(*o*) *Clithero v. Higgs* (1636), W. Jo. 388; *Glenham* v. *Hanby* (1700), 1 Ld. Raym. 739; but this seems to be contrary to principle, since the damage by the lessee's cattle is a trespass, and where a field contains young trees and shrubs, the tenant should give notice to the landlord before grazing cattle in it, so that the landlord may protect them by fences (*Fowler* v. *Johnstone* (1892), 8 T. L. R. 327); see generally as to trespass by animals, title ANIMALS, Vol. I., pp. 375 *et seq.*

(*p*) *Snell* v. *Snell* (1825), 4 B. & C. 741, 749.

(*q*) *Goodright* d. *Peters* v. *Vivian* (1807), 8 East, 190, 192; see *Barret* v. *Barret* (1627), Het. 34.

(*r*) See *Raymond* v. *Fitch* (1835), 2 Cr. M. & R. 588. The executor of the lessor can sue for a breach of the covenant committed in his lifetime (*ibid.*).

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not prevent the lessee from cutting trees or underwood which interfere with the use of the land for the purpose for which it is demised (*s*).

When trees not excepted.

Although trees are not excepted, the lessee may be placed under special restrictions as to removing them during the tenancy, or under special obligations as to delivering them up at the end of the tenancy. Under a covenant not to remove or grub up or destroy trees, the lessee is prevented from removing trees from one part of the premises to another, or taking them away (unless dead), even though he plants a greater number than he takes away (*a*). But under a covenant to deliver up at the end of the term all the orchard trees existing at the time of the demise, reasonable use and wear only excepted, it is a reasonable use of the orchard, if it is overcrowded, to remove trees past bearing (*b*).

SECT. 6.—*Game.*

Ownership of game.

898. Unless otherwise provided by the lease, the right to game passes to the lessee (*c*); but, subject to the provisions of the Ground Game Act, 1880 (*d*), the landlord can reserve the right to himself (*e*). The reservation need not be under seal (*f*).

Rights of lessee where game reserved.

The statutory rights of every occupier of land to kill and take ground game, concurrently with any other person who may be entitled to kill and take ground game on the same land, are dealt with elsewhere (*g*).

Duties of landlord and tenant where game reserved.

Where the lessor has reserved, subject to such statutory rights, the exclusive right of shooting and sporting (*h*), the lessee is entitled to use the land and to destroy furze and underwood in the ordinary and reasonable way, but he must not designedly drive the game away (*h*). On the other hand, the lessor or his tenant of

(*s*) Thus, where in a lease of a farm and quarries of stone thereon, with liberty to work the quarries, there is an exception of trees and a covenant not to commit waste by cutting down wood or underwood, it is not a breach of the covenant to cut down wood and underwood required to be removed in order to work the quarries (*Doe* d. *Rogers* v. *Price* (1849), 8 C. B. 894).

(*a*) *Doe* d. *Wetherell* v. *Bird* (1833), 6 C. & P. 195.

(*b*) *Doe* d. *Jones* v. *Crouch* (1810), 2 Camp. 449. Where the tenant is restrained by covenant from cutting coppice of less than ten years' growth, with a provision that at the end of the term the landlord will pay the value of the coppice then growing, this provision extends to coppice of less than ten years' growth, although, since the tenant could not cut it, there is no special consideration for such extension of the payment (*Love* v. *Pares* (1810), 13 East, 80).

(*c*) *Pochin* v. *Smith* (1887), 52 J. P. 4; see, generally, title GAME, Vol. XV., pp. 216 *et seq.* For form of reservation of sporting rights, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 508 *et seq.*

(*d*) 43 & 44 Vict. c. 47.

(*e*) See title GAME, Vol. XV., p. 217. As to the persons who can exercise the right, see *Wickham* v. *Hawker* (1840), 7 M. & W. 63; *Gardiner* v. *Colyer* (1864), 12 W. R. 979.

(*f*) See title GAME, Vol. XV., pp. 217, 218, notes (*a*), (*b*), 219, 220, note (*t*); *Coleman* v. *Bathurst* (1871), L. R. 6 Q. B. 366.

(*g*) See title GAME, Vol. XV., pp. 221 *et seq.*; and as to the tenant's right to compensation for damage from game, see *ibid.*, p. 224.

(*h*) *Jeffryes* v. *Evans* (1865), 19 C. B. (N. S.) 246, 264; and as to the general effect of such reservation, see title GAME, Vol. XV., pp. 216, note (*h*), 219.

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the shooting must not trample fields of standing crops at a time when it is not usual nor reasonable to do so (*i*); and if he causes the game to increase to an unreasonable extent, the tenant can recover damages for the injury to his crops (*k*).

Part V.—Duration of Tenancy.

SECT. 1.—*Tenancy at Will or at Sufferance.*

Nature of tenancy at will.

899. A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also; for every lease at will must in law be at the will of both parties (*l*). As in other tenancies, a tenancy at will arises by contract binding both lessor and lessee (*m*), and the contract may be express or implied.

Express or implied.

A tenancy expressed to be at will takes effect according to its tenor (*n*), notwithstanding that a rent at an annual rate is reserved (*o*).

A tenancy at will is implied when a person is in possession by the consent of the owner (*a*), and his possession is not as servant or agent (*b*), and is not held in virtue of any freehold estate or of any tenancy for a certain term (*c*). It is implied accordingly in cases of mere permissive occupation without payment of rent (*d*), and of

(*i*) *Hilton* v. *Green* (1862), 2 F. & F. 821.

(*k*) *Hilton* v. *Green, supra*; *Birkbeck* v. *Paget* (1862), 31 Beav. 403; *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258. As to collateral agreements by the landlord to keep down game, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447; and as to enforcing against the shooting tenant a covenant to keep down rabbits, see *Cornewall* v. *Dawson* (1871), 24 L. T. 664.

(*l*) Littleton's Tenures, s. 68; Co. Litt. 55 a.

(*m*) *Ley* v. *Peter* (1858), 3 H. & N. 101, 107.

(*n*) *Richardson* v. *Langridge* (1811), 4 Taunt. 128. For forms of agreement creating tenancy at will, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 288, 302, 319.

(*o*) *Doe* d. *Bastow* v. *Cox* (1847), 11 Q. B. 122; *Walker* v. *Giles* (1848), 6 C. B. 662; *Doe* d. *Dixie* v. *Davies* (1851), 7 Exch. 89. In these cases the tenancy was between mortgagee and mortgagor, and formerly tenancies at will were frequently created by the attornment clause in mortgage deeds; see also *Pinhorn* v. *Souster* (1853), 8 Exch. 763; *Turner* v. *Barnes* (1862), 2 B. & S. 435; *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A.; but now the clause is of less frequent use; see title MORTGAGE.

(*a*) *Doe* d. *Hull* v. *Wood* (1845), 14 M. & W. 682, 687. It has been said that this must be an affirmative consent, and not a mere negative or silent consent (*Ley* v. *Peter, supra, per* BRAMWELL, B., at p. 108), but it seems to be sufficient if the circumstances show assent by the owner.

(*b*) The relation of servant or agent excludes a tenancy; see p. 340, *ante*.

(*c*) See *Doe* d. *Rogers* v. *Pullen* (1836), 2 Bing. (N. C.) 749.

(*d*) *Doe* d. *Groves* v. *Groves* (1847), 10 Q. B. 486; *Smith* v. *Seghill* (1875), L. R. 10 Q. B. 422, 429; see *R.* v. *Collett* (1823), Russ. & Ry. 498; *R.* v. *Jobling* (1823), Russ. & Ry. 525. A *cestui que trust* in actual occupation is in law tenant at will to the trustees (*Garrard* v. *Tuck* (1849), 8 C. B. 231); but if he is

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this nature is the occupation of a house by a dissenting minister under trustees in whom the property in the house is vested (*e*).

It is also implied upon a mere general letting, unless there are circumstances showing an intention that the tenancy shall be from year to year, as where a yearly rent or a rent measured by reference to an aliquot part of a year, is agreed to be paid (*f*).

Similarly a person who enters on land with the consent of the owner under a contract which does not immediately give him a definite interest in the land enters as tenant at will, for example, a purchaser who enters into possession of land pending the completion of the purchase (*g*), or an intending lessee who enters during negotiation for a lease (*h*), or under a void lease (*i*). A lessee who, with the consent of the lessor, remains in possession after his lease has expired, is tenant at will until some other interest is created, until, for instance, the tenancy is turned into a yearly tenancy by payment of rent (*k*); save in the case where there is a

receiving the rents, he does this as agent of the trustees (*Melling* v. *Leak* (1855), 16 C. B. 652, 669); compare *Morgell* v. *Paul* (1828), 2 Man. & Ry. (K. B.) 303; *Vallance* v. *Savage* (1831), 7 Bing. 595.

(*e*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 815, 817.

(*f*) *Richardson* v. *Langridge* (1811), 4 Taunt. 128, *per* CHAMBRE, J., at p. 132; *Doe* d. *Hull* v. *Wood* (1845), 14 M. & W. 682, 687; *Doe* d. *Roberton* v. *Gardiner* (1852), 12 C. B. 319; see *Roe* d. *Bree* v. *Lees* (1778), 2 Wm. Bl. 1171, 1173; *Re Stroud and East and West India Docks and Birmingham Junction Rail. Co.* (1849), 8 C. B. 502; *Bayley* v. *Fitzmaurice* (1857), 8 E. & B. 664, 679; *Hunt* v. *Allgood* (1861), 10 C. B. (N. S.) 253; and compare *Doe* d. *Martin* v. *Watts* (1797), 7 Term Rep. 83, 85 (where a "general occupation" was said to be an occupation from year to year, but there rent had been paid).

(*g*) *Right* d. *Lewis* v. *Beard* (1811), 13 East, 210; *Doe* d. *Newby* v. *Jackson* (1823), 1 B. & C. 448; *Ball* v. *Cullimore* (1835), 2 Cr. M. & R. 120; *Doe* d. *Tomes* v. *Chamberlaine* (1839), 5 M. & W. 14; *Howard* v. *Shaw* (1841), 8 M. & W. 118; *Doe* d. *Stanway* v. *Rock* (1842), 4 Man. & G. 30; see *Doe* d. *Parker* v. *Boulton* (1817), 6 M. & S. 148. Consequently the tenancy cannot be determined without demand of possession (see *Pollen* v. *Brewer* (1859), 7 C. B. (N. S.) 371), though in *Doe* d. *Leeson* v. *Sayer* (1811), 3 Camp. 8, this was not considered necessary; compare *Doe* d. *Moore* v. *Lawder* (1816), 1 Stark. 308; *Doe* d. *Hiatt* v. *Miller* (1833), 5 C. & P. 595. But while the purchaser is thus in possession he is not bound to pay rent, and an action for use and occupation will not lie against him (*Winterbottom* v. *Ingham* (1845), 7 Q. B. 611; see *Hearn* v. *Tomlin* (1793), Peake, 253 [191]; *Kirtland* v. *Pounsett* (1809), 2 Taunt. 145; *Corrigan* v. *Woods* (1867), 1 I. R. C. L. 73; and compare *Tew* v. *Jones* (1844), 13 M. & W. 12); save by virtue of special agreement (*Saunders* v. *Musgrave* (1827), 6 B. & C. 524); though if he remains in possession after the purchase has gone off, the action will lie (*Howard* v. *Shaw*, *supra*; *Markey* v. *Coote* (1876), 10 I. R. C. L. 149, 155); and a vendor who remains in possession may be liable for use and occupation (*Metropolitan Rail. Co.* v. *Defries* (1877), 2 Q. B. D. 387, C. A.).

(*h*) *Coggan* v. *Warwicker* (1852), 3 Car. & Kir. 40 (where the intending tenant was held liable for use and occupation); compare *Doe* d. *Knight* v. *Quigley* (1810), 2 Camp. 505.

(*i*) *Goodtitle* d. *Gallaway* v. *Herbert* (1792), 4 Term Rep. 680; see *Denn* d. *Warren* v. *Fearnside* (1747), 1 Wils. 176; *Segrave* v. *Barber* (1855), 5 I. C. L. R. 67. Formerly entry under an agreement for a lease raised, until payment of rent, an implied tenancy at will (*Hamerton* v. *Stead* (1824), 3 B. & C. 478, 483; *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494, 497; *Anderson* v. *Midland Rail. Co.* (1861), 3 E. & E. 614; *Coatsworth* v. *Johnson* (1886), 55 L. J. (Q. B.) 220, C. A.); but now, provided the agreement is capable of specific performance, the tenant holds for the term agreed to be granted (*Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.; see p. 367, *ante*).

(*k*) *Doe* d. *Hollingsworth* v. *Stennett* (1799), 2 Esp. 717, 719; compare *Morgan*

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lease for a year, and then if, by consent of both parties, the tenant continues in possession after the year, the tenancy becomes a tenancy from year to year (*l*).

Determination of tenancy at will.

900. A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end. But until such intimation the tenant is lawfully in possession, and accordingly the landlord cannot recover the premises in an action for recovery of land without a previous demand of possession (*m*) or other determination of the tenancy. Where rent is payable under a tenancy at will, and the tenancy is determined between the rent days, the rent is apportioned (*n*).

By landlord: (i.) expressly;

901. Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will (*o*). Thus the landlord may expressly demand possession (*p*), or state that the tenant is in against his will (*q*), or send for the keys (*q*); and if the notice states terms, and intimates that if they are not accepted the landlord will take steps to recover the premises, and the terms are rejected, this is a sufficient notice to determine the tenancy (*r*).

(ii.) impliedly.

The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuance of the tenancy; for example, when he re-enters to take

v. *Harrison* (*William*), [1907] 2 Ch. 137, C. A. But in *Simkin* v. *Ashurst* (1834), 1 Cr. M. & R. 261, a holding over by an undertenant with consent was said to make him tenant at sufferance only. A notice to quit the premises, stating that the term has long since expired, does not recognise a yearly tenancy, but is a mere demand of possession (*Doe* d. *Godsell* v. *Inglis* (1810), 3 Taunt. 54).

(*l*) *Right* d. *Flower* v. *Darby* (1786), 1 Term Rep. 159; *Dougal* v. *McCarthy*, [1893] 1 Q. B. 736, C. A. According to Lord MANSFIELD, C.J., in *Right* d. *Flower* v. *Darby*, *supra*, the law implies a tacit renovation of the contract, and this would mean that the tenant holds for another year certain with the right to leave without notice at the end of it. But both Lord MANSFIELD, C.J., and BULLER, J., required that there should be notice before quitting at the end of the second or any subsequent year, so that the tenancy is renewed as a yearly tenancy.

(*m*) *Goodtitle* d. *Gallaway* v. *Herbert* (1792), 4 Term Rep. 680; and receipt of rent under a void lease, though in such circumstances as not to imply a yearly tenancy, is such a recognition of the lawful possession of the tenant as to prevent his being a trespasser till after notice to quit (*Denn* d. *Brune* v. *Rawlins* (1808), 10 East, 261). For form of demand for possession, see Encyclopædia of Forms and Precedents, Vol. VII., p. 688.

(*n*) See Apportionment Act, 1870 (33 & 34 Vict. c. 35). Formerly it was otherwise, and a lessee at a quarterly rent determining the tenancy during a quarter paid the rent for the quarter, but the lessor determining the tenancy lost it (*Leighton* v. *Theed* (1702), 2 Salk. 413; see *Disdale* v. *Iles* (1673), 2 Lev. 88).

(*o*) *Doe* d. *Price* v. *Price* (1832), 9 Bing. 356, 358; see *Locke* v. *Matthews* (1863), 13 C. B. (N. S.) 753.

(*p*) *Doe* d. *Jones* v. *Jones* (1830), 10 B. & C. 718; *Doe* d. *Nicholl* v. *M'Kaeg* (1830), 10 B. & C. 721, 723.

(*q*) *Pollen* v. *Brewer* (1859), 7 C. B. (N. S.) 371, 373.

(*r*) *Doe* d. *Price* v. *Price*, *supra*.

possession (*s*), or puts in a new tenant (*t*), or cuts down trees or carries away stone (*a*), the trees and stone not being excepted from the demise (*b*); and also when he does an act off the premises which is inconsistent with the tenancy, as when he conveys the reversion (*c*), or grants a lease of the premises to commence forthwith (*d*). But an act done off the premises does not determine the tenancy until the tenant has notice of it (*e*).

By tenant.

902. A mere notice by the tenant to determine the tenancy at will is not effectual unless he actually gives up possession (*f*). The tenancy is impliedly determined on his part when he usurps the rights of the landlord, as when he cuts down timber trees or pulls down houses (*g*), or when he assigns (*h*), or underlets (*i*) the premises, and such assignment or underletting comes to the knowledge of the landlord (*h*).

By death of either landlord or tenant.

903. A tenancy at will is a personal relation between the original landlord and tenant, and is determined by the death of either of them (*k*).

Tenant at sufferance.

904. One who enters on land by a lawful title, and after his title has ended continues in possession without obtaining the consent of the person then entitled, is said to be a tenant at sufferance (*l*).

(*s*) Co. Litt. 55 b. Entering for the purpose of doing repairs does not determine the tenancy (*Lynes* v. *Snaith*, [1899] 1 Q. B. 486).

(*t*) *Wallis* v. *Delmar* (1860), 29 L. J. (EX.) 276.

(*a*) *Turner* v. *Doe* d. *Bennett* (1842), 9 M. & W. 643, Ex. Ch.

(*b*) If they are excepted the act is lawful although the tenancy continues, and hence it is not an implied determination of the tenancy (Co. Litt., 55 b).

(*c*) *Doe* d. *Davies* v. *Thomas* (1851), 6 Exch. 854, 857; *Doe* d. *Dixie* v. *Davies* (1851), 7 Exch. 89, 93; see *Daniels* v. *Davison* (1809), 16 Ves. 249, 252. An involuntary alienation, such as a vesting in a trustee in bankruptcy, has the same effect (*Doe* d. *Davies* v. *Thomas*, *supra*). A feoffment with livery of seisin on the land determined the tenancy, although the tenant was off the land and had no notice (*Ball* v. *Cullimore* (1835), 2 Cr. M. & R. 120).

(*d*) *Disdale* v. *Iles* (1673), 2 Lev. 88; *Hogan* v. *Hand* (1861), 14 Moo. P. C. C. 310; *Farrelly* v. *Robins* (1869), 3 I. R. C. L. 284.

(*e*) *Doe* d. *Davis* v. *Thomas*, *supra*; *Pinhorn* v. *Souster* (1853), 8 Exch. 763, 770. Similarly a verbal notice given off the premises must be shown to have reached the tenant (Co. Litt. 55 b). But he is presumed to have notice of any act done openly on the premises (*Pinhorn* v. *Souster*, *supra*; compare *Ball* v. *Cullimore*, *supra*).

(*f*) Co. Litt. 55 b, note 373.

(*g*) Co. Litt. 57 a.

(*h*) *Pinhorn* v. *Souster*, *supra*, at p. 772.

(*i*) *Birch* v. *Wright* (1786), 1 Term Rep. 378, 382.

(*k*) Co. Litt. 57 b; *James* v. *Dean* (1805), 11 Ves. 383, 391; *Doe* d. *Stanway* v. *Rock* (1842), Car. & M. 549, 553; *Turner* v. *Barnes* (1862), 2 B. & S. 435; *Scobie* v. *Collins*, [1895] 1 Q. B. 375; though in *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, 306, Ex. Ch., it was intimated that a tenancy at will might continue to subsist after the death of one of the parties unless the successor in title manifested his intention to determine it; and see *Re Manser*, *Killick* v. *Manser*, [1910] W. N. 61 (where the administratrix of a deceased tenant at will was accepted as tenant at will, and it was held that her tenancy was on behalf of the estate of the deceased).

(*l*) Co. Litt. 57 b. Any assent by the landlord to the holding over constitutes a tenancy at will, though a written acknowledgment that the tenant holds "on sufferance only" has been held to be a mere acknowledgment and not to require to be stamped as an agreement for a tenancy (*Barry* v. *Goodman* (1837), 2 M. & W. 768).

SECT. 1. **Tenancy at Will or at Sufferance.**

This is so whatever was the nature of his original estate, whether he was tenant *pur autre vie* and holds over after the death of the *cestui que vie* (*m*), or whether he was tenant for years (*n*), or the undertenant of a tenant for years (*o*), or a tenant at will (*p*). But a tenancy at sufferance does not arise upon the holding over by one whose title was created by act of law (*q*); and there can be no tenancy at sufferance against the Crown (*r*): in these cases the person holding over is a mere trespasser (*s*). One tenant at sufferance cannot make another (*t*); but it seems that on the death of a tenant at sufferance the like tenancy will continue in favour of a person claiming under him (*a*). A release from the landlord to the tenant at sufferance does not operate to enlarge the estate of the latter (*b*).

Rights of tenant at sufferance.

A tenant at sufferance can by virtue of his possession maintain an action of trespass (*c*), and under the present doctrine he can, like any other person holding without title who is deprived of possession, recover in ejectment against a mere wrongdoer (*d*).

Determination of tenancy.

The tenancy requires no notice to determine it; consequently the landlord may enter, or the tenant may leave, at any time without notice (*e*); and a tenant at sufferance is not entitled to emblements (*f*).

(*m*) *Allen* v. *Hill* (1591), Cro. Eliz. 238; *Shields* v. *Atkins* (1747), 3 Atk. 560, 562.

(*n*) Co. Litt. 57 b, 270 b; see *Bayley* v. *Bradley* (1848), 5 C. B. 396; *Doe* d. *Patrick* v. *Beaufort* (*Duke*) (1851), 6 Exch. 498, 503; so, too, where the lessee under a lessor who was only tenant for life holds over after the lessor's death (*Roe d. Jordan* v. *Ward* (1789), 1 Hy. Bl. 96, 99).

(*o*) *Simkin* v. *Ashurst* (1834), 1 Cr. M. & R. 261.

(*p*) *Doe* d. *Bennett* v. *Turner* (1840), 7 M. & W. 226; affirmed (1842), 9 M. & W. 643, Ex. Ch. (where it was left open whether he would be a trespasser or tenant at sufferance); *Doe* d. *Goody* v. *Carter* (1847), 9 Q. B. 863, 868; *Day* v. *Day* (1871), L. R. 3 P. C. 751, 760.

(*q*) *E.g.*, where a guardian in socage held over after the heir had come of age (Co. Litt. 57 b).

(*r*) Co. Litt. 57 b.

(*s*) The recognition of a tenancy at sufferance in other cases probably arose from a desire to prevent the person holding over from being a disseisor, and therefore in a position to acquire a title by adverse possession. The abolition of the old doctrine of adverse possession has rendered this use of the tenancy obsolete; see title LIMITATION OF ACTIONS.

(*t*) *Thunder* d. *Weaver* v. *Belcher* (1803), 3 East, 449.

(*a*) See *Doe* d. *Burrell* v. *Perkins* (1814), 3 M. & S. 271.

(*b*) A tenant at sufferance has possession, but no privity of estate—hence a release to him is void; *contra*, as to tenant at will (Co. Litt. 270 b; *Butler* v. *Duckmanton* (1607), Cro. Jac. 169); but such an instrument might be held to operate as a grant; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 440.

(*c*) See *Graham* v. *Peat* (1801), 1 East, 244.

(*d*) *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; *Perry* v. *Clissold*, [1907] A. C 73, P. C.

(*e*) *Doe* d. *Bennett* v. *Turner* (1840), 7 M. & W. 226, 235; see *Doe* d. *Godsell* v. *Inglis* (1810), 3 Taunt. 54; *Doe* d. *Moore* v. *Lawder* (1816), 1 Stark. 308; *Randall* v. *Stevens* (1853), 2 E. & B. 641; *contra*, *Doe* d. *Harrison* v. *Murrell* (1837), 8 C. & P. 134, where Lord ABINGER, C.B., considered that trespass would lie against a landlord who turned out his tenant at sufferance without notice. But the landlord immediately on entry is lawfully in possession (*Jones* v. *Chapman* (1849), 2 Exch. 803, Ex. Ch.).

(*f*) *Doe* d. *Bennett* v. *Turner*, *supra*.

The landlord can sue the tenant at sufferance for use and occupation (*g*), but he cannot distrain (*h*).

SECT. 2.—*Tenancy from Year to Year.*

SUB-SECT. 1.—*Creation.*

Nature of tenancy.

905. A tenancy from year to year (*i*) arises either by express agreement or by presumption of law. It differs from a tenancy at will in that it can only be determined by notice duly given (*k*), save where there is a stipulation for determination without notice (*l*). The appropriate words for the express creation of the tenancy are "from year to year"; and the tenancy can be determined at the end of any year—the first as well as any subsequent year—unless the parties use further words showing that they contemplate a tenancy for two years at least (*m*). Thus, where the lease is "for one year certain and so on from year to year," the notice cannot be given in the course of the first year (*n*). Where the tenancy continues beyond the first year, it is not treated as a tenancy determining and recommencing with every year. The tenant has a lease for one year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it (*o*). The tenancy does not determine with his death, but passes to his personal representatives (*p*). Where the lease is for a

(*g*) *Bayley* v. *Bradley* (1848), 5 C. B. 396, 406; see *Hellier* v. *Sillcox* (1850), 19 L. J. (Q. B.) 295.

(*h*) *Jenner* v. *Clegg* (1832), 1 Mood. & R. 213; *Alford* v. *Vickery* (1842), Car. & M. 280.

(*i*) This tenancy is correctly described as a tenancy for a term (*Doe* d. *Hull* v. *Wood* (1845), 14 M. & W. 682, *per* PARKE, B., at p. 686. For form of agreement for yearly tenancy, see Encyclopædia of Forms and Precedents, Vol. VII., p. 420.

(*k*) See p. 443, *post*.

(*l*) *Re Threlfall, Ex parte Queen's Benefit Building Society* (1880), 16 Ch. D. 274, C. A.

(*m*) *Doe* d. *Clarke* v. *Smaridge* (1845), 7 Q. B. 957, 959; *Doe* d. *Hogg* v. *Taylor*, (1838), 1 Jur. 960.

(*n*) *Doe* d. *Chadborn* v. *Green* (1839), 9 Ad. & El. 658; *R.* v. *Chawton* (*Inhabitants*) (1841), 1 Q. B. 247; *Cannon Brewery* v. *Nash* (1898), 77 L. T. 648, C. A. (a lease for six months and so on from six months to six months until six calendar months' notice is given is for a year at least); see *Birch* v. *Wright* (1786), 1 Term Rep. 378, 380; *Doe* d. *Monck* v. *Geekie* (1844), 5 Q. B. 841. Similarly where the tenancy is "not for one year only, but from year to year" (*Denn* d. *Jacklin* v. *Cartwright* (1803), 4 East, 29, 33). But a yearly tenancy does not become a tenancy for two years at least by the inclusion in the lease of expressions showing that the parties contemplated that it would last for more than one year (*Doe* d. *Plumer* v. *Mainby* (1847), 10 Q. B. 473); and the lease may be so worded that it will be for one year only unless there is a further agreement between the parties (*Harris* v. *Evans* (1756), Amb. 329; compare *Bath's* (*Bishop*) *Case* (1605), 6 Co. Rep. 34 b, 36 a; *Austin* v. *Newham*, [1906] 2 K. B. 167).

(*o*) *Oxley* v. *James* (1844), 13 M. & W. 209, 214; *Cattley* v. *Arnold*, *Banks* v. *Arnold* (1859), 1 John. & H. 651, 660; *R.* v. *Thornton* (1860), 2 E. & E. 788, 792; *Gandy* v. *Jubber* (1865), 9 B. & S. 15, 18, Ex. Ch.; compare *Hayes* v. *Fitzgibbon* (1870), 4 I. R. C. L. 500. Similarly, a weekly or other periodic tenancy does not determine at the end of each week or period (*Bowen* v. *Anderson*, [1894] 1 Q. B. 164; differing from *Sandford* v. *Clarke* (1888), 21 Q. B. D. 398).

(*p*) *Mackay* v. *Mackreth* (1785), 4 Doug. (K. B.) 213; *Doe* d. *Shore* v. *Porter*

SECT. 2. Tenancy from Year to Year.

year (*q*), or for one year and no longer (*r*), it expires at the end of the year without notice to quit.

When arising by presumption of law.

906. A tenancy from year to year arises by presumption of law when a person who has entered upon premises (*s*), or, having been tenant, has remained in possession of premises (*t*), in such circumstances as to be in the first instance tenant at will—or, in the case of holding over, tenant at sufferance—subsequently pays rent (*a*) with reference to a yearly holding (*b*), provided that there are

(1789), 3 Term Rep. 13; see *Parker* d. *Walker* v. *Constable* (1769), 3 Wils. 25.

(*q*) See *Messenger* v. *Armstrong* (1785), 1 Term Rep. 53, 54; *Right* d. *Flower* v. *Darby* (1786), 1 Term Rep. 159, 162.

(*r*) *Cobb* v. *Stokes* (1807), 8 East, 358, 361.

(*s*) *E.g.*, where the entry was permissive, or was under an agreement for a lease or a void lease (see p. 435, *ante*). As to possession under an agreement for a lease being turned into a yearly tenancy by payment of rent, see *Knight* v. *Benett* (1826), 3 Bing. 361; *Mann* v. *Lovejoy* (1826), Ry. & M. 355; *Doe* d. *Westmoreland* v. *Smith* (1827), 1 Man. & Ry. (K. B.) 137; *Cox* v. *Bent* (1828), 5 Bing. 185; *Doe* d. *Thomson* v. *Amey* (1840), 12 Ad. & El. 476; *Chapman* v. *Towner* (1840), 6 M. & W. 100; *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494; *Doe* d. *Bailey* v. *Foster* (1846), 3 C. B. 215; *Bennett* v. *Ireland* (1858), E. B. & E. 326. Where the agreement is enforceable, this doctrine is not now of practical importance, since the tenant holds for the term mentioned in the agreement (see p. 367, *ante*), but it is still applicable where the agreement is not enforceable, where, for instance, it is not in writing (see *Knight* v. *Benett*, *supra*). It is not necessary that a lease shall have been tendered by the lessor or demanded by the lessee (*Weakly* d. *Yea* v. *Bucknell* (1776), 2 Cowp. 473). As to entry under a void lease, see *Doe* d. *Rigge* v. *Bell* (1793), 5 Term Rep. 471; 2 Smith, L. C., 11th ed., 119; *Doe* d. *Martin* v. *Watts* (1797), 7 Term Rep. 83; *Clayton* v. *Blakey* (1798), 8 Term Rep. 3; 2 Smith, L. C., 11th ed., 127; *Richardson* v. *Gifford* (1834), 1 Ad. & El. 52; *Doe* d. *Pennington* v. *Taniere* (1848), 12 Q. B. 998, 1013; *Doe* d. *Brammall* v. *Collinge* (1849), 7 C. B. 939, 960; *Doe* d. *Davenish* v. *Moffatt* (1850), 15 Q. B. 257; *Lee* v. *Smith* (1854), 9 Exch. 662; *Tress* v. *Savage* (1854), 4 E. & B. 36; *Martin* v. *Smith* (1874), L. R. 9 Exch. 50, 52. But a void lease may be construed as an agreement for a lease (see p. 385, *ante*); and hence if it is enforceable as an agreement, the tenant will, in effect, hold for the agreed term, and not as tenant from year to year. The rule applies so as to raise an implied tenancy from year to year where a corporation is landlord, unless the possession is otherwise explained (*Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, 20, C. A.); but not necessarily where the corporation is tenant; see title CORPORATIONS, Vol. VIII., pp. 376, 384.

(*t*) This may be because his lease has expired by effluxion of time (*Digby* v. *Atkinson* (1815), 4 Camp. 275; *Bishop* v. *Howard* (1823), 2 B. & C. 100; *Finch* v. *Miller* (1848), 5 C. B. 428; *Hyatt* v. *Griffiths* (1851), 17 Q. B. 505; *Dougal* v. *McCarthy*, [1893] 1 Q. B. 736, 740, C. A.); or because the lessor's title has determined (*Doe* d. *Martin* v. *Watts*, *supra*; *Doe* d. *Tucker* v. *Morse* (1830), 1 B. & Ad. 365, 369; *Cornish* v. *Stubbs* (1870), L. R. 5 C. P. 334; *Wyatt* v. *Cole* (1877), 36 L. T. 613; see *Nixon* v. *Darley* (1868), 2 I. R. C. L. 467).

(*a*) It is sufficient if the rent has been charged in account, and the charge admitted (*Cox* v. *Bent*, *supra*; compare *Vincent* v. *Godson* (1854), 4 De G. M. & G. 546); or if there has been a render in the nature of rent (*Doe* d. *Tucker* v. *Morse*, *supra*). But a notice to "quit the premises which you hold under me, your term therein having long since expired," is a mere demand of possession, and does not recognise a subsisting tenancy from year to year subsequent to the term (*Doe* d. *Godsell* v. *Inglis* (1810), 3 Taunt. 54). As to payment of rent under attornment to a person claiming by title paramount, see *Doe* d. *Chawner* v. *Boulter* (1837), 6 Ad. & El. 675. As to evidence of a yearly tenancy where there has been no payment of rent, see *Taylor* v. *Young* (1837), 6 L. J. (K. B.) 141; *Fahy* v. *O'Donnell* (1870), 4 I. R. C. L. 332.

(*b*) That is, the rent must be a yearly rent, though it may be payable

no circumstances to rebut the presumption. In such cases, where there is an instrument of tenancy with reference to which possession is taken or retained, the yearly tenancy implied by law will be deemed to be upon such of the terms of the instrument as are applicable to a yearly tenancy. Thus, upon an entry under an agreement for a lease, followed by payment of rent, the tenant becomes a yearly tenant upon such of the terms of the agreement as are consistent with that tenancy (*c*); and the agreement so far controls the implied tenancy, that the tenancy ceases without notice to quit at the end of the agreed term (*d*). Similarly a tenant who holds over after the expiration of his lease and pays rent (*e*), or a tenant under a limited owner whose lease has come to an end by the death of the owner, and who pays rent to the remainderman (*f*), holds on such of the terms of the old lease as are applicable to a yearly tenancy (*g*). But in the case of lodgings

quarterly or at any other interval constituting an aliquot part of a year (*Richardson* v. *Langridge* (1811), 4 Taunt. 128; *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494, 497; *Doe* d. *Hull* v. *Wood* (1842), 14 M. & W. 683, 687; *King* v. *Eversfield*, [1897] 2 Q. B. 475, C. A.; see *Pope* v. *Garland* (1841), 4 Y. & C. (EX.) 394, 399. The phrase used by CHAMBRE, J., in *Richardson* v. *Langridge*, *supra* —"yearly rent or rent measured by any aliquot part of a year"—is not to be taken as going beyond the phrase of Lord MANSFIELD, C.J., in the same case—"a yearly rent, though payable half-yearly or quarterly." Thus, payment of £10 as rent under an agreement reserving a yearly rent of £120, payable monthly, would create a yearly tenancy, but not under an agreement reserving a rent of £10 a month, without any reference to a year; see also *R.* v. *Herstmonceaux* (*Inhabitants*) (1827), 7 B. & C. 551; *R.* v. *St. Giles Without Cripplegate* (*Inhabitants*) (1863), 4 B. & S. 509; *Willesden Overseers* v. *Paddington Overseers* (1863), 3 B. & S. 593; *Hastings Union* v. *St. James, Clerkenwell* (*Union*) (1865), L. R. 1 Q. B. 38 (cases on tenancy for a year for poor law purposes, see title POOR LAW); *R.* v. *Norwich Incorporation* (1874), 30 L. T. 704.

(*c*) *Roe* d. *Jordan* v. *Ward* (1789), 1 Hy. Bl. 96; *Doe* d. *Rigge* v. *Bell* (1793), 5 Term Rep. 471; 2 Smith, L. C., 11th ed., 119; *Mann* v. *Lovejoy* (1826), Ry. & M. 355; *Richardson* v. *Gifford* (1834), 1 Ad. & El. 52; *Beale* v. *Sanders* (1837), 3 Bing. (N. C.) 850; *Doe* d. *Thomson* v. *Amey* (1840), 12 Ad. & El. 476; *Tress* v. *Savage* (1854), 4 E. & B. 36; *Elliott* v. *Johnson* (1866), L. R. 2 Q. B. 120, 124; *Wyatt* v. *Cole* (1877), 36 L. T. 613. Before payment of rent, and while the tenant is tenant at will, he is subject to the terms of the agreement (*Richardson* v. *Gifford*, *supra*, at p. 56); and the doctrine applies equally to assignees of a void lease (*Beale* v. *Sanders*, *supra*) and to lessees who continue in occupation after the term under an express agreement that they shall be tenants at will (*Morgan* v. *Harrison* (*William*), *Ltd.*, [1907] 2 Ch. 137, C. A.). It follows that reference may be made to the instrument to ascertain the terms of the holding (*De Medina* v. *Polson* (1815), Holt (N. P.), 47; *Lee* v. *Smith* (1854), 9 Exch. 662, 665, 666; *Tress* v. *Savage*, *supra*), and reference may be made to it also to ascertain the commencement of the year of the tenancy (*Roe* d. *Jordan* v. *Ward*, *supra*; *Kelly* v. *Patterrson* (1874), L. R. 9 C. P. 681).

(*d*) *Doe* d. *Tilt* v. *Stratton* (1828), 4 Bing. 446; *Berrey* v. *Lindley* (1841), 3 Man. & G. 498, 513; *Doe* d. *Davenish* v. *Moffatt* (1850), 15 Q. B. 257; *Tress* v. *Savage*, *supra*; see *Sauvage* v. *Dupuis* (1811), 3 Taunt. 410.

(*e*) *Digby* v. *Atkinson* (1815), 4 Camp. 275; *Bishop* v. *Howard* (1823), 2 B. & C. 100; *Finch* v. *Miller* (1848), 5 C. B. 428; *Hyatt* v. *Griffiths* (1851), 17 Q. B. 505; *Dougal* v. *McCarthy*, [1893] 1 Q. B. 736, 740, C. A. So also where a bankrupt tenant continues to hold after his discharge (*Ponsford* v. *Abbott* (1884), Cab. & El. 225).

(*f*) *Doe* d. *Martin* v. *Watts* (1797), 7 Term Rep. 83; *Doe* d. *Tucker* v. *Morse* (1830), 1 B. & Ad. 365, 369; *Cornish* v. *Stubbs* (1870), L. R. 5 C. P. 334; *Wyatt* v. *Cole* (1877), 36 L. T. 613.

(*g*) That is, not merely the terms necessarily incident to a yearly tenancy,

SECT. 2. Tenancy from Year to Year.

payment of rent during the first year is not evidence of a tenancy from year to year, since this would be contrary to the general usage in letting lodgings (*h*).

Effect of payment of rent.

907. Payment of rent with reference to a yearly holding is not conclusive as to the creation of a tenancy from year to year; it is only evidence of such a tenancy (*i*). Accordingly it is competent for either payer or receiver of rent to prove the circumstances in which the payment was made, and by such circumstances to rebut the presumption which would arise from the receipt of rent unexplained (*k*). Whether the circumstances exclude the implication

but the terms which may be incident to such a tenancy (*Hyatt* v. *Griffiths* (1851), 17 Q. B. 505, 509). Of this nature are provisions for payment of rent in advance (*Finch* v. *Miller* (1848), 5 C. B. 428; *Lee* v. *Smith* (1854), 9 Exch. 662), or for payment of rent, damage by fire excepted (*Bennett* v. *Ireland* (1858), E. B. & E. 326); covenants to keep the premises in repair (*Digby* v. *Atkinson* (1815), 4 Camp. 275; *Richardson* v. *Gifford* (1834), 1 Ad. & El. 52; *Beale* v. *Sanders* (1837), 3 Bing. (N. C.) 850; *Arden* v. *Sullivan* (1850), 14 Q. B. 832; *Ecclesiastical Commissioners* v. *Merral* (1869), L. R. 4 Exch. 162; *Wyatt* v. *Cole* (1877), 36 L. T. 613); covenants relating to the user of the premises, such as to carry on a particular trade (*Sanders* v. *Karnell* (1858), 1 F. & F. 356); covenants in agricultural tenancies with respect to the cultivation of the land (*Roe* d. *Jordan* v. *Ward* (1789), 1 Hy. Bl. 96, 99; *Doe* d. *Thomson* v. *Amey*, (1840), 12 Ad. & El. 476; *Tooker* v. *Smith* (1857), 1 H. & N. 732, 736); and provisions as to the liabilities and rights of the tenant at the end of the tenancy, such as liability to leave manure on the farm (*Roberts* v. *Barker* (1833), 1 Cr. & M. 808); or the right to be paid for tillages or to have away-going crops (*Boraston* v. *Green* (1812), 16 East, 71; *Hutton* v. *Warren* (1836), 1 M. & W. 466; *Brocklington* v. *Saunders* (1864), 13 W. R. 46); or (probably) in a lease of nursery gardens, to be paid for fruit trees (*Oakley* v. *Monck* (1866), L. R. 1 Exch. 159, 164, Ex. Ch.); or to use the land after the end of the term (*Hyatt* v. *Griffiths*, *supra*); provisoes with respect to the determination of the tenancy by a specified notice (*Bridges* v. *Potts* (1864), 17 C. B. (N. S.) 314), and provisoes for re-entry on non-payment of rent or breach of covenant (*Doe* d. *Thomson* v. *Amey*, *supra*; *Thomas* v. *Packer* (1857), 1 H. & N. 669; *Crawley* v. *Price* (1875), L. R. 10 Q. B. 302). But covenants to put premises into repair (*Pinero* v. *Judson* (1829), 6 Bing. 206, 210, 211); or to build or to do substantial repairs, such as are not usually done by tenants from year to year (*Doe* d. *Thomson* v. *Amey*, *supra*, at p. 479; *Bowes* v. *Croll* (1856), 6 E. & B. 255, 264); or to paint every three years (*Pinero* v. *Judson*, *supra*); or a provision for a two years' notice to quit (*Tooker* v. *Smith*, *supra*) are inconsistent with a yearly tenancy; though a covenant to paint every three or seven years will be imported if the tenant occupies for so long (*Martin* v. *Smith* (1874), L. R. 9 Exch. 50); and generally, where the tenant has occupied during the full period of the agreed lease, he is bound to perform all the covenants (*Pistor* v. *Cater* (1842), 9 M. & W. 315; *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403, 406). If the lease was subject to determination on a given event, so also is the yearly tenancy arising on holding over (*Johnson* v. *Reardon* (1839), 2 I. Eq. R. 123).

(*h*) *Wilson* v. *Abbott* (1824), 3 B. & C. 88, 90.

(*i*) *Doe* d. *Tucker* v. *Morse* (1830), 1 B. & Ad. 365; *Doe* d. *Pennington* v. *Taniere* (1848), 12 Q. B. 998, 1013; *Finlay* v. *Bristol and Exeter Rail. Co.* (1852), 7 Exch. 409, 420; *Smith* v. *Widlake* (1877), 3 C. P. D. 10, C. A. Thus the payment may be made in the course of negotiations for a new lease (*Caulfield* v. *Farr* (1873), 7 I. R. C. L. 469); and mere payment of rent is not proof of a demise from year to year from a particular date (*Phillips* v. *Mosely* (1824), 1 C. & P. 262). In the case of joint lessees the payment must be with the consent of all (*Doidge* v. *Bowers* (1837), 2 M. & W. 365).

(*k*) *Doe* d. *Lord* v. *Crago* (1848), 6 C. B. 90, 98; see *Right* d. *Wells* (*Dean and Chapter*) v. *Bawden* (1803), 3 East, 260; *Mildmay* d. *Digby* (*Lord*) v. *Shirley* (1806), cited 10 East, 164; *Doe* d. *Harvey* v. *Francis* (1837), 2 Mood. & R. 57;

of a yearly tenancy is a question of fact to be decided on the circumstances of the case (*l*). Thus it is excluded where the parties have expressly created a tenancy at will (*m*), or where the rent has been received in ignorance that the former tenancy has expired (*n*); and in the case of a holding under a void lease, the yearly tenancy may be excluded if there is a great disproportion between the rent reserved by the void lease and the real value (*o*).

Holding over.

908. The tenancy arising by implication in favour of a tenant who holds over after the expiration of his lease and pays rent is only deemed to be on the terms of the old lease in the absence of evidence of a different understanding (*p*). The question is one of fact, though it is inferred as a fact that the former terms are to continue unless there is an alteration in the terms or circumstances of the holding at the expiration of the lease (*q*). Thus where there have been negotiations for a letting at an increased rent, and the tenant stays on, it is not a necessary inference that he is liable only for the former rent (*p*); though if a different rent has been in fact agreed upon this will not prevent the new tenancy being upon the old terms in other respects (*r*). The implied tenancy operates as a new contract and has reference to the state of affairs existing at its commencement; so that a covenant to repair and to leave premises in the same state as at the beginning of the lease, if imported into the new tenancy, has reference to the state of the premises at the commencement of the new, not of the old, tenancy (*s*). The presumption that the former terms are incorporated in the new tenancy does not apply when the new tenancy is under a different lessor—*e.g.*, where the lease is by a tenant for life, and then after his death the reversioner receives rent—so as to bind the new lessor by a term which is unusual, and which was in fact unknown to him (*t*).

SUB-SECT. 2.—*Determination.*

(i.) *Notice to Quit.*

How determined.

909. A tenancy from year to year is determinable by notice to quit (*u*), and the parties may enter into special stipulations both as

Woodbridge Union Guardians v. *Colneis Union Guardians* (1849), 13 Q. B. 269; see *Camden* (*Marquis*) v. *Batterbury* (1860), 7 C. B. (N. S.) 864; *Hurley* v. *Hanrahan* (1867), 15 W. R. 990 (lessee held liable in use and occupation for a sum in excess of the rent.).

(*l*) *Finlay* v. *Bristol and Exeter Rail. Co.* (1852), 7 Exch. 409, 417, 420; see *Jones* v. *Sheers* (1836), 4 Ad. & El. 832.

(*m*) *Doe* d. *Bastow* v. *Cox* (1847), 11 Q. B. 122; see *Doe* d. *Dixie* v. *Davies* (1851), 7 Exch. 89.

(*n*) *Doe* d. *Lord* v. *Crago* (1848), 6 C. B. 90, 98.

(*o*) *Roe* d. *Brune* v. *Prideaux* (1808), 10 East, 158; *Denn* d. *Brune* v. *Rawlins* (1808), 10 East, 261; *Smith* v. *Widlake* (1877), 3 C. P. D. 10, C. A.

(*p*) *Thetford Corporation* v. *Taylor* (1845), 8 Q. B. 95, 101.

(*q*) *Johnson* v. *St. Peter, Hereford* (*Churchwardens*) (1836), 4 Ad. & El. 520, 525; *Elgar* v. *Watson* (1842), Car. & M. 494; see *Oakley* v. *Monck* (1866), L. R. 1 Exch. 159, 167, Ex. Ch.

(*r*) *Digby* v. *Atkinson* (1815), 4 Camp. 275; *Doe* d. *Monck* v. *Geekie* (1844), 5 Q. B. 841.

(*s*) *Johnson* v. *St. Peter, Hereford* (*Churchwardens*), *supra.*

(*t*) *Oakley* v. *Monck, supra.*

(*u*) An undertenant is not entitled to leave without notice because he

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to the length of the notice and the time when the tenancy may be determined under it (*a*). In the absence of special stipulation or of special custom (*b*), the notice must be half a year's notice, expiring at the end of some year of the tenancy (*c*). If the parties have agreed that the tenancy shall be determinable by notice of a specified length, without providing for the date when it is to expire, and if the tenancy is in fact a yearly tenancy, the notice must be given so as to expire at the end of some year of the tenancy (*d*); but if, on the construction of the agreement, the tenancy is not a yearly tenancy, the notice may be given so as to expire at the end of any complete period of the notice reckoning

anticipates a distress by the superior landlord (*Rickett* v. *Tullick* (1833), 6 C. & P. 66). For forms of notice to quit, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 686 *et seq.*

(*a*) *Bridges* v. *Potts* (1864), 17 C. B. (N. S.) 314, 333; *Re Threlfall, Ex parte Queen's Benefit Building Society* (1880), 16 Ch. D. 274, 281, C. A; see *Herron* v. *Martin* (1911), 27 T. L. R. 431. But the parties may agree that on a specified event the tenant may quit without notice (*Bethell* v. *Blencowe* (1841), 3 Man. & G. 119); or that he may quit on payment of an agreed sum by way of rent in advance (*Florence* v. *Robinson* (1871), 24 L. T. 705).

(*b*) As to length of notice, see *Doe* d. *Dagget* v. *Snowdon* (1778), 2 Wm. Bl. 1224, 1225; there must be clear evidence of the custom (*Roe* d. *Henderson* v. *Charnock* (1790), Peake, 6 [4]; Co. Litt. 270 b, note 228; see *Tyley* v. *Seed* (1696), Skin. 649). As to date of determination of notice, see *Brown* v. *Burtinshaw* (1826), 7 Dow. & Ry. (K. B.) 603; and as to a custom for the tenant of a quarry to remain after the end of the tenancy to get stone which he has bared, see *Vint* v. *Constable* (1871), 25 L. T. 324.

(*c*) That is, at the end of the first or any subsequent year, unless the tenancy is for two years certain, when it can only be given for the end of the second or some subsequent year (see p. 439, *ante*; *Bridges* v. *Potts*, *supra*, at p. 332). The notice must, in the absence of express stipulation, be a reasonable notice (*Doe* d. *Martin* v. *Watts* (1797), 7 Term Rep. 83, 85); and in the case of a tenancy from year to year, half a year's notice is a reasonable notice (*Right* d. *Flower* v. *Darby* (1786), 1 Term Rep. 159, 163; *Birch* v. *Wright* (1786), 1 Term Rep. 378, 379; *Doe* d. *Shore* v. *Porter* (1789), 3 Term Rep. 13, 17). This does not depend on the rent being reserved half-yearly, and it is the same where the rent is payable quarterly (*Shirley* v. *Newman* (1795), 1 Esp. 266). In the case of agricultural holdings, in the absence of express agreement, a year's notice is required; see title AGRICULTURE, Vol. I., p. 241. In agricultural tenancies in Ireland the notice is a six calendar months' notice terminating on the last gale day of the calendar year (Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), s. 58). The rule applies where an infant becomes entitled to the reversion (*Maddon* d. *Baker* v. *White* (1787), 2 Term Rep. 159); and where the tenancy devolves upon an executor (*Gulliver* d. *Tasker* v. *Burr* (1766), 1 Wm. Bl. 596).

(*d*) *Doe* d. *Pitcher* v. *Donovan* (1809), 1 Taunt. 555 (letting from year to year to quit at a quarter's notice); *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*, [1904] 1 K. B. 444 (letting at an annual rent, "three months' notice on either side to determine this agreement"). It has been held that where the tenancy is "for twelve months certain and six months' notice to quit afterwards," the notice can be given for the end of the first year (*Thompson* v. *Maberly* (1811), 2 Camp. 573); but this is of doubtful authority, and in general, where there is a fixed term, and then the tenancy is to be determinable on notice, the notice cannot, it seems, be given until after the expiration of the fixed term; see *Gardner* v. *Ingram* (1889), 61 L. T. 729. It cannot be given so as to determine the tenancy during the fixed term (*Cannon Brewery* v. *Nash* (1898), 77 L. T. 648, C. A.). But the words of the demise may show that it can be given for the end of the fixed term (*Jones* v. *Nixon* (1862), 1 H. & C. 48 (demise for a term of three years and, unless determined by a six months' previous notice to quit, to continue from year to year)); and see *Herron* v. *Martin*, *supra*.

from the commencement of the tenancy (*e*). If, however, the stipulation is for determination of the tenancy "at any time," it may be determined, even though it is a yearly tenancy, by notice of the specified length at any time of the year; though, perhaps, if the specified rent days are the usual quarter days, and the notice is a three months' notice, it can only be given for the end of a quarter (*f*). A tenancy determinable at any time at a week's notice may properly include a stipulation allowing the tenant a reasonable time after the week to remove his goods (*g*).

Determination of weekly or monthly tenancies.

Similarly other periodic tenancies, such as weekly, monthly, and quarterly tenancies, are determinable by notice to quit (*h*), and, in the absence of special stipulation, this should be a notice equal to the length of the period (*i*); in a weekly tenancy a week's notice (*k*), in a monthly tenancy a month's notice (*l*), and in a quarterly tenancy a quarter's notice (*m*).

(ii.) *Length of Notice.*

Period of notice to quit:

(i.) tenancy commencing on quarter day;

910. The reckoning of the period of half a year varies according as the tenancy commences on one of the usual quarter days, or on some intermediate day. Where the tenancy commences on a quarter day, the period of the notice is a customary half-year, that is, the interval between one quarter day and the next quarter day but one. Such a notice is sufficient, although in point of length it falls short of the actual period of half a year, namely, 182 days (*n*), and it is necessary, although it may exceed that period. Thus, notice may be given on 29th September to quit on 25th March,

(*e*) *Kemp* v. *Derrett* (1814), 3 Camp. 510 (tenant "always" to "be subject to quit at three months' notice"); *Doe* d. *King* v. *Grafton* (1852), 18 Q. B. 496, where, although there was a reservation of a yearly rent payable quarterly, yet the habendum was "until one of the said parties shall give unto the other six calendar months' notice in writing to quit." These words rebutted the presumption of a yearly tenancy arising on the reservation of rent. In the first case, the notice could be given for the end of any period of three months; in the second, for the end of any period of six months. But in *Lewis* v. *Baker*, [1905] 2 K. B. 576; affirmed, [1906] 2 K. B. 599, C. A., where the habendum was "until such tenancy shall be determined as hereinafter mentioned," and it was provided that either party might determine the tenancy by three calendar months' notice, it was held that the reference in the habendum to determination by notice did not cut down the *primâ facie* yearly tenancy, and the notice could only be given for the end of the current year; compare *Doe* d. *Carter* v. *Roe* (1842), 10 M. & W. 670.

(*f*) *Bridges* v. *Potts* (1864), 17 C. B. (N. S.) 314, 333; *Soames* v. *Nicholson*, [1902] 1 K. B. 157; see *King* v. *Eversfield*, [1897] 2 Q. B. 475, C. A.

(*g*) *Cornish* v. *Stubbs* (1870), L. R. 5 C. P. 334.

(*h*) *Jones* v. *Mills* (1861), 10 C. B. (N. S.) 788, 798; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

(*i*) *Doe* d. *Parry* v. *Hazell* (1794), 1 Esp. 94.

(*k*) *Doe* d. *Peacock* v. *Raffan* (1806), 6 Esp. 4; *Harvey* v. *Copeland* (1892), 30 L. R. Ir. 412; *Bowen* v. *Anderson*, *supra*; but see *Huffell* v. *Armitstead* (1835), 7 C. & P. 56; *Towne* v. *Campbell* (1847), 3 C. B. 921.

(*l*) *Doe* d. *Parry* v. *Hazell*, *supra*; *Beamish* v. *Cox* (1885), 16 L. R. Ir. 270, 458.

(*m*) *Kemp* v. *Derrett*, *supra*; *Wilkinson* v. *Hall* (1837), 3 Bing. (N. C.) 508, 531.

(*n*) Co. Litt. 135 b.

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(ii.) tenancy commencing on intermediate day.

though the interval is only 177 days (*o*); and notice to quit on 29th September must be given not later than 25th March, though the interval is 187 days (*p*).

Where the tenancy commences on an intermediate day, the length of the notice must be 182 days at least, the days being reckoned by including the one extreme and excluding the other (*q*). But if there is an express stipulation for determination on six months' notice, this will be construed literally, whether the tenancy commences on a quarter day or between two quarter days, and unless the expression "calendar months" is used (*r*) a notice of six lunar months is sufficient (*s*).

Date of expiration of notice.

911. The notice must be given so as to expire at the end of the year or other period of the tenancy (*t*), and if it expires at a later date it is bad (*a*); and strictly it should be given so as to expire on the last day of the current year or period, though, since the tenant has the whole of that day in which to leave, it must not be given for any particular hour of the day (*b*). But the exact ascertainment of the last day of the year depends on whether the tenancy began "on" or "from" the day named for commencement, and to avoid the inconvenience arising from this distinction it has been settled that the notice may in all cases be given for the anniversary of the commencement of the tenancy without considering whether the word "on" or "from" or any similar expression was used (*c*).

(*o*) *Roe* d. *Durant* v. *Doe* (1830), 6 Bing. 574; see *Doe* d. *Harrop* v. *Green* (1803), 4 Esp. 198; 1 Wms. Saund. (ed. 1871) 385, n.; *Howard* v. *Wemsley* (1806), 6 Esp. 53.

(*p*) *Right* d. *Flower* v. *Darby* (1786), 1 Term Rep. 159; *Morgan* v. *Davies* (1878), 3 C. P. D. 260; see *Papillon* v. *Brunton* (1860), 5 H. & N. 518.

(*q*) 1 Wms. Saund. (ed. 1871), 386, n.; *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, 384, C. A. (notice given on 17th November to quit on 19th May, the anniversary of the commencement of the tenancy, thus allowing the sufficient interval of 183 days).

(*r*) *Travers* v. *Mason* (1896), 45 W. R. 77; see *Quatermaine* v. *Selby* (1889), 5 T. L. R. 223, C. A.

(*s*) *Rogers* v. *Kingston-upon-Hull Dock Co.* (1864), 12 W. R. 1101; affirmed, 13 W. R. 217; see *Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922, 932; *Wilkins* v. *M'Ginity*, [1907] 2 I. R. 660, C. A.

(*t*) As to expressing the notice in an alternative form, see p. 450, *post*. Where an agreement not under seal specifies Lady-day or Michaelmas as the commencement of the tenancy, evidence can by given that Old Lady-day and Old Michaelmas-day were intended (*Doe* d. *Hall* v. *Benson* (1821), 4 B. & Ald. 588; *Den* d. *Peters* v. *Hopkinson* (1823), 3 Dow. & Ry. (K. B.) 507; compare *Hogg* v. *Norris* (1860), 2 F. & F. 246; *Rogers* v. *Hull Dock Co.* (1864), 13 W. R. 217); but not where the agreement is under seal (*Doe* d. *Spicer* v. *Lea* (1809), 11 East, 312; compare *Smith* v. *Walton* (1832), 8 Bing. 235). Where the commencement of the tenancy is on one of the feast-days, Old Style, a notice to quit at the corresponding feast-day will be construed to mean Old Style (*Denn* d. *Willan* v. *Walker* (1800), Peake, Add. Cas. 194; *Doe* d. *Hinde* v. *Vince* (1809), 2 Camp. 256; *Doe* d. *Willis* v. *Perrin* (1840), 9 C. & P. 467; see *Furley* d. *Canterbury Corporation* v. *Wood* (1794), 1 Esp. 198).

(*a*) *Doe* d. *Spicer* v. *Lea*, *supra*. The notice may be given on Sunday (*Sangster* v. *Noy* (1867), 16 L. T. 157); see title TIME.

(*b*) *Page* v. *Moore* (1850), 15 Q. B. 684.

(*c*) *Sidebotham* v. *Holland*, *supra*; see *Wilkins* v. *M'Ginity*, *supra*. According to strict reckoning the whole of the first day must be included in the tenancy (*Clayton's Case* (1585), 5 Co. Rep. 1 a), so that in a tenancy com-

In the case of a weekly tenancy beginning, say, on Thursday, notice should be given for that day, but it is also good if given to quit "on or before Friday" (*d*). Any question as to the validity of the notice may be avoided by giving it in a general form, *i.e.*, to quit at the end of the next complete week of the tenancy after the date of the notice (*e*). If the tenancy agreement expressly provides for a week's notice, this should be given so as to allow seven clear days (*f*).

Necessity for ascertaining date of commencement of tenancy.

912. To ascertain the effect of a notice to quit, it is necessary to know the day of the commencement of the tenancy. Where the agreement expressly specifies such day, the words of the agreement will prevail over any contrary indication afforded by the dates for payment of rent (*g*). Where no day is expressly specified, and the tenant enters as yearly tenant in the middle of a quarter, the commencement of the year depends on the manner in which rent is paid or agreed to be paid. If he pays rent up to the next quarter day, and then pays quarterly (*h*), or if the agreement specifies a quarter day as the day for first payment (*i*), the broken part of the quarter is neglected, and the year is taken to begin from the first quarter day; but otherwise the year runs from the date of the agreement (*k*). Where the tenant enters upon different parts of the premises at different times, it must be ascertained which is the principal part of the premises in value and importance, and which is accessory (*l*), and it is sufficient if the notice is given with reference to the entry on the principal part (*m*).

Proof of date of commencement.

913. If there is any doubt as to the day of the commencement of the tenancy, this is a matter of fact to be proved by evidence (*n*). The mere specifying of a particular date for quitting in a notice given by the landlord is not evidence that such was the date of commencement,

mencing on 19th May, the 18th May is the last day; but if the tenancy commences from 19th May this day would be excluded, and the 19th May would be the last day. But in practice the notice is given for the anniversary of the day of commencement; see *Roe* d. *Durant* v. *Doe* (1830), 6 Bing. 574; *Doe* d. *Cornwall* v. *Matthews* (1851), 11 C. B. 675; *Papillon* v. *Brunton* (1860), 5 H. & N. 518; see *Herron* v. *Martin* (1911), 27 T. L. R. 431; as to a quarterly tenancy, see *Kemp* v. *Derrett* (1814), 3 Camp. 510.

(*d*) *Harvey* v. *Copeland* (1892), 30 L. R. Ir. 412; compare *Doe* d. *Finlayson* v. *Bayley* (1831), 5 C. & P. 67.

(*e*) *Doe* d. *Campbell* v. *Scott* (1830), 6 Bing. 362.

(*f*) *Weston* v. *Fidler* (1903), 88 L. T. 769.

(*g*) *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, 382, C. A.

(*h*) *Doe* d. *Holcomb* v. *Johnson* (1806), 6 Esp. 10; *Doe* d. *Savage* v. *Stapleton* (1828), 3 C. & P. 275; *Simmons* v. *Underwood* (1897), 76 L. T. 777.

(*i*) *Sandill* v. *Franklin* (1875), L. R. 10 C. P. 377.

(*k*) *Doe* d. *Cornwall* v. *Matthews* (1851), 11 C. B. 675; *Bishop* v. *Wraith* (1853), 2 C. L. R. 287; *Sandill* v. *Franklin*, *supra*. If the agreement is verbal or undated the tenancy apparently commences from actual entry; see *Doe* d. *Cornwall* v. *Matthews*, *supra*.

(*l*) *Doe* d. *Heapy* v. *Howard* (1809), 11 East, 498, 501.

(*m*) *Doe* d. *Dagget* v. *Snowdon* (1778), 2 Wm. Bl. 1224; *Doe* d. *Strickland* v. *Spence* (1805), 6 East, 120, 123; *Doe* d. *Bradford* (*Lord*) v. *Watkins* (1806), 7 East, 551, 555; *Doe* d. *Kindersley* v. *Hughes* (1840), 7 M. & W. 139. See *Doe* d. *Davenport* v. *Rhodes* (1843), 11 M. & W. 600.

(*n*) *Walker* v. *Godè* (1861), 6 H. & N. 594.

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nor does it throw upon the tenant the onus of proving that the tenancy commenced on a different date (*o*); but if the date is a day on which rent has been paid, and the contents of the notice are brought to the attention of the tenant when he is served with it, and he makes no objection to the date, this is *primâ facie* evidence that the specified date is correct (*p*), though the tenant is not precluded from afterwards disproving it (*q*). If the tenant is asked as to the commencement of the tenancy, and specifies a particular day, and notice to quit on that day is given accordingly, he cannot afterwards allege that the tenancy began on a different day; the result is the same whether he gave erroneous information by mistake or by design (*r*). But if a tenant, in giving notice to quit, gives it for a day previous to the end of the year, this does not bind him, notwithstanding that it is accepted by the landlord (*s*).

Lease for years and part of another year.

Where a lease is for a certain number of years and a part of another year, and the tenant holds over and becomes yearly tenant by payment of rent, the current year of the yearly tenancy is treated as ending on the anniversary of the commencement of the term and not on that of its determination. Hence notice must be given for the anniversary of the commencement of the term (*a*). But the rule is different when the person holding over is not the original tenant, but some person deriving title under him, and then the yearly tenancy runs from the determination of the lease (*b*); save that if an undertenant is allowed by the superior landlord to hold over, he holds according to the year of the undertenancy (*c*).

Void lease or agreement for lease.

When a tenant enters under a void lease, or under an agreement for lease, and becomes yearly tenant, he holds on the terms of the lease as to quitting. His holding determines without notice to quit at the end of the specified term, and if there is any further provision as to the date of quitting it applies to the yearly tenancy (*d*);

(*o*) *Doe* d. *Ash* v. *Calvert* (1810), 2 Camp. 387, 388; *Doe* d. *Clarges* v. *Forster* (1811), 13 East, 405. At one time the onus of disproving the date mentioned in the notice was held to be on the tenant (*Doe* d. *Puddicombe* v. *Harris* (1784), cited 1 Term Rep. 161); see *Doe* d. *Matthewson* v. *Wrightman* (1801), 4 Esp. 5.

(*p*) *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109; *Doe* d. *Clarges* v. *Forster*, *supra*; *Doe* d. *Baker* v. *Woombwell* (1811), 2 Camp. 559; *Thomas* d. *Jones* v. *Thomas* (1811), 2 Camp. 647.

(*q*) *Oakapple* d. *Green* v. *Copous* (1791), 4 Term Rep. 361.

(*r*) *Doe* d. *Eyre* v. *Lambly* (1798), 2 Esp. 635.

(*s*) *Doe* d. *Murrell* v. *Milward* (1838), 3 M. & W. 328.

(*a*) *Doe* d. *Robinson* v. *Dobell* (1841), 1 Q. B. 806. The same rule applies where a lease determines during its currency in consequence of the title of the lessor coming to an end; *e.g.*, where a lessor, who was tenant for life, has died. The remainderman, by accepting rent, adopts the current year of the tenancy (*Roe* d. *Jordan* v. *Ward* (1789), 1 Hy. Bl. 96; *Doe* d. *Collins* v. *Weller* (1798), 7 Term Rep. 478).

(*b*) *Doe* d. *Buddle* v. *Lines* (1848), 11 Q. B. 402; *contra*, in a case where the wife continues in occupation and pays rent after her husband's death (*Humphreys* v. *Franks* (1856), 18 C. B. 323). Moreover, if the tenant assigns while holding over, the assignee takes the tenancy as it exists, and the current year dates from the original entry (*Doe* d. *Castleton* v. *Samuel* (1805), 5 Esp. 173).

(*c*) *Kelly* v. *Patterrson* (1874), L. R. 9 C. P. 681, 687.

(*d*) *Doe* d. *Rigge* v. *Bell* (1793), 5 Term Rep. 471; see p. 422, *ante*.

but subject to this the current year dates from the time of entry, and notice to determine it must be given accordingly (*e*).

(iii.) *Form and Construction of Notice.*

Form of notice.

914. A notice to quit need not be in any particular form (*f*), nor need it be addressed to the tenant by name, provided it is properly served on him (*g*); and if the tenancy was created verbally, the notice may be given verbally (*h*). Errors in the description of the premises (*i*), or as to the christian name of the tenant (*k*), will not invalidate the notice if the tenant understands its effect and makes no objection on receiving it. In the absence of an express or statutory (*l*) power to resume possession of part of the premises, it must be a notice to quit the whole; a notice to quit a part only is void (*m*). The notice need not state to whom the premises are to be given up (*n*), though if this is stated it should be stated with certainty (*o*); but the notice must indicate when the premises are to be given up (*p*), and it must be expressed unequivocally.

Date when premises to be given up.

The notice may state the exact day on which the premises are to be given up (*q*), or it may be expressed generally by such words as "at the expiration of the present year's tenancy." A notice in the latter form is not void, because it does not purport to be served half a year before the end of the current year, and the onus of proving that it was not in fact served in due time is on the

(*e*) *Berrey* v. *Lindley* (1841), 3 Man. & G. 498, 513.

(*f*) See *Easton* v. *Penny* (1892), 67 L. T. 290. If it is in writing, signature is apparently not essential (*Carleton* v. *Herbert* (1866), 14 W. R. 772). But in Ireland a notice to quit an agricultural holding must be in writing or printed, signed by the landlord or his agent, and stamped 2*s*. 6*d*. (Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), s. 58). For forms of notice to quit, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 686 *et seq.*

(*g*) *Doe* d. *Matthewson* v. *Wrightman* (1801), 4 Esp. 5.

(*h*) *Doe* d. *Macartney* (*Lord*) v. *Crick* (1805), 5 Esp. 196; *Roe* d. *Rochester* (*Dean and Chapter*) v. *Pierce* (1809), 2 Camp. 96; *Bird* v. *Defonvielle* (1846), 2 Car. & Kir. 415, 420.

(*i*) *Doe* d. *Cox* v. *Roe* (1802), 4 Esp. 185 (the notice specified "The Waterman's Arms" instead of "The Bricklayer's Arms," and there was only one house held by the tenant under the landlord); *Doe* d. *Armstrong* v. *Wilkinson* (1840), 12 Ad. & El. 743.

(*k*) *Doe* v. *Spiller* (1807), 6 Esp. 70 (there being no other tenant of the landlord with the same surname).

(*l*) *E.g.*, under the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 23.

(*m*) *Doe* d. *Morgan* v. *Church* (1811), 3 Camp. 71; *Doe* d. *Rodd* v. *Archer* (1811), 14 East, 245: it is the same notwithstanding that the landlord has sold the part in respect of which notice is given, and that the notice is given by the purchaser (*Prince* v. *Evans* (1874), 29 L. T. 835).

(*n*) *Doe* d. *Bailey* v. *Foster* (1846), 3 C. B. 215, 225.

(*o*) *Doe* d. *Brooks* v. *Fairclough* (1817), 6 M. & S. 40 (where notice to give up possession to "the rector and churchwardens for the time being" was insufficient, these persons not being a corporation).

(*p*) See *Goodé* v. *Howells* (1838), 4 M. & W. 198, *per* PARKE, B., at p. 201: "Such a notice only can be good as, on a reasonable construction of it, denotes an intention to give up the premises at the lawful time."

(*q*) But where the tenant simply gave notice of his desire to quit and asked the landlord as to the time of quitting, and the landlord by his reply fixed the time, this cured any insufficiency in the notice (*General Assurance Co.* v. *Worsley* (1895), 72 L. T. 358).

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party who disputes its sufficiency (*r*). But the appropriate general words are "at the end of the year of the tenancy which will expire next after the end of one half-year from the date of the service of this notice" (*s*); and it is usual, after first mentioning the day which is believed to be the anniversary of the commencement of the tenancy, to add these general words in the alternative, so that an error as to the specific day may not invalidate the notice (*t*).

Construction of incorrect notice.

915. If possible, a notice to quit will be construed so as to make it effectual, and inaccuracies, obviously opposed to the intention of the party giving it, will be corrected (*u*). Thus a notice which is expressed to be for the end of the "present" or "current" year will be effectual for the following year if this is clearly the intention (*a*); where, for instance, the current year ends only two days after service of the notice (*b*). But a notice, which is not long enough to determine the tenancy at the end of the current year, is not merely on that ground treated as a notice for the end of the following year (*c*). This will only be done if necessary to effectuate the obvious intention (*d*). A notice to quit given after the determination of a term of years is not necessarily a recognition of an existing tenancy (*e*).

Notice to quit on a contingency.

916. A notice to quit must be clear and certain in its terms (*f*). It is bad if it is expressed so as to take effect on a contingency; such as a notice to quit given by the landlord if a breach of covenant shall be committed (*g*), or by the tenant when he can get another situation (*h*); or if it is doubtful whether the tenancy is to be determined by notice or by surrender (*i*). But if a definite notice to quit is given, it is not invalidated by the addition of words

(*r*) *Doe* d. *Gorst* v. *Timothy* (1847), 2 Car. & Kir. 351.

(*s*) *Doe* d. *Phillips* v. *Butler* (1797), 2 Esp. 589.

(*t*) *Doe* d. *Digby* v. *Steel* (1811), 3 Camp. 115, 117; *Mills* v. *Goff* (1845), 14 M. & W. 72, 75; *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, 389, C. A. See *Ashtown* (*Lord*) v. *Larke* (1872), 6 I. R. C. L. 270; and compare *Ferguson* v. *Daly* (1873), 8 I. R. C. L. 216 (both on the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), s. 58). Similarly the notice may state two specific days in the alternative, provided it is in fact served half a year before the anniversary of the commencement of the tenancy (*Doe* d. *Matthewson* v. *Wrightman* (1801), 4 Esp. 5).

(*u*) *Doe* d. *Bedford* (*Duke*) v. *Kightley* (1796), 7 Term Rep. 63 (where a notice given at Michaelmas, 1795, to quit at Lady Day, 1795, was held good for Lady Day, 1796).

(*a*) *Doe* d. *Williams* v. *Smith* (1836), 5 Ad. & El. 350.

(*b*) *Doe* d. *Huntingtower* (*Lord*) v. *Culliford* (1824), 4 Dow. & Ry. (K. B.) 248, *per* BAYLEY, J., at p. 249: "It is quite sufficient if the tenant understood what is meant."

(*c*) *Doe* d. *Richmond Corporation* v. *Morphett* (1845), 7 Q. B. 577; *Mills* v. *Goff*, *supra*.

(*d*) *Wride* v. *Dyer*, [1900] 1 Q. B. 23, disapproving of the adverse criticism of *Doe* d. *Huntingtower* (*Lord*) v. *Culliford*, *supra*, in *Doe* d. *Richmond Corporation* v. *Morphett*, *supra*.

(*e*) *Doe* d. *Godsell* v. *Inglis* (1810), 3 Taunt. 54; see *Doe* d. *Wilcockson* v. *Lynch* (1771), 2 Chit. 683.

(*f*) *Ahearn* v. *Bellman*, *Sedgwick* v. *Ahearn* (1879), 4 Ex. D. 201, 205, C. A.

(*g*) *Muskett* v. *Hill* (1839), 5 Bing. (N. C.) 694, 711. A notice to quit served during the pendency of ejectment for non-payment of rent is in effect conditional and is bad (*Hall* v. *Flanagan* (1877), 11 I. R. C. L. 470).

(*h*) *Farrance* v. *Elkington* (1811), 2 Camp. 591.

(*i*) *Gardner* v. *Ingram* (1889), 61 L. T. 729.

requiring, in a notice by the landlord, an increase (*k*), or, in a notice by the tenant, a diminution, of rent, if the tenant stays on (*l*). A notice so expressed operates as a notice to quit, with an offer to grant or to take a new tenancy as the case may be (*m*).

(iv.) *Persons to give and receive Notice.*

Who can give notice to quit.

917. The notice to quit may be given either by the landlord or the tenant (*n*). For this purpose the landlord is the person in whom the legal reversion is vested, or the person whom the tenant is bound to recognise as his landlord by estoppel (*o*). The notice when once given enures for the benefit of the successors in title of the landlord or tenant giving it (*p*). Similarly the notice must be given to the tenant or the reversioner. A notice cannot be given by a landlord to a sub-tenant of part of the premises so as to determine the sub-tenancy, even though the intermediate tenant has given up possession of the remainder of the premises (*q*). But where no sub-letting has taken place, a person who succeeds the tenant in the occupation of the premises will be presumed to be his assign, and notice may be given to him (*r*).

Who can receive notice.

Notice given by agent.

918. The notice may be given by the agent of either party, provided he is duly authorised for that purpose at the time of giving it. If he is not so authorised, a subsequent ratification of the notice will not make it effectual (*s*), since the notice must be one which is, in fact, binding on the landlord when it is served (*t*).

(*k*) *Ahearn* v. *Bellman, Sedgwick* v. *Ahearn* (1879), 4 Ex. D. 201, 205, C. A. A notice to quit stating that in default the landlord will require payment of double value is good (*Doe* d. *Matthews* v. *Jackson* (1779), 1 Doug. (K. B.) 175 ; *Doe* d. *Lyster* v. *Goldwin* (1841), 2 Q. B. 143, 144).

(*l*) *Bury* v. *Thompson*, [1895] 1 Q. B. 696, C. A.

(*m*) *Ahearn* v. *Bellman, Sedgwick* v. *Ahearn, supra*. If the tenant stays on, he must pay the increased rent (*Roberts* v. *Hayward* (1828), 3 C. & P. 432).

(*n*) It is inconsistent with a tenancy from year to year that the landlord should bind himself not to give notice to quit (*Doe* d. *Warner* v. *Browne* (1807), 8 East, 165, 167).

(*o*) *Doe* d. *Green* v. *Baker* (1818), 8 Taunt. 241 ; see *Burton* v. *Dickenson* (1867), 17 L. T. 264 ; and see p. 336, *ante*. When the landlord has granted a lease for a term by deed to a third party he ceases to be entitled to the reversion on the yearly tenancy, and cannot give a notice to quit to the yearly tenant (*Wordsley Brewery Co.* v. *Halford* (1903), 90 L. T. 89). Where the tenancy was in existence at the time of a mortgage it was formerly necessary that the notice should be given by the mortgagee (see *Miles* v. *Murphy* (1871), 5 I. R. C. L. 382), unless the mortgagor had been constituted his agent to give the notice (*Stacpoole* v. *Parkinson* (1874), 8 I. R. C. L. 561). Perhaps the mortgagor while in possession can now give the notice by virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5). As to the rights of a mortgagor while in possession, see title MORTGAGE.

(*p*) *Doe* d. *Egremont (Earl)* v. *Forwood* (1842), 3 Q. B. 627.

(*q*) *Pleasant* d. *Hayton* v. *Benson* (1811), 14 East, 234.

(*r*) *Doe* d. *Morris* v. *Williams* (1826), 6 B. & C. 41. Notice may be given to a widow of a deceased tenant from year to year, unless some other person is then his personal representative (*Rees* d. *Mears* v. *Perrot* (1830), 4 C. & P. 230 ; *Sweeny* v. *Sweeny* (1876), 10 I. R. C. L. 375).

(*s*) *Doe* d. *Mann* v. *Walters* (1830), 10 B. & C. 626 ; *Doe* d. *Lyster* v. *Goldwin* (1841), 2 Q. B. 143 ; and see title AGENCY, Vol. I., p. 177. A notice given by an agent of an agent is not effectual without the recognition of the principal (*Doe* d. *Rhodes* v. *Robinson* (1837), 3 Bing. (N. C.) 677).

(*t*) See *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567, 573.

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Moreover, the tenant must have reason to believe that it is thus binding, so that he may safely act on it (*u*), and if it is given by an agent having only a special authority, the fact of his agency must appear on the face of the notice; but this is not necessary if the agent has been held out as having a general authority (*v*). An agent who is entrusted with the management of an estate, and who has authority to let and to receive rents, has a general authority in respect of the tenancies, and can give notice to quit (*a*).

Notice given by co-owners.

919. Where the demise is by joint tenants, one may give notice on behalf of all (*b*), but this doctrine is confined to a common law notice to quit. Where a lease is determinable under a proviso which allows either party to determine it on notice, the notice must either be given by all, or the one who gives it must have at the time the authority of the others to do so (*c*).

(v.) *Service of Notice.*

Service on tenant.

920. The notice to quit need not be served personally upon the tenant (*d*). It may be served upon his agent (*e*), and when so

(*u*) *Doe* d. *Mann* v. *Walters* (1830), 10 B. & C. 626; *Doe* d. *Lyster* v. *Goldwin* (1841), 2 Q. B. 143; *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567, 573.

(*v*) *Jones* v. *Phipps*, *supra*, at p. 572; but see *Stacpoole* v. *Parkinson* (1874), 8 I. R. C. L. 561.

(*a*) *Doe* d. *Manvers* (*Earl*) v. *Mizem* (1837), 2 Mood. & R. 56; *Erne* (*Earl*) v. *Armstrong* (1872), 6 I. R. C. L. 279. A receiver appointed by the court is such an agent (*Wilkinson* v. *Colley* (1771), 5 Burr. 2694; *Doe* d. *Marsack* v. *Read* (1810), 12 East, 57); and the steward of a corporation may be a general agent for this purpose, though not appointed under seal (*Roe* d. *Rochester* (*Dean and Chapter*) v. *Pierce* (1809), 2 Camp. 96; *Doe* d. *Birmingham Canal Co.* v. *Bold* (1847), 11 Q. B. 127). A *cestui que trust* who did not create the tenancy cannot give notice unless he has been held out as the agent of the trustees (*Easton* v. *Penney* (1892), 67 L. T. 290), as, for instance, where he has been permitted to have the management of the trust estate (*Jones* v. *Phipps*, *supra*).

(*b*) *Doe* d. *Aslin* v. *Summersett* (1830), 1 B. & Ad. 135; *Doe* d. *Kindersley* v. *Hughes* (1840), 7 M. & W. 139, 141; *Alford* v. *Vickery* (1842), Car. & M. 280; compare *Doe* d. *Whayman* v. *Chaplin* (1810), 3 Taunt. 120 (where it was held that three out of four joint tenants who gave the notice could recover three fourth parts). It is not, perhaps, finally settled that it is unnecessary to prove the authority of the other joint tenants; though, if the authority of all is required, it may be sufficient if they recognise the notice after it has been given (*Goodtitle* d. *King* v. *Woodward* (1820), 3 B. & Ald. 689; see *Doe* d. *Jolliffe* v. *Sybourn* (1798), 2 Esp. 677); but this is opposed to the cases cited in note (*s*), p. 451, *ante*. Where joint tenants are under an agreement to quit on payment of an equivalent for the crop, tender to one is sufficient (*Loddiges* v. *Lister* (1860), 1 L. T. 548).

(*c*) *Right* d. *Fisher* v. *Cuthell* (1804), 5 East, 491 (proviso for determining lease at end of fourteen years on six months' notice in writing by landlord or tenant or their respective heirs and executors under his or their respective hands; notice signed by two out of three of lessor's executors held insufficient); *Re Viola's Indenture of Lease*, *Humphrey* v. *Stenbury*, [1909] 1 Ch. 244 (proviso enabling "the lessees" to determine lease by notice in writing requires signature by or under authority of both); see *Quartermaine* v. *Selby* (1889), 5 T. L. R. 223, C. A. In the case of partners, authority may be presumed (*Doe* d. *Elliot* v. *Hulme* (1828), 2 Man. & Ry. (K. B.) 433); and generally as to the implied authority of partners, see title PARTNERSHIP.

(*d*) A memorandum of service should be indorsed on a duplicate of the notice at the time when the notice is served. The duplicate will then be primary evidence (*Doe* d. *Patteshall* v. *Turford* (1832), 3 B. & Ad. 890; *Doe* d. *Fleming* v. *Somerton* (1845), 7 Q. B. 58; *Stapylton* v. *Clough* (1853), 2 E. & B. 933).

(*e*) See *Doe* d. *Prior* v. *Ongley* (1850), 10 C. B. 25 In the case of a corporation

served it is unnecessary to prove that it actually came to his knowledge; it is sufficient if the fact of the agency is established (*f*). The servant of the tenant at his dwelling-house, whether this is on or off the demised premises, is his implied agent to receive a notice to quit, though the tenant can give evidence to rebut the implication (*f*). Apart from any question of agency, the fact that the notice has been delivered to the wife (*g*) or servant (*h*) of the tenant raises a strong presumption that it has reached him, especially if an explanation of the notice was given when it was delivered (*i*); and the presumption can only be rebutted by proof that the notice did not come to the knowledge of the tenant at all (*k*).

A notice left at a tenant's house, but not served on anyone personally, is effectual if it can be proved that it actually came to his hands in time to give him notice of the proper length (*l*).

It is not necessary that the notice should be directed to the tenant: it is sufficient if it can be proved, either by direct evidence or by his own admissions (*m*), that it was delivered to him in proper time (*n*). But if the tenant has disappeared, service becomes impossible unless the lease makes special provision for such a case, as by authorising service of the notice on the premises or at the lessee's last known address (*o*). Where the premises are held by two tenants jointly, the service of notice on one who lives on the premises is evidence that it reached the other who lives elsewhere (*p*), and apparently, even without such evidence, it is effectual as to both (*q*).

Service on landlord.

921. A notice given by the tenant can be served on the landlord or his agent (*r*). If sent by post it is sufficient if it is delivered

service should be on an officer (*Doe* d. *Carlisle* (*Earl*) v. *Woodman* (1807), 8 East, 228).

(*f*) *Tanham* v. *Nicholson* (1872), L. R. 5 H. L. 561, 569; see *Jones* d. *Griffiths* v. *Marsh* (1791), 4 Term Rep. 464; *London School Board* v. *Peters* (1902), 18 T. L. R. 509; and title AGENCY, Vol. I., p. 215. Consequently it is immaterial that the notice came to the knowledge of the tenant too late to allow for a proper length of service on him personally (*Doe* d. *Neville* v. *Dunbar* (1826), Mood. & M. 10); *contra*, if the notice was addressed to the wrong person (*Doe* d. *Exeter Corporation* v. *Mitchell* (1837), 1 Jur. 795). As to a provision for service of the notice at the usual place of abode of the tenant, see *Liddy* v. *Kennedy* (1871), L. R. 5 H. L. 134.

(*g*) *Roe* d. *Blair* v. *Street* (1834), 2 Ad. & El. 329; *Smith* v. *Clark* (1840), 9 Dowl. 202.

(*h*) *Jones* d. *Griffiths* v. *Marsh*, *supra*. See also title AGRICULTURE, Vol. I., p. 241.

(*i*) See *Doe* d. *Buross* v. *Lucas* (1804), 5 Esp. 153.

(*k*) *Tanham* v. *Nicholson*, *supra*.

(*l*) *Alford* v. *Vickery* (1842), Car. & M. 280 (notice put under door of house).

(*m*) *Doe* d. *Simpson* v. *Hall* (1843), 5 Man. & G. 795.

(*n*) *Doe* d. *Matthewson* v. *Wrightman* (1801), 4 Esp. 5.

(*o*) Compare *Seaward* v. *Drew* (1898), 67 L. J. (Q. B.) 322. If the notice is to be served on the lessee or his assigns, service on a mortgagee by sub-demise is ineffectual (*Hogg* v. *Brooks* (1885), 15 Q. B. D. 256, C. A.).

(*p*) *Doe* d. *Bradford* (*Lord*) v. *Watkins* (1806), 7 East, 551.

(*q*) *Doe* d. *Macartney* (*Lord*) v. *Crick* (1805), 5 Esp. 196.

(*r*) The agent must be authorised to receive a notice to quit either specially or by the course of his employment, as where he has the general management

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during the last day on which service can be made, though after business hours (*s*). If the posting is proved, the notice will be presumed to have been delivered in due course of post (*t*), and the time of delivery will be the time of service (*a*).

(vi.) *Waiver of Notice.*

Waiver or withdrawal.

922. A notice to quit may be withdrawn or abandoned during its currency; or it may be waived, either expressly or by implication, after it has expired; but no withdrawal, abandonment, or waiver is effectual without the consent of the party to whom the notice is given (*b*).

Effect of withdrawal by consent.

It has been held that a withdrawal of the notice by consent during its currency does not nullify the notice, but operates as evidence of an agreement for a new tenancy to take effect on the determination of the old one (*c*). After the notice has expired, a waiver of it can only operate by creating a new tenancy, since the old tenancy is already at an end (*d*).

What acts amount to waiver.

923. Questions of waiver usually arise when some act is done by the landlord after the expiration of the notice, which either necessarily or *primâ facie* imports the recognition of an existing tenancy. A distress levied for rent accrued due since the expiration of the notice is of the former nature, and, if acquiesced in by the tenant, necessarily operates as a waiver of the notice (*e*). But in other cases the *primâ facie* effect of the act may be avoided by showing that it was done with some other intention; and when such evidence is offered it must be determined, as a question of fact, whether the act was intended to operate as a waiver (*f*). A mere demand of rent accrued due after the expiration of the notice, not followed by a promise to pay by the tenant, cannot operate as a

of the estate. It is not sufficient that he collects the rents (*Pearse* v. *Boulter* (1860), 2 F. & F. 133).

(*s*) *Papillon* v. *Brunton* (1860), 5 H. & N. 518, 522.

(*t*) *Gresham House Estate Co.* v. *Rossa Grande Gold Mining Co.*, [1870] W. N. 119.

(*a*) *R.* v. *Slawstone* (*Inhabitants*) (1852), 18 Q. B. 388; *R.* v. *Richmond* (*Recorder*) (1858), E. B. & E. 253.

(*b*) *Blyth* v. *Dennett* (1853), 13 C. B. 178; *Tayleur* v. *Wildin* (1868), L. R. 3 Exch. 303, 305.

(*c*) *Tayleur* v. *Wildin*, *supra*; see *Vance* v. *Vance* (1871), 5 I. R. C. L. 363. Hence a guarantor of rent under the old tenancy is not liable for rent under the new tenancy (*Tayleur* v. *Wildin*, *supra*). But the doctrine of a new tenancy was emphatically repudiated by the Irish Court of Appeal in *Inchiquin* (*Lord*) v. *Lyon* (1887), 20 L. R. Ir. 474, C. A., and the discharge of the guarantor was attributed to the variation in the position of the parties effected by the withdrawal of the notice. See also title GUARANTEE, Vol. XV., pp. 481, 546 *et seq.*

(*d*) *Inchiquin* (*Lord*) v. *Lyon*, *supra*.

(*e*) *Zouch* d. *Ward* v. *Willingale* (1790), 1 Hy. Bl. 311. Until a new tenancy is created, the landlord is not entitled to distrain (*Jenner* v. *Clegg* (1832), 1 Mood. & R. 213; *Alford* v. *Vickery* (1842), Car. & M. 280); but submitting to a distress is an acknowledgment of a tenancy (*Panton* v. *Jones* (1813), 3 Camp. 372). After judgment in ejectment a distress may be evidence of a tenancy, but it is no ground for setting aside the judgment (*Doe* d. *Holmes* v. *Darby* (1818), 8 Taunt. 538).

(*f*) *Doe* d. *Cheny* v. *Batten* (1775), 1 Cowp. 243.

waiver for want of the tenant's consent (*g*). But payment and acceptance of rent so accrued due (*h*) requires the concurrence of both parties, and operates as a waiver (*i*), unless otherwise explained (*k*). So, also, does a second notice to quit given after the expiration of the first, since it implies that the tenant may lawfully continue in possession until the expiration of the second notice (*l*), unless the circumstances show that this was not the landlord's intention; where, for instance, the notice is given as a preliminary to recovering double value (*m*), or where the landlord is at the same time proceeding for recovery of possession (*n*). A mere holding over by the tenant after the expiration of the notice does not by itself operate as a waiver of the notice, whether the notice was given by himself (*o*) or by the landlord (*p*). It is a question of fact whether the tenant intended to avail himself of the notice to quit, or whether the circumstances of the holding over amounted to a waiver of the notice (*q*). An agreement by the landlord to suspend the exercise of his rights under a notice to quit—for example, where he promises that the tenant shall not be turned out until the premises are sold—is not a waiver of the notice, and the landlord retains all his rights under it, subject only to the agreement (*a*).

(vii.) *Dispensing with Notice.*

Dispensing with notice.

924. Where rent accruing under a yearly tenancy has not been paid for a long time, this will raise a presumption that the tenancy has been determined (*b*). If at the end of a year the landlord accepts a new tenant, he dispenses with notice to quit by the old tenant (*c*). But this is because there is a surrender by operation of law, and the immediate change of possession is an essential

(*g*) *Blyth* v. *Dennett* (1853), 13 C. B. 178. Authorizing the tenant to pay an annuity charged on the premises is not a recognition of his tenancy, so as to constitute a waiver (*Doe* d. *Bath* v. *Scott* (1827), 6 L. J. (O. S.) (K. B.) 110).

(*h*) Though only for a single day (*Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147). But where rent has been paid quarterly, the subsequent payment of a year's rent in one sum is not necessarily a waiver (*London School Board* v. *Peters* (1902), 18 T. L. R. 509).

(*i*) *Goodright* d. *Charter* v. *Cordwent* (1795), 7 Term Rep. 219. Where the rent is received by an agent, there is no waiver unless he is authorised to receive it notwithstanding the notice (*Doe* d. *Ash* v. *Calvert* (1810), 2 Camp. 387).

(*k*) *E.g.*, where it is accepted in lieu of double rent or double value (*Doe* d. *Cheny* v. *Batten* (1775), 1 Cowp. 243); see p. 554, *post*. A receipt for rent, stipulating that it shall not operate as a waiver, does not require an agreement stamp (*Doe* d. *Wheble* v. *Fuller* (1835), Tyr. & Gr. 17).

(*l*) See *Doe* d. *Brierly* v. *Palmer* (1812), 16 East, 53, 56.

(*m*) *Doe* d. *Digby* v. *Steel* (1811), 3 Camp. 115, 117; compare *Messenger* v. *Armstrong* (1785), 1 Term Rep. 53.

(*n*) *Doe* d. *Williams* v. *Humphreys* (1802), 2 East, 237.

(*o*) *Gray* v. *Bompas* (1862), 11 C. B. (N. S.) 520.

(*p*) *Jenner* v. *Clegg* (1832), 1 Mood. & R. 213; *Cusack* v. *Farrell* (1886), 18 L. R. Ir. 494, affirmed (1887), 20 L. R. Ir. 56, C. A.

(*q*) *Jones* v. *Shears* (1836), 4 Ad. & El. 832, 836.

(*a*) *Whiteacre* d. *Boult* v. *Symonds* (1808), 10 East, 13; see *London School Board* v. *Peters* (1902), 18 T. L. R. 509.

(*b*) *Stagg* v. *Wyatt* (1838), 2 Jur. 892.

(*c*) *Sparrow* v. *Hawkes* (1796), 2 Esp. 505.

SECT. 2. Tenancy from Year to Year.

element (*d*). There cannot be a surrender *in futuro* (*e*), hence the landlord's mere acquiescence in a short notice, whether by parol or in writing, does not make the notice binding; though if the tenant quits in accordance with the notice, he is not liable for subsequent rent (*f*).

SECT. 3.—*Term of Years.*

Tenancy for years.

925. A tenancy for a term of years arises by express contract, and it is essential to the contract that the commencement and duration of the term should be so defined as either to be certain in the first instance (*g*), or to be capable of being afterwards ascertained with certainty (*h*). But the commencement of the term is only important as an element in measuring its duration (*i*). It may commence either immediately, or from a past or future date (*j*); and although it is expressed to commence from a past day, yet the actual interest of the lessee commences only on the execution of the deed (*k*), and his liability is limited accordingly; thus he is not liable under the covenant to repair for matters arising before the date of execution (*l*). But under a proviso for determining the lease at the end of seven or fourteen years, these periods are reckoned from the commencement of the term (*m*).

Commencement of term.

Effect of the instrument.

926. It is the office of the habendum in a deed to limit the estate granted, and hence in a lease by deed the habendum should state specifically both the commencement and duration of the term (*n*). Where the term is expressed to commence "from" a specified day, this day is in strictness not included in the term, and the term, therefore, lasts during the whole anniversary of the day from which it begins (*o*); while if it commences "on" a specified

(*d*) *Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922; *Bessell* v. *Landsberg* (1845), 7 Q. B. 638; see *Doe* d. *Huddleston* v. *Johnston* (1825), M'Cle. & Yo. 141; p. 551, *post*.

(*e*) *Doe* d. *Murrell* v. *Milward* (1838), 3 M. & W. 328; p. 548, *post*.

(*f*) *Shirley* v. *Newman* (1795), 1 Esp. 266; compare *Brown* v. *Burtinshaw* (1826), 7 Dow. & Ry. (K. B.) 603.

(*g*) See *Say* v. *Smith* (1564), Plowd. 269, 272; *Anon.* (1674), 1 Mod. Rep. 180 (lease made 10th October, habendum from 20th November, without mentioning the year, void for uncertainty); see *Kirsley* v. *Duck* (1712), 2 Vern. 684. A lease is good for a term specified though it is also granted for a further indefinite term (*Gwynne* v. *Mainstone* (1828), 3 C. & P. 302). For forms of lease see Encyclopædia of Forms and Precedents, Vol. VII., pp. 109 *et seq.*

(*h*) *Goodright* d. *Hall* v. *Richardson* (1789), 3 Term Rep. 462, 463. The word "term" in a covenant means the term which the lessor purports to grant (*Evans* v. *Vaughan* (1825), 4 B. & C. 261). As to the grant by mistake of a shorter term than that agreed on, see *Wilde* v. *Ashley* (1838), 2 Jur. 679.

(*i*) See *Wyburd* v. *Tuck* (1799), 1 Bos. & P. 458, 464.

(*j*) Compare p. 459, *post*.

(*k*) *Jervis* v. *Tomkinson* (1856), 1 H. & N. 195; see *Cooper* v. *Robinson* (1842), 10 M. & W. 694, 696.

(*l*) *Shaw* v. *Kay* (1847), 1 Exch. 412.

(*m*) *Bird* v. *Baker* (1858), 1 E. & E. 12.

(*n*) *Buckler's Case* (1597), 2 Co. Rep. 55 a; *Burton* v. *Barclay* (1831), 7 Bing. 745, 757; *Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663, 667; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 473. The limitation in the habendum may, in a clear case, be controlled by other parts of the instrument (*Strickland* v. *Maxwell* (1834), 2 Cr. & M. 539, 549).

(*o*) Co. Litt. 46 b; *Anon.* (1773), Lofft, 275; *Ackland* v. *Lutley* (1839), 9 Ad. & El. 879, 894; see *Cutting* v. *Derby* (1776), 2 Wm. Bl. 1075.

day, the day is included (*p*). But the deed must be interpreted so as to give effect to the substantial rights of the parties, and for practical purposes this distinction can usually be neglected (*q*).

If in a lease by deed the term is expressed to commence "from henceforth," or "from the making hereof" (*r*), or if no date is specified (*s*), it commences from the time when the deed takes effect, that is, from delivery. If it is expressed to commence from the date of the deed, this date is by reference inserted in the habendum, and the term commences on the following day (*s*); but if in such case the deed is not dated, or if it bears an impossible date, the term commences from delivery (*t*). Where the tenant enters under an agreement not under seal, which does not specify the commencement of the term, this will usually commence from entry (*a*), but parol evidence is admissible to show when the instrument was intended to take effect (*b*).

Commencement at future date.

927. It is sufficient if the commencement of the term is ascertained with certainty at the time when the lease is to take effect in possession (*c*); hence the term may be made to commence after the failure of specified lives (*d*), or upon the occurrence of a future contingent event (*e*). Where it is to take effect after the expiration of a previous term, and the previous term is surrendered or forfeited, the lease takes effect on the surrender or forfeiture (*f*), and if the previous lease has already determined, or if it is void or non-existent, the new lease takes effect at once (*g*).

Commencement at expiration of previous term.

Duration of term.

928. The duration of the term must be either fixed by specifying the number of years in the first instance, or so defined by reference to some then existing or subsequent

(*p*) Co. Litt. 46 b; *Clayton's Case* (1585), 5 Co. Rep. 1 a.

(*q*) *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, C. A.; see *Pugh* v. *Leeds* (*Duke*) (1777), 2 Cowp. 714, 717, 725; *Doe* d. *Cox* v. *Day* (1809), 10 East, 427; *Wilkinson* v. *Gaston* (1846), 9 Q. B. 137, 144, 145.

(*r*) Co. Litt. 46 b; *Clayton's Case, supra*; *Llewelyn* v. *Williams* (1610), Cro. Jac. 258; *Steele* v. *Mart* (1825), 4 B. & C. 272, 278.

(*s*) Co. Litt. 46 b.

(*t*) *Ibid.*; *Styles* v. *Wardle* (1825), 4 B. & C. 908, 911.

(*a*) *Doe* d. *Cornwall* v. *Matthews* (1851), 11 C. B. 675; compare *Sandill* v. *Franklin* (1875), L. R. 10 C. P. 377.

(*b*) *Davis* v. *Jones* (1856), 17 C. B. 625.

(*c*) Co. Litt. 45 b; Shep. Touch. (ed. Preston), 272; *Bath's* (*Bishop*) *Case* (1605), 6 Co. Rep. 34 b.

(*d*) *Goodright* d. *Hall* v. *Richardson* (1789), 3 Term Rep. 462, 463.

(*e*) *Bath's* (*Bishop*) *Case, supra*; Co. Litt. 45 b. Where a mortgagor in possession was, on default, to become tenant at a rent, it was held that the mortgagee was not entitled to distrain after default unless he had given notice to the mortgagor of his intention to treat him as tenant (*Clowes* v. *Hughes* (1870), L. R. 5 Exch. 160); but such a case could not now arise (see p. 336, *ante*).

(*f*) Co. Litt. 45 b; *Wrottesley* v. *Adams* (1560), Dyer, 177 b; *Chedington's* (*Rector*) *Case* (1598), 1 Co. Rep. 148 b, 154 b; *contra*, if the second lease is to begin at the expiration of twenty-one years (the term of the first lease) (*Chedington's* (*Rector*) *Case, supra*). Where the premises are subject in part to lease A and in part to lease B, and the new lease is to begin after the determination of leases A and B, it will begin as to each part on the determination of the lease of that part (*Windham's* (*J.*) *Case* (1589), 5 Co. Rep. 7 a).

(*g*) *Miller* v. *Manwaring* (1635), Cro. Car. 397, 399.

SECT. 3. Term of Years.

circumstance that the exact length can be fixed with certainty afterwards (*h*). The term may be for any length of time, however great, and in building leases terms of ninety-nine years or nine hundred and ninety-nine years are frequently granted (*i*). But there must be a definite limit; there cannot be a lease in perpetuity (*j*), except by virtue of statute (*k*). An instrument purporting to create a perpetual lease at a rent would operate, if at all, as a conveyance in fee simple subject to a perpetual rentcharge, or as an agreement to convey such an estate (*l*).

Lease cannot be perpetual.

Term definite by reference to determining event.

It is sufficient, however, if the maximum duration of the term is fixed. Provided this is done, the lease may be subject to determination within the period, either directly by a provision that it shall determine on a given event—for instance, upon the death of a specified person, or indirectly by a provision that it shall continue only during the continuation of a specified state of affairs—for instance, during a specified life or lives (*m*), or while the lessee remains in the lessor's service (*n*), or continues to occupy the premises (*o*). An under-tenancy at a weekly rent, with a provision that the rent shall not be raised during the head term, gives the under-tenant a right to hold till the end of that term (*p*).

Time of quitting.

929. A lease for a term requires no notice to quit at the end of the term, whether the term expires by effluxion of time (*q*), or on the happening of an event on which it is expressed to determine (*a*).

(*h*) *I.e.*, it may be fixed (1) by reference to a certainty, *e.g.*, for the same term as in another specified lease; or (2) by matter *ex post facto*, as where the term is to be from a fixed commencement for so many years as A. shall name, but this must be done in the life of the lessor (*Bath's (Bishop) Case* (1605), 6 Co. Rep. 34 b, 35 a, b; Co. Litt. 45 b; Shep. Touch. (ed. Preston), 274. If to a certain term the lease purports to add a term which is uncertain, it is valid only as to the certain term (*Say* v. *Smith* (1564), Plowd. 269, 271; *Gwynne* v. *Mainstone* (1828), 3 C. & P. 302).

(*i*) See 55 Sol. Jo. 420.

(*j*) *Doe* d. *Robertson* v. *Gardiner* (1852), 12 C. B. 319, 333; *Sevenoaks, Maidstone, and Tunbridge Rail. Co.* v. *London, Chatham, and Dover Rail. Co.* (1879), 11 Ch. D. 625, 635. But a lease may contain a covenant for perpetual renewal (*Pollock* v. *Booth* (1875), 9 I. R. Eq. 229); see p. 463, *post*.

(*k*) *Sevenoaks, Maidstone, and Tunbridge Rail. Co.* v. *London, Chatham, and Dover Rail. Co., supra*; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, *per* FARWELL, J., at p. 360, affirmed, [1901] 2 Ch. 37, C. A.

(*l*) It would, perhaps, operate as a conveyance subject to a rentcharge if made by deed in favour of the lessee and his heirs (*Doe* d. *Robertson* v. *Gardiner, supra*); otherwise it might operate as an agreement for a conveyance (see p. 460, *post*); or, if not, a tenancy from year to year would arise on payment of rent (*Doe* d. *Robertson* v. *Gardiner, supra*; compare *Re Coleman's Estate*, [1907] 1 I. R. 488).

(*m*) *Hughes and Crowther's Case* (1610), 13 Co. Rep. 66; *Wright* d. *Plowden* v. *Cartwright* (1757), 1 Burr. 282; Co. Litt. 225 a; Shep. Touch. (ed. Preston), 274; see *Truepenny's Case* (1589), cited Cro. Eliz. 270 (reported *sub nom. Baldwin* v. *Cooke*, Moore (K. B.), 239); *Daniel* v. *Waddington* (1615), Cro. Jac. 377; compare *Nesham* v. *Selby* (1872), L. R. 13 Eq. 191.

(*n*) *Wrenford* v. *Gyles* (1598), Cro. Eliz. 643 (where, however, it was held that the lease did not determine by the lessor's death).

(*o*) *Doe* d. *Lockwood* v. *Clarke* (1807), 8 East, 185; see *Doe* d. *Shaw* v. *Steward* (1834), 1 Ad. & El. 300 (condition for occupation in a will).

(*p*) *Adams* v. *Cairns* (1901), 85 L. T. 10, C. A.; see p. 460, *post*.

(*q*) *Cobb* v. *Stokes* (1807), 8 East, 358.

(*a*) *Right* d. *Flower* v. *Darby* (1786), 1 Term Rep. 159, 162. A lease by a

But the lessee is not justified in quitting before the end of the term because the lessor has failed in the performance of a stipulation on his part, such as a covenant to repair (*b*).

The lease may provide for different parts of the premises to be delivered up at different times (*c*), or it may enable the lessor to resume possession of the premises, or part of them, for building or other purposes, on a specified notice (*d*).

SECT. 4.—*Lease for Life or Lives.*

Nature of interest created by lease for life.

930. A lease may be granted for the life of the lessee or the life or lives of any other person or persons. In the latter case the lessee has an estate *pur autre vie* (*e*), and in both cases the lessee has a freehold estate (*f*); consequently it is subject to the rule that a freehold estate cannot be created to arise *in futuro* unless it has some preceding freehold estate to support it (*g*).

A term of years, on the other hand, is not subject to this rule and can be granted so as to commence from a future date (*h*).

partner to a firm of which he is a member determines on the dissolution of the partnership (*Doe* d. *Waithman* v. *Miles* (1816), 1 Stark. 181; *Doe* d. *Colnaghi* v. *Bluck* (1838), 8 C. & P. 464); and see title PARTNERSHIP.

(*b*) *Surplice* v. *Farnsworth* (1844), 7 Man. & G. 576.

(*c*) *Doe* d. *Waters* v. *Houghton* (1827), 1 Man. & Ry. (K. B.) 208. Consequently ejectment will lie for the part to be delivered up first, before the time for delivering up the rest has arrived (*ibid.*).

(*d*) The premises must be *bonâ fide* wanted for the purpose specified (*Gough* v. *Worcester and Birmingham Canal Co.* (1801), 6 Ves. 354; *Russell* v. *Coggins* (1802), 8 Ves. 34). The resumption may extend to the whole of the premises (*Doe* d. *Wilson* (*Lady*) v. *Abel* (1814), 2 M. & S. 541; *Doe* d. *Gardner* v. *Kennard* (1848), 12 Q. B. 244; *Liddy* v. *Kennedy* (1871), L. R. 5 H. L. 134). If possession is resumed by an assignee of part of the premises, any liability to pay compensation will attach to him and not to the lessor (*Bath* v. *Bowles* (1905), 93 L. T. 801).

(*e*) Co. Litt. 41 b. The lease may also be for the lives of the lessee and some other person or persons (*ibid.*; *Wright* d. *Plowden* v. *Cartwright* (1757), 1 Burr. 282). As to the statutory right to require production of the *cestui qui vie* by the tenant *pur autre vie*, see title REAL PROPERTY AND CHATTELS REAL.

(*f*) As regards the nature of the estate a contractual lease for life at a rent does not differ from an estate for life created by settlement. But in fact the lessee for life is a tenant paying rent, and the tenant for life under a settlement is a landlord receiving rent, and it follows from this distinction that statutory and other powers which are in the nature of powers of ownership are exercisable by tenants for life under settlements, but not by lessees for lives; see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (5), 10 (i.), 58 (1) (iv.), (v.), (vi.); title SETTLEMENTS; Challis on Real Property, 3rd ed., 340. As to a lease for an indefinite time—*e.g.*, while the lessor remains vicar—giving a freehold interest, see *Brewer* v. *Hill* (1794), 2 Anst. 413.

(*g*) *Buckler's Case* (1597), 2 Co. Rep. 55 a, b; *Barwick's Case* (1597), 5 Co. Rep. 93 b, 94 b; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 474, note (*m*). But the lease is good if the deed is delivered after the day fixed for its commencement, although it is dated before (*Greenwood* v. *Tyber* (1620), Cro. Jac. 563; *Freeman* d. *Vernon* v. *West* (1763), 2 Wils. 165). The rule forbidding the creation of a freehold lease to commence *in futuro* originally depended on the consideration that livery of seisin was necessary to create the estate, and there could not be present livery to a future estate (*Barwick's Case*, *supra*); and if the lease is effectual to divest the freehold out of the lessor, it is void because the freehold would then be in abeyance; but the rule applies also to the creation of freehold estates by grant (Challis on Real Property, 3rd ed., 100—106); see title REAL PROPERTY AND CHATTELS REAL.

(*h*) *Barwick's Case*, *supra*.

SECT. 4. Lease for Life or Lives.

A lease may also be granted for a term of years determinable on the death of a specified person or of the survivor of several persons; and although the term is so long that it must necessarily exceed the named life or lives, yet it is a mere chattel interest and is personal estate (*i*).

How lease for life created.

931. A lease for life or lives should be created by deed, and unless so created it is void at law (*j*); but in equity it is treated as an agreement for a lease (*k*), and the doctrine of specific performance applies to it. Consequently, if it is of such a nature that the court would order specific performance, the lessee can obtain the grant of an effectual lease, or, without this being done, the informal lease is, for the purpose of any question arising in a court which has jurisdiction to order specific performance, equivalent to a lease by deed (*l*). Cases of this kind occur when a landlord lets a house and agrees not to raise the rent as long as the tenant pays it regularly (*m*). Provided that the agreement is in writing, it operates as an agreement to lease for the life of the tenant (*n*), subject to regular payment of rent, and, for most purposes, is equivalent to a formal lease by deed for the tenant's life (*o*).

(*i*) Since a term of years, however long, does not carry any freehold interest, a subsequent vested freehold estate is treated as an estate in possession, and can be created without infringing the rule against the creation of freehold estates *in futuro;* and this led to a distinction between short and long terms determinable on life. In a limitation to A. for twenty-one years if he shall so long live, and after his death to B. in fee simple, there is a reasonable possibility that A. will survive the twenty-one years; consequently the remainder to B. is contingent, and there being no preceding estate of freehold to support it, it is void in its inception; the limitation attempts to create a freehold *in futuro.* But if the term is so long that there is no reasonable probability of A. surviving it—and for this purpose eighty years is sufficient—the remainder to B. is treated as vested. Consequently it takes effect as an immediate freehold in B. and the limitation is valid (Fearne's Contingent Remainders, 24; Challis on Real Property, 3rd ed., 129, 130; see title REAL PROPERTY AND CHATTELS REAL). A lease for years if the lessee so long lives, with remainder over, will be construed so as to give the residue of the term after the lessor's death to the remainderman (*Wright* d. *Plowden* v. *Cartwright* (1757), 1 Burr. 282).

(*j*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3; see *Doe* d. *Warner* v. *Browne* (1807), 8 East, 165; *Dosee* v. *Doe* d. *East India Co.* (1859), 1 L. T. 345, 347, P. C. In Ireland a freehold interest can be created by note in writing signed by the lessor (Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 4; *Wood* v. *Davis* (1880), 6 L. R. Ir. 50). For form of lease for lives see Encyclopædia of Forms and Precedents, Vol. VII., p. 272.

(*k*) *Parker* v. *Taswell* (1858), 2 De G. & J. 559.

(*l*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.; see p. 367, *ante.*

(*m*) This is so, although the tenancy is *primâ facie* a weekly tenancy (*Adams* v. *Cairns* (1901), 85 L. T. 10, C. A.). In *Holmes* v. *Day* (1874), 8 I. R. C. L. 235, the court was equally divided as to whether a provision for indefinite continuance of the tenancy was repugnant to a *primâ facie* yearly tenancy and therefore void.

(*n*) If the lessor has only a leasehold interest, the tenant will be entitled to hold for the residue of the term, if he so long lives (*Kusel* v. *Watson* (1879), 11 Ch. D. 129, C. A.).

(*o*) *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577, C. A.; *Re Coleman's Estate*, [1907] 1 I. R. 488; compare *Austin* v. *Newham*, [1906] 2 K. B. 167. Formerly a distinction was made for this purpose between executory agreements for a lease of which a court of equity would grant specific performance (*Browne* v. *Warner* (1808), 14 Ves. 156, 409; *Re King's Leasehold Estates, Ex parte East of*

SECT. 4. Lease for Life or Lives.

932. A lease for the life of the lessee should expressly state in the habendum that he is to hold during his life; but a lease for life without mentioning the life which is to define its duration will be deemed to be for the life of the lessee (*p*); unless the lessor might lawfully grant a lease for his own life, but not for the life of the lessee, and then the lease will be taken to be for the life of the lessor (*q*). Similarly, where the lease is for the lives of others than the lessee, the lives must be mentioned in the habendum (*r*). Such leases, and also leases for a term of years determinable on lives, frequently contain a covenant for renewal on the dropping of any of the lives (*s*). Upon an assignment of the lease with a covenant that the lease is a valid and subsisting lease for the lives mentioned in it, there is no implied covenant that all the original lives are still in existence (*t*).

Lives should be specified.

SECT. 5.—*Covenants for Renewal.*

933. A lease may contain a covenant on the part of the lessor (*u*) that he will, at the end of the term, or at some stated period within

Effect of covenant for renewal.

London Rail. Co. (1873), L. R. 16 Eq. 521), and instruments which were intended to pass a present interest, but which were void at law because not made by deed (*Cheshire Lines Committee* v. *Lewis & Co.* (1880), 50 L. J. (Q. B.) 121, C. A.); and the former were assisted, but not the latter. In accordance, however, with the doctrine of *Parker* v. *Taswell* (1858), 2 De G. & J. 559, both executory agreements, and invalid leases which operate in equity as agreements, are equally entitled to the benefit of specific performance (*Zimbler* v. *Abrahams*, [1903] 1 K. B. 577, C. A.; see *Mardell* v. *Curtis* (1899), 43 Sol. Jo. 587). Where the agreement is not capable of specific performance, then the tenant, on payment of rent, becomes tenant from year to year or for other periodic period according to the computation of the rent; see *Doe* d. *Warner* v. *Browne* (1807), 8 East, 165; p. 440, *ante*. If the duration of the lease is made dependent on the lessor's power of letting, the lease is void for uncertainty (*Wood* v. *Beard* (1876), 2 Ex. D. 30). It has been held that such an agreement is merely personal, and is not binding on a purchaser of the reversion whether with or without notice (*Roberts* v. *Tregaskis* (1878), 38 L. T. 176; *sed quære*).

(*p*) An estate for a man's own life is deemed to be greater than an estate for the life of another; and since the lease is to be construed most strongly against the grantor, it is the lessee's life which sets the measure of the term (Co. Litt. 41 b, 42 a; see *Re Coleman's Estate*, [1907] 1 I. R. 488). In a demise by A. to B. for the term of "his" life, the word "his" will usually be referred to B., but it will be referred to A. if it appears upon the whole instrument that such was the intention (*Doe* d. *Pritchard* v. *Dodd* (1833), 5 B. & Ad. 689, 693).

(*q*) Co. Litt. 42 a; and see *Doe* d. *Bromfield* v. *Smith* (1805), 6 East, 530, where the lease was held to be for the joint lives of the lessor and the lessee.

(*r*) The habendum will be, in a lease for lives, "during the lives of A. B. & C., and the lives and life of the survivors and survivor of them"; and in a lease for years determinable on lives, "for the term of [99] years if A. B. & C. or any of them shall so long live." If no reference is made to survivors, it seems that these two forms of limitation have different effects. Thus, under a lease to A. during the lives of B. & C., A. will continue to hold during the life of the survivor; but otherwise where the lease is for 100 years if B. & C. shall so long live (*Brudnel's Case* (1592), 5 Co. Rep. 9 a; *Hughes and Crowther's Case* (1610), 13 Co. Rep. 66). Where one of the specified lives is not in being the lease is valid for the other lives (*Doe* d. *Pemberton* v. *Edwards* (1836), 1 M. & W. 553).

(*s*) See the text, *infra*; Encyclopædia of Forms and Precedents, Vol. VII., pp. 274, 278.

(*t*) *Coates* v. *Collins* (1871), L. R. 7 Q. B. 144.

(*u*) As to options to renew, see p. 393, *ante*. The lessor cannot deal with the

SECT. 5. Covenants for Renewal.

the term (*v*), grant a renewal of the lease if so required by the lessee (*w*). Such a lease confers on the lessee an immediate term with a right to the further term; and this right will, in the event of his death within the term, devolve upon his personal representatives (*x*). But, if the lease is granted in the exercise of a power, the covenant cannot be enforced unless, at the date of renewal, the renewed lease is one authorised by the power (*a*).

Observance of conditions by lessee.

934. The covenant usually requires that the lessee shall give notice of his intention to take a renewal before the determination of the term, and, when this is the case, he will lose his right if he fails to give the notice in time (*b*); and if the renewal is made conditional on the observance of his covenants by the lessee, such observance is a condition precedent to the right of renewal, and the right of renewal is not enforceable if at the time for renewal there is a

property in prejudice of the lessee's rights under the covenant for renewal; see *A.-G of the Straits Settlements* v. *Wemyss* (1888), 13 App. Cas. 192, P. C.

(*v*) Where the lease is renewable at the end of any of certain periods, as at the end of every fourteen years of the term, the lessee can require renewal at the end of any such period notwithstanding that he has missed previous periods (*Bogg* v. *Midland Rail. Co.* (1867), L. R. 4 Eq. 310); unless on the terms of the covenant he is bound to renew, if at all, at the end of the various periods in order (*Rubery* v. *Jervoise* (1786), 1 Term Rep. 229). On renewal of a lease for three lives, the renewal need not take place as each life drops, but the lessee may wait for two lives to drop (*Swinburne* v. *Milburn* (1884), 9 App. Cas. 844); unless the language of the covenant requires a different construction (*Hussey* v. *Domvile*, [1903] 1 I. R. 265, C. A.; *Domvile* v. *Callwell*, [1907] 2 I. R. 617; see *Reid* v. *Blagrave* (1831), 9 L. J. (o. s.) (CH.) 245; *Maxwell* v. *Ward* (1824), 13 Price, 674); as to a right of renewal for one life only, see *Walmesley* v. *Pilkington* (1866), 35 Beav. 362.

(*w*) On notice to renew being given the contract for renewal becomes binding on the lessee (*Dawson* v. *Lepper* (1892), 29 L. R. Ir. 211). As to the consideration for an agreement to renew, see *Richardson* v. *Sydenham* (1703), 2 Vern. 447; *Robertson* v. *St. John* (1786), 2 Bro. C. C. 140; *Redshaw* v. *Bedford Level (Governor & Co.)* (1759), 1 Eden, 346; *Dowling* v. *Mill* (1816), 1 Madd. 541; *Crofton* v. *Ormsby* (1806), 2 Sch. & Lef. 583. Where the lessee is bound to renew under a penalty, this does not give him the option to pay the penalty and not renew (*Reid* v. *Blagrave, supra*); and as to a penalty on failure to renew in time, see *Doneraile (Lord)* v. *Chartres* (1784), 1 Ridg. Parl. Rep. 122.

(*x*) *Hyde* v. *Skinner* (1723), 2 P. Wms. 196.

(*a*) *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519; *Doe* d. *Bromley* v. *Bettison* (1810), 12 East, 305; *Dowell* v. *Dew* (1842), 1 Y. & C. Ch. Cas. 345; *Salamon* v. *Sopwith* (1877), 35 L. T. 826, C. A.

(*b*) *Bayly* v. *Leominster Corporation* (1792), 1 Ves. 476; *Wight* v. *Hopetoun (Earl)* (1864), 4 Macq. 729, H. L.; *Nicholson* v. *Smith* (1882), 22 Ch. D. 640. Relief will not be given in equity against failure to give the notice in time (*Eaton* v. *Lyon* (1798), 3 Ves. 690; *London (City)* v. *Mitford* (1807), 14 Ves. 41); save under special circumstances (*Ross (Earl)* v. *Worsop* (1741), 1 Bro. Parl. Cas. 281; *Statham* v. *Liverpool Docks (Trustees)* (1830), 3 Y. & J. 565; *Hunter* v. *Hopetoun (Earl)* (1865), 13 L. T. 130, H. L.). Where notice to renew a lease for lives is to be given within six months after the dropping of any life, relief will not be given on the ground of ignorance of the death if the lessee might with reasonable diligence have discovered it (*Harries* v. *Bryant* (1827), 4 Russ. 89); and generally accident will not entitle the lessee to time for renewal unless it could not by reasonable diligence have been avoided (*Reid* v. *Blagrave, supra;* see *Maxwell* v. *Ward, supra*), but *contra* in a case of surprise (*Firman* v. *Ormonde (Lord)* (1829), Beat. 347). Formerly relief against failure to renew was granted (*Lennon* v. *Napper* (1802), 2 Sch. & Lef. 682), but this case was overruled (*Reid* v *Blagrave, supra*). As to laches in applying for renewal, see p. 380, *ante;* compare *Baldwin* v. *Bridges* (1835), L. & G. *temp.* Plunk. 408.

subsisting breach of covenant (*c*), even though it is not a serious breach (*d*). But if the new lease is to be granted on payment of a sum of money, and it is not stipulated that this shall be paid before the expiration of the old lease, it is sufficient if it is paid on the granting of the new lease notwithstanding that this is after the expiration of the old term (*e*). If the renewed lease is not conditional on the observance of covenants, the court will not refuse to enforce the renewal on the ground of breach of covenant unless the breach is serious and wilful, or unless the lessor could immediately put an end to the renewed lease under a proviso for re-entry (*f*).

Perpetual renewal.

935. The covenant may be a covenant for perpetual renewal (*g*), but the court will not give it this effect unless the intention in that behalf is clearly shown (*h*); as, for instance, where the covenant expressly states that the lease is to be renewable for ever (*i*). A provision that the new lease shall contain the same covenants as the old lease does not entitle the lessee to have the covenant for renewal inserted, so as to give him perpetual renewal (*j*), unless the provision expressly includes "this present covenant" (*k*). The

(*c*) *Job* v. *Banister* (1856), 2 K. & J. 374; *Finch* v. *Underwood* (1876), 2 Ch. D. 310, C. A.; *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238; *Greville* v. *Parker*, [1910] A. C. 335, P. C.; see *Thompson* v. *Guyon* (1831), 5 Sim. 65; or it may be essential, on the construction of the covenant, that there shall be no breach at the time when the new lease is applied for (see *Bastin* v. *Bidwell*, *supra*, at pp. 251, 252).

(*d*) *Finch* v. *Underwood*, *supra*; *contra*, where the performance of the covenants is not a condition precedent (*Hare* v. *Burges* (1857), 5 W. R. 585, C. A.).

(*e*) *Nicholson* v. *Smith* (1882), 22 Ch. D. 640. The lessor cannot require payment of a collateral debt as a condition of renewal (*Fitzgerald* v. *Carew* (1839), 1 I. Eq. R. 346).

(*f*) *Hare* v. *Burges*, *supra*; see *Greville* v. *Parker*, *supra*.

(*g*) The covenant is not open to objection on the ground of perpetuity (*Bridges* v. *Hitchcock* (1715), 5 Bro. Parl. Cas. 6), unless the persons entitled to renewal are an unascertained class (*Hope* v. *Gloucester Corporation* (1855), 7 De G. M. & G. 647, C. A.); see also *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A., *per* JESSEL, M.R., at p. 572; *Muller* v. *Trafford*, [1901] 1 Ch. 54, 61; and title PERPETUITIES.

(*h*) *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295, 298; *Moore* v. *Foley* (1801), 6 Ves. 232, 237; *Iggulden* v. *May* (1804), 9 Ves. 325, 330; *Brown* v. *Tighe* (1834), 2 Cl. & Fin. 396, 416, H. L.; *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844; compare *Smyth* v. *Nangle* (1840), 7 Cl. & Fin. 405, H. L. As to an agreement to grant a term where the lessor holds for lives with perpetual renewal, see *Leathem* v. *Allen* (1850), 1 I. Ch. R. 683.

(*i*) *London* (*City*) v. *Mitford* (1807), 14 Ves. 41; *Nicholson* v. *Smith*, *supra*; see *Atkinson* v. *Pillsworth* (1787), 1 Ridg. Parl. Rep. 449; *Palmer* v. *Hamilton* (1793), 2 Ridg. Parl. Rep. 535. An express covenant to renew is not essential (*Chambers* v. *Gaussen* (1844), 2 Jo. & Lat. 99); and it seems that the habendum may be so framed as to amount to a covenant for perpetual renewal (*Sheppard* v. *Doolan* (1842), 3 Dr. & War. 1).

(*j*) *Hyde* v. *Skinner* (1723), 2 P. Wms. 196; *Tritton* v. *Foote* (1789), 2 Bro. C. C. 636; *Russell* v. *Darwin* (1767), 2 Bro. C. C. 689, n.; *Lewis* v. *Stephenson* (1898), 67 L. J. (Q. B.) 296; compare *Swan* v. *Colclough* (1834), Hayes & Jo. 607.

(*k*) *Hare* v. *Burges* (1857), 4 K. & J. 45. A covenant to renew "from time to time" (*Furnival* v. *Crew* (1744), 3 Atk. 83), or "at any time" (*Copper Mining Co.* v. *Beach* (1823), 13 Beav. 478), will be a covenant for perpetual renewal if on the whole language it means "to renew and continue renewing," but not otherwise (*Brown* v. *Tighe*, *supra*, at p. 419).

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intention to renew perpetually must be clear on the language of the lease; the fact that several renewals have been granted is not admissible to explain the intention of the parties to the lease (*l*).

Underlease with covenant for renewal.

936. A lessee holding for a term or for lives with a covenant for renewal may underlease upon similar conditions, and it is usually provided that the underlessee shall contribute to fines (*m*); but, where an underlessor covenants for renewal at the same rent or fine if he obtains a renewal of his own lease, and he can only obtain such renewal on payment of an increased rent or fine, the underlessee is not bound to contribute to the increased rent or fine (*n*). If the lessor covenants to do his utmost to procure a renewal of his own lease he must offer a reasonable fine for renewal (*o*).

Part VI.—Rent.

SECT. 1.—*Nature and Reservation.*

Nature of rent.

937. Rent—that is, rent-service—is the recompense paid by the lessee to the lessor for the exclusive possession of corporeal hereditaments. It need not consist of the payment of money. It may consist in the render of chattels (*p*), or the performance of

(*l*) *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295, 298; see *Sadlier* v. *Biggs* (1853), 4 H. L. Cas. 435, 457; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 453, note (*i*). The burden of strict proof of the right to a renewal lies on the lessee (*Swinburne* v. *Milburn* (1884), 9 App. Cas. 844, 850).

(*m*) The underlessee contributes in proportion to the quality and quantity of land comprised in his underlease (*Frankfort (Lord)* v. *Thorpe* (1813), 2 Ball & B. 372, 379; *Curry* v. *Stanley* (1833), Hayes & Jo. 487; *Molony* v. *Scollard* (1848), 12 I. Eq. R. 93; *Orr* v. *Littlewood* (1861), 11 I. Ch. R. 502); or in proportion to his interest (*Charlton* v. *Driver* (1820), 2 Brod. & Bing. 345; see *Clutton* v. *Fleming* (1836), 8 Sim. 105); and see *M'Nulty* v. *Hamill* (1815), Beat. 544; and as to interest on fines, see *Brabazon* v. *Lucan* (*Lord*) (1849), 12 I. Eq. R. 432. As to the underlessee's right of renewal, see *Morgan* v. *Gurley* (1851), 1 I. Ch. R. 482; and as to his liability to accept renewal, see *Curry* v. *Stanley*, *supra*; *Pilson* v. *Spratt* (1889), 25 L. R. Ir. 5. The underlessee may forfeit his right of renewal by non-payment of fines (*Hunt* v. *Sayers* (1832), Hayes, 590; *Cullen* v. *Leonard* (1842), 5 I. Eq. R. 134; *Chesterman* v. *Mann* (1851), 9 Hare, 206); but the notice requiring payment must be distinctly proved (*Lawless* v. *Grogan* (1837), 1 Dr. & Wal. 53; compare *John* v. *Armstrong* (1834), L. & G. *temp.* Plunk. 392; *Statham* v. *Liverpool Dock Co.* (1830), 3 Y. & J. 565); and as to renewal by lessee and sub-lessee, see *M'Donnell* v. *Burnett*, *Burnett* v. *Going* (1841), 4 I. Eq. R. 216; as to the person entitled to arrears of fines, see *Re Brinkley's Estate* (1868), 16 W. R. 356; and as to apportioning liability for fines among beneficiaries, see *Re Baring*, *Jeune* v. *Baring*, [1893] 1 Ch. 61.

(*n*) *Evans* v. *Walshe* (1805), 2 Sch. & Lef. 519 (increased rent); *Revell* v. *Hussey* (1813), 2 Ball & B. 280; *Lawder* v. *Blachford* (1815), Beat. 522; *Thomas* v. *Burne* (1838), 1 Dr. & Wal. 657 (increased fine). It seems that such a covenant does not bind the assigns of the covenantor (*Muller* v. *Trafford*, [1901] 1 Ch. 54).

(*o*) *Simpson* v. *Clayton* (1838), 4 Bing. (N. C.) 758. As to renewal taken by the lessor to a trustee for his wife, see *Lumley* v. *Timms* (1873), 28 L. T. 608, C. A.

(*p*) *E.g.*, hens, spurs, horses, or wheat (Co. Litt. 142 a; see *Pitcher* v. *Tovey*

services (*q*). The possibility of distraining is the mark of rent, and hence it cannot be reserved out of incorporeal hereditaments, inasmuch as upon these the lessor cannot distrain (*r*); but it may be reserved out of a remainder or reversion, since the lessor can distrain when the property falls into possession (*s*). Rent does not necessarily represent the annual produce of the land; a royalty, notwithstanding that it is reserved in respect of substances which are taken from the land so as to cause its permanent diminution, is a true rent (*t*). A single rent reserved in respect of the whole of the demised land issues or becomes due out of every part of the land, and therefore the lessor can distrain for it on any part (*u*). But in a single lease separate rents may be reserved in respect of different parts of the demised premises (*a*), and may be made payable at different times (*b*).

Payments which are not rent.

938. Since a rent can only be reserved on a demise (*c*) of corporeal hereditaments, the following payments, though recoverable by virtue of the contract, are not rent:—Payments reserved on

(1692), 4 Mod. Rep. 71). In *Lanyon* v. *Carne* (1670), 2 Wms. Saund. (ed. 1871), 485, a reservation in a lease for lives of a heriot payable on the death of each lessee was treated as a rent, and the heriots were not payable after the determination of the term in the lives of the lessees.

(*q*) *E.g.*, shearing sheep (Co. Litt. 96 a); *Doe* d. *Tucker* v. *Morse* (1830), 1 B. & Ad. 365 (carrying coals); *Doe* d. *Edney* v. *Benham* (1845), 7 Q. B. 976 (cleaning a church); *Marlborough* (*Duke*) v. *Osborn* (1864), 5 B. & S. 67 (work with horses and cart). Reservation of suit to the lessor's mill is in the nature of rent (*Vyvyan* v. *Arthur* (1823), 1 B. & C. 410). But the lessor cannot reserve as rent a right involving the actual use by him of the land, as the vesture or herbage; see Co. Litt. 142 a, where such a right is called "parcel of the annual profits." This phrase is, however, misleading, for the lessor can reserve part of the produce if it is delivered by the lessee, as in corn rents; see *St. Cross Hospital* (*Master etc.*) v. *De Walden* (*Lord Howard*) (1795), 6 Term Rep. 338, 343; but reservation of the actual use of the land is repugnant to the grant (Co. Litt. 142 a).

(*r*) "A rent must be reserved out of the lands or tenements whereunto the lessor may have recourse or resort to distrain" (Co. Litt. 47 a; *Butt's Case* (1600), 7 Co. Rep. 23 a). See title DISTRESS, Vol. XI., p. 122; and as to the distinction between rent-service and rent-charge, see titles DISTRESS, Vol. XI., p. 119; RENTCHARGES AND ANNUITIES. Rent might formerly exist without a power of distress as rent sec, but this was abolished; see the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6. Apparently the Crown can reserve rent out of incorporeal hereditaments, since it can distrain on any lands of the lessee (Co. Litt. 47 a, note 284).

(*s*) Co. Litt. 47 a, 142 a.

(*t*) *R.* v. *Westbrook*, *R.* v. *Everist* (1847), 10 Q. B. 178, 203; see *Daniel* v. *Gracie* (1844), 6 Q. B. 145; *Barrs* v. *Lea* (1864), 33 L. J. (CH.) 437.

(*u*) *Hargrave* v. *Shewin* (1826), 6 B. & C. 34; *Curtis* v. *Spitty* (1835), 1 Bing. (N. C.) 756, 760.

(*a*) *Knight's Case* (1588), 5 Co. Rep. 54 b, 55 a; Gilbert on Rents, 34, 35.

(*b*) *Coomber* v. *Howard* (1845), 1 C. B. 440.

(*c*) Hence, sums reserved as rent on a mere agreement for a lease under which the intending lessee had entered could not formerly be distrained for (*Hegan* v. *Johnson* (1809), 2 Taunt. 148; *Dunk* v. *Hunter* (1822), 5 B. & Ald. 322; *Regnart* v. *Porter* (1831), 7 Bing. 451) until a yearly tenancy had arisen by payment of one of such sums; but usually such an agreement can be specifically enforced, and, if so, it is equivalent to a lease, and the lessor has the remedy of distress (*Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.; see p. 367, *ante*). As to reservation of rent, see also *Inchiquin* (*Earl*) v. *Burnell* (1795), 3 Ridg. Parl. Rep. 376, 418.

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the grant of a licence for the use of premises, not giving the right to exclusive possession (*d*); payments reserved on a lease of an incorporeal hereditament (*e*); payments reserved on a lease of chattels (*f*); payments, not included in the reservation, which are agreed to be made in addition to the rent (*g*); and payments by way of increased rent which the lessee agrees to make subsequently to the demise (*h*).

Single rent in respect of land and chattels.

939. Where a single rent is reserved on a lease of land and incorporeal hereditaments (*i*), or of land and chattels (*k*), the rent will be treated as issuing out of the land alone (*l*). If the titles to the land and chattels are severed, either the rent will be apportioned, or a new agreement will be inferred under which the tenant takes the land at a reasonable proportion of the rent from the person entitled to it, and agrees to pay the remainder as compensation to the person entitled to the chattels (*m*).

Rent must be certain.

940. The rent must be certain, or must be so stated that it can afterwards be ascertained with certainty (*n*). For this purpose

(*d*) *Hancock* v. *Austin* (1863), 14 C. B. (N. S.) 634; compare *Selby* v. *Greaves* (1868), L. R. 3 C. P. 594, where exclusive possession was given of part of a room in a factory.

(*e*) *E.g.*, a fair (*Jewel's Case* (1588), 5 Co. Rep. 3 a); or tithes (*Windsor* (*Dean and Chapter*) v. *Gover* (1671), 2 Wms. Saund. (ed. 1871) 696; *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336, 339); or an easement (*Buszard* v. *Capel* (1828), 8 B. & C. 141, 150; affirmed (1829), 6 Bing. 150, Ex. Ch.). But the lease leaves a reversion in the owner to which the payments in the nature of rent are attached, and the right to receive them passes to the assignee of the reversion (*Hastings* (*Lord*) v. *North Eastern Railway*, [1898] 2 Ch. 674, 678; affirmed, [1899] 1 Ch. 656, 665, C. A.). A payment reserved on the grant of an easement by a tenant will cease with his tenancy (*Jones* v. *Dorothea Co.* (1887), 58 L. T. 80).

(*f*) See *Spencer's Case* (1583), 5 Co. Rep. 16 a.

(*g*) *Smith* v. *Maplèback* (1786), 1 Term Rep. 441, 445; see *Cox* v. *Harper*, [1910] 1 Ch. 480, C. A. (payment in lieu of premium for the purchase of goodwill).

(*h*) *Hoby* v. *Roebuck and Palmer* (1816), 7 Taunt. 157; *Donellan* v. *Read* (1832), 3 B. & Ad. 899, 905; *Lambert* v. *Norris* (1837), 2 M. & W. 333. To make the increased payment a true rent there must be a new demise; see *Foquet* v. *Moor* (1852), 7 Exch. 870; compare *Phillips* v. *Miller* (1875), L. R. 10 C. P. 420, Ex. Ch.

(*i*) *Smith* v. *Bowles* (1617), 2 Roll. Abr. 451; to be effective as to the incorporeal hereditaments the lease must be by deed (*Gardiner* v. *Williamson*, *supra*), unless the incorporeal hereditaments are appurtenant to the land; see p. 384, *ante*.

(*k*) *Collins* v. *Harding* (1598), Cro. Eliz. 606, 607; *Farewell* v. *Dickenson* (1827), 6 B. & C. 251.

(*l*) *Read* v. *Lawnse* (1562), 2 Dyer, 212 b; *Farewell* v. *Dickenson*, *supra*, at p. 257; *Brown* v. *Peto*, [1900] 1 Q. B. 346, 354; affirmed, [1900] 2 Q. B. 653, C. A. Thus rent for furnished lodgings (*Newman* v. *Anderton* (1806), 2 Bos. & P. (N. R.) 224), or for part of a factory with a supply of power (*Selby* v. *Greaves*, *supra*; compare *Bentley Brothers* v. *Metcalfe & Co.*, [1906] 2 K. B. 548, C. A.) can be distrained for, and is recoverable notwithstanding the premises are destroyed by fire (*Marshall* v. *Schofield & Co.* (1882), 52 L. J. (Q. B.) 58, C. A.).

(*m*) *Salmon* v. *Matthews* (1841), 8 M. & W. 827, 833.

(*n*) Co. Litt. 142 a; see *Parker* v. *Harris* (1692), 1 Salk. 262, where a reservation "after the rate" of £18 per annum was held void for uncertainty; *sed quære*. If the rent though at first uncertain is afterwards fixed, this will operate as a new demise; see *Watson* v. *Waud* (1853), 8 Exch. 335, 339. The rent may be fixed by arbitration; see *Daly* v. *Duggan* (1839), 1 I. Eq. R. 311; but an

it is sufficient if by calculation and upon the happening of certain events it becomes certain; and provided it can be so ascertained from time to time, it is no objection that the rent is of fluctuating amount (*o*).

Agreements to increase or reduce rents.

941. An agreement for reduction of rent requires to be in writing (*p*), but it may be unenforceable for want of consideration (*q*), and the mere payment and acceptance of the reduced rent does not operate as a new demise (*a*). An increased rent can be agreed upon verbally, provided the consideration on the part of the landlord, such as the execution of improvements, is to be performed within a year (*b*); but it can only be recovered on the agreement and does not pass with the reversion (*c*). As in the case of reduction of rent, the mere change of rent does not operate as a new demise (*d*).

Reservation of rent.

942. The reservation of rent usually commences with the word "paying" or "rendering" therefor, and these words, in addition to creating a rent for which the remedy of distress will lie, create, if the lessee executes the lease or a counterpart, a covenant for its payment (*e*), though an express covenant is usually inserted in the

agreement for a lease at a rent to be fixed by arbitration will not be specifically enforced if the arbitration is improperly conducted (*Chichester* v. *M'Intire* (1830), 4 Bli. (N. S.) 78, H. L.).

(*o*) *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, 458, C. A.; see Co. Litt. 96 a, where the service of shearing "all the sheep pasturing within the lord's manor" is said to have the requisite certainty. Thus the rent may vary with the price of wheat (*Kendall* v. *Baker* (1852), 11 C. B. 842); and see title DISTRESS, Vol. XI., p. 122, note (*t*).

(*p*) Under the Statute of Frauds (29 Car. 2, c. 3); see *O'Connor* v. *Spaight* (1804), 1 Sch. & Lef. 305, 306; *Hilton* v. *Goodhind* (1827), 2 C. & P. 591.

(*q*) See *Fitzgerald* v. *Portarlington* (*Lord*) (1835), 1 Jo. Ex. Ir. 431; *Crowley* v. *Vitty* (1852), 7 Exch. 319. Or the consideration may be too uncertain (*Morgan* v. *Rainsford* (1845), 8 I. Eq. R. 299). As to presumption of an agreement for reduction of rent, see *Enraght* v. *Haughton* (1845), 8 I. Eq. R. 274; and as to abatement where the estate is under the administration of the court, see *Latewards* v. *Schreiber* (1817), Coop. Pr. Cas. 46, n.; *Millbank* v. *Stevens* (1838), Coop. Pr. Cas. 45; compare *Fitzgibbon* v. *Flynn* (1837), Sau. & Sc. 687; *Maguire* v. *Richards* (1838), Sau. & Sc. 690.

(*a*) *Clarke* v. *Moore* (1844), 1 Jo. & Lat. 723, 729; *Crowley* v. *Vitty*, *supra*. Where the landlord agrees to accept the rent by different instalments than those reserved, the original reservation revives on default (*Re Smith and Hartogs, Ex parte Official Receiver* (1895), 73 L. T. 221).

(*b*) *Donellan* v. *Read* (1832), 3 B. & Ad. 899, 905.

(*c*) Though see *Burrowes* v. *Gradin* (1843), 1 Dow. & L. 213, where a mortgagee was allowed to sue in use and occupation for an increased rent agreed by the tenant with the mortgagor after the mortgage.

(*d*) *Geeckie* v. *Monk*, *Doe* d. *Monk* v. *Geeckie* (1844), 1 Car. & Kir. 307; *Doe* d. *Monck* v. *Geeckie* (1844), 5 Q. B. 841; *Kelly* v. *Patterrson* (1874), L. R. 9 C. P. 381; *Delmege* v. *Mullins* (1875), 9 I. R. C. L. 209, Ex. Ch.

(*e*) *Giles* v. *Hooper* (1690), Carth. 135; *Iggulden* v. *May* (1804), 9 Ves. 325, 330. On principle, since the covenant arises on construction of the words, it should be an express covenant, and this view has frequently been taken (*Newton* v. *Osborn* (1653), Sty. 387; *Porter* v. *Swetnam* (1654), Sty. 406; *Hellier* v. *Casbard* (1665), 1 Sid. 266; S. C., *sub nom. Helier* v. *Casebert*, 1 Lev. 127; *Steward* v. *Wolveridge* (1832), 9 Bing. 60, 67); but more usually it has been treated as an implied covenant (*Paradine* v. *Jane* (1647), Aleyn, 26; *Anon.* (1670), 1 Sid. 447

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lease (*f*). Conversely, any words which operate as an agreement to pay the rent, such as a covenant (*g*), or a proviso (*h*), or a letting at a stated rent (*i*), also constitute a good reservation. Whether the lease is by parol or under seal, the rent constitutes a debt which is in the same rank as a specialty debt (*k*).

Rent follows the reversion.

943. Rent is incident to the reversion, and, without being reserved expressly to the lessor and his heirs, goes with the reversionary estate in the land (*l*). If it is reserved to a stranger, it is not a true rent and cannot be distrained for, but the stranger

(pl. 9); *Harper* v. *Burgh* (1677), 2 Lev. 206; *Webb* v. *Russell* (1789), 3 Term Rep. 393, 402; *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410; *Iggulden* v. *May* (1804), 3 Ves. 325, 330; *Church* v. *Brown* (1808), 15 Ves. 258, 264). The practical distinction is that the liability of the lessee under an implied covenant does not arise before entry and would cease on assignment; on an express covenant it is not so limited; but the balance of authority appears to be in favour of the view that, for this purpose at any rate, the covenant is only an implied covenant, or a covenant in law; see Platt on Covenants (1829), 53; 2 Platt on Leases (1847), 87; and in order that the lessee may be liable the lease must be by an instrument executed by him; *ibid.*, 87; Platt on Covenants (1829), 55.

(*f*) Under an express covenant for payment of rent the lessee must seek out the lessor and pay it to him (*Haldane* v. *Johnson* (1853), 8 Exch. 689, 695); where there is no express covenant the lessee must be prepared to pay it on the demised premises on the appointed day (*Crouche* v. *Fastolfe* (1680), T. Raym. 418; *Rowe* v. *Young* (1820), 2 Brod. & Bing. 165, H. L., *per* BAYLEY, J., at p. 234), unless some other place has been fixed (Co. Litt. 201 b; *Boroughe's Case* (1596), 4 Co. Rep. 72 b, 73 a); and see *Boroughe's Case*, *supra*, as to rent reserved on a Crown lease. In a proviso for acceptance of a reduced rent if the covenants in the lease are performed the word "covenants" does not include the covenant for payment of rent (*M'Kay* v. *M'Nally* (1879), 4 L. R. Ir. 438, C. A.). As to a provision for postponing payment of rent on giving security, see *Jones* v. *Winkfield* (1833), 10 Bing. 308; and for retention of rent in satisfaction of a debt due from the lessor (*Ledger* v. *Stanton* (1862), 2 John. & H. 687). Where a surety joins to covenant for payment of rent, any qualification of his liability must be observed in suing on his covenant (*Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9). As to the liability of the surety's devisees under stat. (1691) 3 Will. & Mar. c. 14, see *Farley* v. *Briant* (1835), 3 Ad. & El. 839.

(*g*) *Drake* v. *Munday* (1631), Cro. Car. 207.

(*h*) *Harrington* v. *Wise* (1596), Cro. Eliz. 486.

(*i*) *Doe* d. *Rains* v. *Kneller* (1829), 4 C. & P. 3 (where a letting "at and under the rent of £80" constituted an agreement to pay the rent). As to rent due under occupation by a relation of the lessor, see *Alington* v. *Booth* (1856), 3 Jur. (N. S.) 50.

(*k*) *Gage* or *Gray* v. *Acton* (1700), 1 Salk. 325; *Thompson* v. *Thompson* (1821), 9 Price, 464, 471; *Vincent* v. *Godson* (1854), 4 De G. M. & G. 546, 551; *Kidd* v. *Boone* (1871), L. R. 12 Eq. 89; *Re Hastings*, *Shirreff* v. *Hastings* (1877), 6 Ch. D. 610; see *Talbot* v. *Shrewsbury* (*Earl*) (1873), L. R. 16 Eq. 26.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10; and before this enactment, too, it was proper to leave the law to make the distribution of the rent, without an express reservation to any person (*Whitlock's Case* (1609), 8 Co. Rep. 69 b, 71 a). Where there was such an express reservation slight inaccuracies were overlooked, "for the law uses all industry imaginable to conform the reservation to the estate" (*Sacheverel* v. *Frogate* (1671), 1 Vent. 161, 162; see *Drake* v. *Munday*, *supra*); but a reservation to the lessor, without mention of his heirs, confined the rent to his life (Co. Litt. 47 a; *Wooton* v. *Edwin* (1607), 12 Co. Rep. 36); unless it was expressly reserved during the term (*Sacheverell* v. *Froggatt* (1671), 2 Wms. Saund. (ed. 1871), 751). As to apportionment in equity where the whole rent is reserved to one person and part of the premises belongs to another person who concurs in the lease, see *Harryman* v. *Collins* (1854), 18 Beav. 11.

can recover it by action (*m*). Similarly, no rent can be reserved on the assignment of a lease, since no reversion remains in the assignor; but here, also, the reservation is good as a contract to pay the rent (*n*).

Nature of penal rents.

944. An increased rent may be reserved in case the lessee commits a breach of the covenants of his lease (*o*). Such a rent is commonly known as a penal rent; in general, however, it is not in the nature of a penalty, but is a liquidated sum or succession of sums payable by way of satisfaction (*p*). If the increased rent is made payable as "rent," and if it has once become payable, it will continue to be payable periodically during the residue of the term (*q*), and none the less that the breach of covenant has been put an end to, where, for instance, land which has been ploughed up has been laid down to grass again (*r*), unless the terms of the lease as a whole show that the rent is to be payable only while the breach continues (*s*). A receipt of the original rent is not a waiver of the landlord's claim to the additional rent (*t*).

(*m*) *Jewel's Case* (1588), 5 Co. Rep. 3 a; Littleton's Tenures, s. 346; Co. Litt. 143 b. See *Oates* v. *Frith* (1614), Hob. 130; *Cole* v. *Sury* (1626), Lat. 264; *Deering* v. *Farrington* (1674), 1 Mod. Rep. 113; *Dollen* v. *Batt* (1858), 4 C. B. (N. S.) 760, 768; *Gilbertson* v. *Richards* (1859), 4 H. & N. 277, 295. A lessor without title has a reversion by estoppel to which the rent is properly incident; see title ESTOPPEL, Vol. XIII., pp. 402 *et seq.*; p. 336, *ante*. Possibly the Crown can reserve rent to a stranger (Co. Litt. 143 b).

(*n*) *Witton* v. *Bye* (1618), Cro. Jac. 486; —— v. *Cooper* (1768), 2 Wils. 375; *Parmenter* v. *Webber* (1818), 8 Taunt. 593; *Langford* v. *Selmes* (1857), 3 K. & J. 220; and see p. 407, *ante*.

(*o*) *E.g.*, if he sells hay off the premises (*Pollitt* v. *Forrest* (1847), 11 Q. B. 949; *Fielden* v. *Tattersall* (1863), 7 L. T. 718; *Massey* v. *Goodall* (1851), 17 Q. B. 310; *Legh* v. *Lillie* (1860), 6 H. & N. 165); or does not follow a specified system of cultivation (*Fuller* v. *Fenwick* (1846), 3 C. B. 705; and see title AGRICULTURE, Vol. I., p. 250, note (*r*)); or turns pasture into arable land (*Rolfe* v. *Peterson* (1772), 2 Bro. Parl. Cas. 436); but the description of land as pasture in the lease, though sufficient if no evidence to the contrary is given (*Birch* v. *Stephenson* (1811), 3 Taunt. 469), is not conclusive (*Skipworth* v. *Green* (1724), 8 Mod. Rep. 311; see *Aldridge* v. *Howard* (1842), 4 Man. & G. 921); and does not include land subsequently turned into pasture by the tenant (*Rush* v. *Lucas*, [1910] 1 Ch. 437).

(*p*) *Rolfe* v. *Peterson*, *supra*; *Farrant* v. *Olmius* (1820), 3 B. & Ald. 692; *Jones* v. *Green* (1829), 3 Y. & J. 298; *Smith* v. *Ryan* (1844), 9 I. L. R. 235; *Wright* v. *Tracey* (1873), 7 I. R. C. L. 134; *Re Mexborough (Earl) and Wood* (1882), 47 L. T. 516; *Elphinstone (Lord)* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; see *Pollitt* v. *Forrest* (1847), 11 Q. B. 949, 962, Ex. Ch. As to satisfaction generally, see title CONTRACT, Vol. VII., p. 443. If it were a penalty the lessor could recover only the actual damage suffered, and in the case of penal rents reserved in respect of agricultural holdings he is, with certain exceptions, always restricted to such damage; see title AGRICULTURE, Vol. I., pp. 249, 250, and Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 25. As to the distinction generally between penalty and liquidated damages, see title DAMAGES, Vol. X., p. 328. An increased rent may be reserved in case the lessee suffers the land to be occupied by other persons (*Greenslade* v. *Tapscott* (1834), 1 Cr. M. & R. 55; see *Ponsonby* v. *Adams* (1770), 2 Bro. Parl. Cas. 431), or ceases to reside on the premises (*Ponsonby* v. *Adams*, *supra*), or carries on specified trades (*Weston* v. *Metropolitan Asylum District* (*Managers*) (1882), 9 Q. B. D. 404, C. A.).

(*q*) *Bowers* v. *Nixon* (1848), 12 Q. B. 558, n.; see *Farrant* v. *Olmius*, *supra*.

(*r*) *Birch* v. *Stephenson* (1811), 3 Taunt. 469, 478.

(*s*) *Domvile* v. *Ford* (1873), 7 I. R. C. L. 534.

(*t*) *Denton* v. *Richmond* (1833), 1 Cr. & M. 734, 742.

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Payment of penal rent does not authorise breach of covenant.

Primâ facie the lessee is bound to observe his covenants, and the mere circumstance that a penal rent is reserved does not give him the option of breaking the covenant and paying the increased rent (*a*); and in general he has no such option where a single sum is made payable (*b*), or where the lessor has a right of re-entry on breach of the covenant (*c*); but if the increased rent is payable throughout the remainder of the term, this is an indication that the lessee is to have the right to break the covenant and render himself liable to the additional rent (*d*). Where the lessee has not the option of breaking the covenant, the lessor is entitled to have a breach prevented by injunction (*e*); and if he has a right of re-entry, he is entitled either to exercise this right and forfeit the lease, or to require payment of the increased rent (*f*).

SECT. 2.—*Time and Mode of Payment.*

When rent payable.

945. The reddendum fixes the periods when the rent is to be paid. If no periods are fixed, a yearly rent is not payable until the end of the year (*g*); but it is usually made payable quarterly or half-yearly (*h*): and it may be made payable in advance, either generally (*i*), or for the last quarter or half-year, so as to give the lessor the remedy of distress for the rent in respect of that period

(*a*) *French* v. *Macale* (1842), 2 Dr. & War. 269, 274, 284; *Bray* v. *Fogarty* (1870), 4 I. R. Eq. 544. Similarly a provision for a reduction of rent while the lessee observes a "tied house" covenant does not entitle him to pay the full rent and disregard the tie (*Hanbury* v. *Cundy* (1887), 58 L. T. 155). See also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 495; *Hardy* v. *Martin* (1783), 1 Cox, Eq. Cas. 26; *Bringloe* v. *Goodson* (1839), 8 Scott, 71.

(*b*) *London Corporation* v. *Pugh* (1728), 4 Bro. Parl. Cas. 395, 397; *French* v. *Macale*, *supra*.

(*c*) See *Barret* v. *Blagrave* (1800), 5 Ves. 555.

(*d*) In such a case the parties themselves have fixed the recompense for the act in question (*Woodward* v. *Gyles* (1691), 2 Vern. 119; *Rolfe* v. *Peterson* (1772), 2 Bro. Parl. Cas. 436; *French* v. *Macale*, *supra*, at p. 277; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414, 430; *Legh* v. *Lillie* (1860), 6 H. & N. 165); see also *Aylet* v. *Dodd* (1742), 2 Atk. 238, 239; *Benson* v. *Gibson* (1746), 3 Atk. 395, 396; *Jones* v. *Green* (1829), 3 Y. & J. 298, 304.

(*e*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 496.

(*f*) *Weston* v. *Metropolitan Asylum District* (*Managers*) (1882), 9 Q. B. D. 404, C. A.; see *Doe* d. *Antrobus* v. *Jepson* (1832), 3 B. & Ad. 402.

(*g*) *Cole* v. *Sury* (1626), Lat. 264; *Turner* v. *Allday* (1836), Tyr. & Gr. 819; *Coomber* v. *Howard* (1845), 1 C. B. 440; *Collett* v. *Curling* (1847), 10 Q. B. 785. But where the time of payment is left indefinite, evidence may be given of the contemporaneous or subsequent dealings of the parties to show that the rent was to be payable earlier than the end of the year (*Gore* v. *Lloyd* (1844), 12 M. & W. 463).

(*h*) See *Tomkins* v. *Pinsent* (1702), 2 Ld. Raym. 819; *Doe* d. *Rudd* v. *Golding* (1821), 6 Moore (C. P.), 231; *Coomber* v. *Howard*, *supra*; *Bishop* v. *Goodwin* (1845), 14 M. & W. 260. But a provision for determination of the term by notice expiring on any quarter day does not make the rent payable quarterly (*Collett* v. *Curling*, *supra*). A reservation of rent at a fixed sum per quarter, with a provision for continuance of the tenancy from quarter to quarter, creates a quarterly tenancy (*R.* v. *Norwich Incorporation* (1874), 30 L. T. 704). If the rent is payable "quarterly, or half-quarterly, if required," the landlord, after receiving it quarterly, cannot distrain for a half-quarter's rent without previous demand (*Mallam* v. *Arden* (1833), 10 Bing. 299).

(*i*) *Finch* v. *Miller* (1848), 5 C. B. 428; see *Hopkins* v. *Helmore* (1838), 8 Ad. & El. 463. If so intended, it should be expressly stated that the rent is to be payable "from time to time," or "throughout the term," in advance;

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before the expiration of the lease (*k*). The reddendum should also specify the days on which the payments are to be made (*l*), and the day for the first payment (*m*); and if the first payment is to cover a greater or less time than the usual period, this should be expressly stated (*n*). But slight inaccuracies in the days of payment will not prevent the lessor from recovering the full aggregate rent for the term (*o*).

Payment in advance.

The lessee has the whole of the rent day in which to pay his rent, and the rent is not in arrear till after midnight of that day (*p*). A payment made before that day is a payment not of rent, but of a sum in gross (*q*). It is an advance to the lessor, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent (*r*). Hence it is no discharge to the tenant unless when the

otherwise the provision may be held to relate to the first payment only (*Holland* v. *Palser* (1817), 2 Stark. 161; compare *Allen* v. *Bates* (1833), 3 L. J. (EX.) 39). As to rent payable in advance, see, further, titles AGRICULTURE, Vol. I., p. 257; DISTRESS, Vol. XI., pp. 123, 149.

(*k*) *Witty* v. *Williams* (1864), 12 W. R. 755. As to a clause allowing the tenant to retain a half-year's rent in hand, see —— v. *Nicholls* (1774), Lofft, 393.

(*l*) Where the days are not mentioned, the rent will be payable by equal instalments on the half-yearly or quarterly days, as the case may be, reckoned from the commencement of the term (*Tomkins* v. *Pinsent* (1702), 2 Ld. Raym. 819; Gilbert on Rents, 50; see *Harrington* v. *Wise* (1596), 2 Roll. Abr. 450). Rent payable at the "two usual feasts of the year" is due at Lady Day and Michaelmas (*Harrington* v. *Wise*, *supra*). But evidence of a custom of the country as to the meaning of "Lady Day," or any similar expression, is admissible to explain a parol demise (*Doe* d. *Hall* v. *Benson* (1821), 4 B. & Ald. 588, 589; compare *Den* d. *Peters* v. *Hopkinson* (1823), 3 Dow. & Ry. (K. B.) 507). If days of grace are allowed, where, that is, the rent is payable on specified days, or within a certain number of days thereafter, it is not due, so as to entitle the lessor to his remedies for it, until the expiration of the last of the days of grace (*Blunden's Case* (1597), Cro. Eliz. 585; *Pilkington* v. *Dalton* (1597), Cro. Eliz. 575; *Clun's Case* (1613), 10 Co. Rep. 127 a, 128 a), save that if the term expires on a rent day, the last instalment of rent then becomes due, and the days of grace are disregarded (*Barwick* v. *Foster* (1609), Cro. Jac. 227, 233; see *Biggin* v. *Bridge* (1676), 3 Keb. 534).

(*m*) Where the day for first payment is not mentioned, the first payment will be due on such of the specified rent days as first occurs, although it is not the first mentioned (*Hill* v. *Grange* (1556), Plowd. 164, 171; Co. Litt. 217 b). For the construction of the words "25th day of December next" in a lease dated 23rd December, see *Simner* v. *Watney* (1911), 27 T. L. R. 439.

(*n*) See *Hutchins* v. *Scott* (1837), 2 M. & W. 809, 810; *Simner* v. *Watney*, *supra*. For a subsequent agreement operating retrospectively to make a reservation of rent from an earlier date, see *M'Leish* v. *Tate* (1778), 2 Cowp. 781.

(*o*) *Hopkins* v. *Helmore* (1838), 8 Ad. & El. 463. If necessary for the purpose of making up the full payment, one day of payment will be reckoned after the expiration of the term (*ibid.*).

(*p*) *Dibble* v. *Bowater* (1853), 2 E. & B. 564; see *Duppa* v. *Mayo* (1670), 1 Saund. 275, 287 (see *ibid.*, ed. 1871, p. 455); *Cutting* v. *Derby* (1776), 2 Wm. Bl. 1075, 1077). Rent falling due on a Sunday may be lawfully paid on that day, and is therefore in arrear on Monday (*Child* v. *Edwards*, [1909] 2 K. B. 753); see also title TIME.

(*q*) *Cromwel* (*Lord*) v. *Andrews* (1583), Cro. Eliz. 15; and the payment is voluntary (*Clun's Case*, *supra*).

(*r*) *De Nicholls* v. *Saunders* (1870), L. R. 5 C. P. 589, 594. At law the payment did not save a condition for re-entry on non-payment on the day (*Cromwel* (*Lord*) v. *Andrews*, *supra*); but in equity it was a defence to any further claim in respect of the rent by the person who had received it

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day arrives, the lessor is still entitled to receive and give a discharge for the rent (*s*). In the case of rent incident to a freehold reversion, if the lessor receives prepayment and dies before the rent day, his personal representatives must account to the heir or devisee for an apportioned part from his death to the rent day (*t*).

To whom payable. Lessor and agents.

946. The rent is payable either to the lessor, or to his agent expressly or impliedly authorised to receive it (*a*); an authority is implied where the lessor has held out the person in question as his agent to receive the rents (*b*)—for instance, by recognising from time to time the validity of his receipts (*c*); and the lessee is entitled to continue payment in pursuance of such authority until he has notice that it is withdrawn (*d*). On the death of the lessor, the rent is payable to his personal representatives until the reversion becomes vested by their consent or by conveyance, if freehold, in the devisee or heir-at-law, or, if leasehold, in the persons beneficially entitled to it under the will or intestacy (*e*).

Lessor's representatives.

Co-owners.

Where the lessors are joint tenants, any one of them can sue and give a receipt for the entire rent (*f*); and, on the death of any, the entire rent is due to the survivors (*g*). Where they are tenants in common, the rent should be either paid to all on their joint receipt, or should be paid to them severally in the proper proportions, since they must either sue jointly for the whole (*h*), or each separately for his share (*i*). An action for rent by tenants in common is in its

(*Rockingham* (*Lord*) v. *Penrice* (1711), 1 P. Wms. 177; see 1 Swan. 345, n. (a); *Nash* v. *Gray* (1861), 2 F. & F. 391).

(*s*) Thus, where the lessor has mortgaged his reversion, a prepayment to him of rent does not discharge the lessee if before the rent day he has notice of the mortgage and receives a demand for payment of the rent to the mortgagee (*De Nicholls* v. *Saunders* (1870), L. R. 5 C. P. 589, 594); as to whether a claim by a mortgagee to rent amounts to sufficient notice of the mortgage, see *Cook* v. *Guerra* (1872), L. R. 7 C. P. 132. As to the circumstances giving rise to the right of a mortgagee to receive rent, see title MORTGAGE.

(*t*) *Rockingham* (*Lord*) v. *Penrice*, *supra*.

(*a*) See *Goodland* v. *Blewith* (1808), 1 Camp. 477. Although the principal's name is not disclosed at the time of payment, yet if the rent is paid over to him the payment is evidence as against the tenant of his title (*Hitchings* v. *Thompson* (1850), 5 Exch. 50).

(*b*) As to cases of implied agency or agency by estoppel, see title AGENCY, Vol. I., pp. 154, 158.

(*c*) Thus the landlord will constitute his wife his agent by recognising payment of rent to her; see *Browne* v. *Powell* (1827), 4 Bing. 230, 232.

(*d*) See *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.

(*e*) See Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I. The executors are entitled to receive the rent before probate (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 244), but in the case of intestacy there is no one who can give a legal discharge pending the grant of administration, and any payment made to the heir-at-law is ineffectual to discharge the tenant should the rent be required for purposes of administration.

(*f*) *Robinson* v. *Hofman* (1828), 4 Bing. 562, 565.

(*g*) *Henstead's Case* (1594), 5 Co. Rep. 10 a.

(*h*) See *Last* v. *Dinn* (1858), 28 L. J. (EX.) 94. But formerly, if there were separate reservations of rent to each tenant in common, there must have been separate actions (*Powis* v. *Smith* (1822), 5 B. & Ald. 850, 851); but see R. S. C., Ord. 16, r. 1. After separate demands for and separate payment of parts of an entire rent, it is a question of fact whether there has been a new demise at separate rents (*ibid.*).

(*i*) *Martin* v. *Crompe* (1698), 1 Ld. Raym. 340; and he may bring an action

nature a joint action, and consequently on the death of one the survivors may sue for the entire rent (*k*). One tenant in common may be the agent of the rest so as to be entitled to receive the rent; but payment by the lessee to one of two tenants in common after notice to the contrary from the other leaves him liable to pay such other's share again (*l*).

Assignees of reversion.

Upon an assignment of the reversion the assignee becomes entitled to receive the rent, but the tenant is not prejudiced if he continues to pay it to the assignor until he has received notice of the assignment (*m*). Without assigning the reversion the lessor can assign the right to receive the rent; a written direction to the tenant to pay the rent to the assignee, if given for valuable consideration, operates as an equitable assignment (*n*); but in the absence of consideration it is a mere authority, revocable on notice to the tenant (*o*). An assignee of the rent without the reversion can sue for it (*p*), but cannot recover it by distress save in the name of the assignor (*q*). Where rent is due to a judgment debtor, the judgment creditor can obtain the right to receive it by a garnishee order (*r*).

Estoppel by payment of rent.

947. Payment of rent is a recognition of the title of the person to whom it is paid (*s*), and operates as an estoppel against the tenant if he disputes such title; save that where the tenant did not originally receive possession from such payee, or where his title has expired, the tenant may show that the payment has been made by mistake, and that the real title is in someone else (*t*). Where rent has

for double value in respect of his share (*Cutting* v. *Derby* (1776), 2 Wm. Bl. 1075, 1077); see p. 554, *post*.

(*k*) *Wallace* v. *M'Laren* (1828), 1 Man. & Ry. (K. B.) 516. But though the words of the demise are joint, the reversions are several, and the rent follows the reversions, so that a surviving tenant in common must account to the representatives of the deceased tenant in common (*Beer* v. *Beer* (1852), 12 C. B. 60).

(*l*) *Harrison* v. *Barnby* (1793), 5 Term Rep. 246.

(*m*) Stat. (1705) 4 & 5 Ann. c. 3, s. 10. When the half-yearly rent accrues partly before and partly after the assignment of the reversion the assignee can sue for the whole half-yearly rent (*Rickett* v. *Green*, [1910] 1 K. B. 253). As to payment of rent where the lessor has mortgaged the land, whether before or after the date of the lease, see title MORTGAGE.

(*n*) *Knill* v. *Prowse* (1884), 33 W. R. 163.

(*o*) *Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, C. A.; see *Venning* v. *Bray* (1862), 2 B. & S. 502.

(*p*) *Robins* v. *Cox* (1661), 1 Lev. 22; *Allen* v. *Bryan* (1826), 5 B. & C. 512; *Williams* v. *Hayward* (1859), 1 E. & E. 1040, 1050. After notice by the assignee to the tenant, the assignee can sue for the rent in his own name (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); *Knill* v. *Prowse*, *supra* at p. 164); see title CHOSES IN ACTION, Vol. IV., p. 367.

(*q*) The person distraining must have the reversion in himself; see title DISTRESS, Vol. XI., p. 125.

(*r*) *Mitchell* v. *Lee* (1867), L. R. 2 Q. B. 259; R. S. C., Ord. 45. The rent must be actually due (*Jones* v. *Thompson* (1858), E. B. & E. 63); and see title EXECUTION, Vol. XIV., pp. 90, 91.

(*s*) See *Doe* d. *Jackson* v. *Wilkinson* (1824), 3 B. & C. 413; and title ESTOPPEL, Vol. XIII., p. 402. But payment of rent does not necessarily create a tenancy (*Strahan* v. *Smith* (1827), 4 Bing. 91; compare *Meredith* v. *Gilpin* (1818), 6 Price, 146).

(*t*) See p. 337, *ante*; and title ESTOPPEL, Vol. XIII., pp. 402—405.

SECT. 2. Time and Mode of Payment.

been paid to a person not entitled to the reversion, the tenant is liable to pay it over again to the reversioner (*u*), unless the reversioner is estopped from claiming it; where, for instance, the payment has been made on his representation as to the person entitled to receive it (*a*); but the tenant may recover it from the adverse receiver (*b*), or the reversioner may at his option himself sue the adverse receiver for the rent in an action for money had and received (*c*).

Payment in cash, or by cheques or notes.

948. Rent reserved in money is payable in cash (*d*). An agent who is not specially authorised to receive payment by cheque is not justified in doing so if the circumstances are such that the landlord will be prejudiced should the cheque be dishonoured, and in such case he will be liable to pay to the landlord the amount of the cheque (*e*). Since rent constitutes a debt of equal degree with a specialty debt (*f*), it is not discharged by the landlord accepting a bill of exchange or promissory note; such bill or note does not, in the absence of agreement to that effect, operate as satisfaction until paid (*g*).

SECT. 3.—*Deductions allowed.*

Distinction between authorised deductions and set-off.

949. Where the lessee is expressly authorised by the lease to make deductions from the rent, the balance represents all that is due to the lessor under the reservation of rent, and it is only such balance that he is entitled to recover, whether by distress or by

(*u*) See *Williams* v. *Bartholomew* (1798), 1 Bos. & P. 326.

(*a*) *White* v. *Greenish* (1861), 11 C. B. (N. S.) 209, see title ESTOPPEL, Vol. XIII., p. 383.

(*b*) *Newsome* v. *Graham* (1829), 10 B. & C. 234; see *Barber* v. *Brown* (1856), 1 C. B. (N. S.) 121; and compare *Finck* v. *Tranter*, [1905] 1 K. B. 427.

(*c*) See *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492, 495; and as to actions for money had and received, see titles CONTRACT, Vol. VII., pp. 473 *et seq.*; MONEY AND MONEY-LENDING.

(*d*) See *Henderson* v. *Arthur*, [1907] 1 K. B. 10, C. A.; where under a lease in writing rent is payable in advance, evidence of a parol agreement by the landlord to accept a bill is not admissible (*ibid.*).

(*e*) In general the taking of the cheque does not prejudice the landlord, since his remedies for the rent remain, but it is otherwise if under the circumstances the remedy by distress has become unavailable (*Pape* v. *Westacott*, [1894] 1 Q. B. 272, C. A.). See, further, titles AGENCY, Vol. I., pp. 145 *et seq.*; CONTRACT, Vol. VII., pp. 444 *et seq.* If the rent is remitted by post, this is done at the risk of the tenant, unless the landlord has expressly or impliedly authorised such method of payment (*Warwick* v. *Noakes* (1791), Peake, 98 [67]; *Norman* v. *Ricketts* (1886), 3 T. L. R. 182, C. A.; *Luttges* v. *Sherwood* (1895), 11 T. L. R. 233; *Pennington* v. *Crossley & Sons* (1897), 13 T. L. R. 513, C. A.); but the tenant must exercise due care in posting; see *Hawkins* v. *Rutt* (1793), Peake, 248 [186].

(*f*) See p. 468, *ante*.

(*g*) *Davis* v. *Gyde* (1835), 2 Ad. & El. 623; see *Harris* v. *Shipway* (1744), Buller, Law of Nisi Prius, 1st ed., 178; *Palfrey* v. *Baker* (1817), 3 Price, 572; *Davidson* v. *Allen* (1886), 20 L. R. Ir. 16, 23. Since the bill or note is no satisfaction, a judgment recovered thereon is no satisfaction until it results in payment (*Drake* v. *Mitchell* (1803), 3 East, 251, 259). See also title DISTRESS, Vol. XI., p. 153. As to the effect of the landlord discounting the bill, and as to the presumption raised by his accepting a bill or note of an agreement to suspend his remedy by distress, see *ibid.* A subsequent agreement that no rent is due discharges the note (*Howell* v. *Lewis* (1836), 7 C. & P. 566).

SECT. 3. Deductions allowed.

action (*h*); and, generally, where the lessee has a liquidated demand against the lessor, and the lessor brings an action for rent, the lessee has a right to set off his own liquidated demand, and the lessor will recover only the balance (*i*). But when the lessor is exercising his remedy of distress, this right of set-off is not recognised (*k*), and he is entitled to distrain for the entire rent due, subject only to deduction of sums which are deemed to have been already paid to him on account of the rent, and of certain payments made by the tenant the deduction of which is authorised by statute.

Underlessee's deductions.

950. An underlessee is entitled to deduct from his rent arrears of rent due to the superior landlord which have been demanded from him and which he has paid (*l*). There need not be a threat of immediate distress, and after actual payment the deduction may be made notwithstanding that the superior landlord has allowed time for payment. It is sufficient that the superior landlord has demanded the rent and is entitled to distrain (*m*). The rule is the same in the case of a rentcharge enforceable by distress which the lessee has paid on demand, notwithstanding that there was no personal liability on the lessor to pay it (*n*); and also in the case where the lessee is liable to eviction at the suit of a mortgagee and pays rent to him

(*h*) See *Dallman* v. *King* (1837), 4 Bing. (N. C.) 105. There must be an agreement to allow deduction from the rent; it is not sufficient that the landlord has agreed to allow a specified sum for repairs (*Graham* v. *Tate* (1813), 1 M. & S. 609); see *Davies* v. *Stacey* (1840), 12 Ad. & El. 506. Frequently the reservation of rent expresses that it is to be free from specified deductions, such as taxes, charges, and impositions (*Giles* v. *Hooper* (1690), Carth. 135), or from deductions generally; and then the lessee is debarred from making deductions which he could make in the absence of an agreement (*Bradbury* v. *Wright* (1781), 2 Doug. (K. B.) 624); and it is the same where the lease reserves a net rent (*Bennett* v. *Womack* (1828), 7 B. & C. 627, 629) save as regards deductions, such as income tax, which the lessee cannot abandon.

(*i*) See *Roper* v. *Bumford* (1810), 3 Taunt. 76; title SET-OFF AND COUNTER-CLAIM; and compare *Gower* v. *Hunt* (1734), Barnes, 290; *Willson* v. *Davenport* (1833), 5 C. & P. 531. But the lessee cannot set off an unliquidated demand, such as damages for breach of covenant by the lessor (*Weigall* v. *Waters* (1795), 6 Term Rep. 488).

(*k*) *Absolom* v. *Knight* (1743), Buller, Law of Nisi Prius, 1st ed., 177; *Laycock* v. *Tufnell* (1787), 2 Chit. 531; *Andrew* v. *Hancock* (1819), 1 Brod. & Bing. 37, 46; *Willson* v. *Davenport* (1833), 5 C. & P. 531; *Graham* v. *Allsopp* (1848), 3 Exch. 186, 198; but the distinction has been emphatically disapproved (*Sapsford* v. *Fletcher* (1792), 4 Term Rep. 511, *per* Lord KENYON, C.J., at p. 513). Since there is no set-off in distress, it follows that the tenant cannot obtain an injunction against a distress for the full amount; see *Townrow* v. *Benson* (1818), 3 Madd. 203; *Pratt* v. *Keith* (1864), 33 L. J. (CH.) 528; and see title DISTRESS, Vol. XI., pp. 156 *et seq.*

(*l*) *Sapsford* v. *Fletcher*, *supra*; *Jones* v. *Morris* (1849), 3 Exch. 742; as to setting off such a payment in an action, see *Sturgess* v. *Farrington* (1812), 4 Taunt. 614; and see *Wilkinson* v. *Cawood* (1797), 3 Anst. 905; *Doe* v. *Hare* (1833), 2 Cr. & M. 145; *O'Donoghue* v. *Coalbrook and Broadoak Co.* (1872), 26 L. T. 806. As to the statutory right of lodgers and certain undertenants to prevent a distress by paying rent to the superior landlord, see title DISTRESS, Vol. XI., p. 143.

(*m*) *Carter* v. *Carter* (1829), 5 Bing. 406, 409.

(*n*) *Taylor* v. *Zamira* (1816), 6 Taunt. 524; *Whitmore* v. *Walker* (1848), 2 Car. & Kir. 615; *Irnham's* (*Lord*) *Lessee* v. *Luttrell* (1775), Wallis, 243.

SECT. 3. Deductions allowed.

in consequence of the mortgagee's threat to assert his legal remedy (*o*). In such cases it is the duty of the lessor to make the payment in order to protect the lessee. If he leaves the lessee to pay, such payment is treated as being a payment of so much of the rent due or growing due to the immediate lessor, and the latter is entitled to distrain only for the balance (*p*).

Income tax.

951. Certain deductions from rent are authorised by statute (*q*). The tenant is authorised (*r*) to deduct from the first payment of rent, after the tax has been paid, the amount of the rate of income tax chargeable upon or in respect of the rent during the period through which the same was accruing due (*a*). Any agreement between the landlord and tenant for payment of rent without allowing the deduction of tax is void (*b*); but a proviso for reduction

(*o*) *Johnson* v. *Jones* (1839), 9 Ad. & El. 809, 814; *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A.; see *Dyer* v. *Bowley* (1824), 2 Bing. 94. This may happen where the mortgagor makes a lease after the date of the mortgage, and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, does not apply (*Underhay* v. *Read*, *supra*); and see title MORTGAGE.

(*p*) *Sapsford* v. *Fletcher* (1792), 4 Term Rep. 511; *Graham* v. *Allsopp* (1848), 3 Exch. 186, 198; see *Boodle* v. *Cambell* (1844), 7 Man. & G. 386. As to such payments discharging rent growing due, as well as rent actually due, see *Carter* v. *Carter* (1829), 5 Bing. 406, 409.

(*q*) As regards tithe rentcharge (see titles DISTRESS, Vol. XI., p. 158; ECCLESIASTICAL LAW, Vol. XI., pp. 747—749, where the subject is fully dealt with); it may here be stated that a contract by the tenant to reimburse to the landlord such sums as he shall pay for tithe rentcharge is prohibited (see Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 1 (1); *Ludlow* (*Lord*) v. *Pike*, [1904] 1 K. B. 531); compare *Daly* v. *Duggan* (1839), 1 I. Eq. R. 311 (which would not be followed); though the parties may arrange for an additional fixed rent so as to cover the tithe rentcharge (*Davies* v. *Fitton* (1842), 2 Dr. & War. 225; *Carolan* v. *Brabazon* (1846), 3 Jo. & Lat. 200). The rentcharge falls on the person, such as a lessee, in actual receipt of rent from the occupier (see *Peed* v. *King* (1894), 11 T. L. R. 18), but it can be shifted by agreement from such non-occupying lessee to the lessor.

(*r*) See title INCOME TAX, Vol. XVI., pp. 632—635, 661, 686; and see, further, titles CONTRACT, Vol. VII., p. 466; DISTRESS, Vol. XI., p. 158.

(*a*) Under the Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), the deduction is in accordance with the rate for the time being in force. The deduction may be made notwithstanding that the landlord is entitled to exemption (*Swatman* v. *Ambler* (1854), 24 L. J. (EX.) 185). As to the landlord's property tax under stat. (1806) 46 Geo. 3, c. 65, now repealed, and other earlier statutes, see *R.* v. *Mitcham* (*Inhabitants*) (1783), 1 Doug. (K. B.) 226, n.; *Gabell* v. *Shevell* (1813), 5 Taunt. 81; *Graham* v. *Tate* (1813), 1 M. & S. 609; *Franklin* v. *Carter* (1845), 1 C. B. 750. The tenant must prove actual payment by production of the receipt (see *Pocock* v. *Eustace* (1809), 2 Camp. 181; *Baker* v. *Davis* (1813), 3 Camp. 474), though he need not produce the assessment (*Philips* v. *Beer* (1815), 4 Camp. 266); and a succeeding occupier may make use of a receipt given to his predecessor for tax which has become due since the last payment of rent (*Clennel* v. *Read* (1816), 7 Taunt. 50).

(*b*) See title INCOME TAX, Vol. XVI., pp. 633, 661; and see stat. (1806) 46 Geo. 3, c. 65, s. 115. But a covenant for payment of income tax by the tenant, though itself void, does not avoid a separate covenant for payment of rent clear of all parliamentary taxes etc., for these general words must be understood to refer to taxes which the tenant might lawfully covenant to pay in exoneration of his landlord (*Gaskell* v. *King* (1809), 11 East, 165; see *Readshaw* v. *Balders* (1811), 4 Taunt. 57); and where rent is reserved clear of property tax, the lease is not thereby rendered void, but the words "clear of property tax" are inoperative (*Fuller* v. *Abbott* (1811), 4 Taunt. 105; *Tinckler* v. *Prentice* (1812), 4 Taunt. 549); compare *Davies* v. *Fitton*, *supra*.

of rent in the event of the repeal of the Income Tax Acts is valid (*c*).

Land tax.

952. The tenant pays the entire land tax in the first instance, and he is then entitled to deduct from the rent so much of the tax as the landlord ought to bear (*d*); that is, such proportion of the tax as the rent bears to the total annual value at which the premises are rated for land tax (*e*). But this is subject to any agreement to the contrary (*f*), and accordingly the lease may contain a provision excluding the right of deduction (*g*); and the tax can only be deducted from the rent which was due or accruing due when the tax was paid. The payment of the tax is considered as a payment of so much of the rent then due or growing due, but if the rent is afterwards paid in full the overpayment cannot at a subsequent time be deducted from the rent (*h*); nor can the tenant recover it in an action as money paid to the landlord's use (*i*). Similarly, if the landlord, by mistake but with knowledge, or means of knowledge, of all the facts, allows an excessive deduction, he cannot afterwards distrain for this as arrears of rent (*k*), or, it seems, recover the amount in an action (*l*).

Drainage and paving expenses in the metropolis.

953. Under the Metropolis Management Act, 1855 (*m*), the local authority may execute drainage and paving works, and under the Metropolis Management Amendment Act, 1862 (*n*), it may require payment of the expenses from either the owner or the occupier.

(*c*) *Colbron* v. *Travers* (1862), 12 C. B. (N. S.) 181; *Beadel* v. *Pitt* (1865), 11 L. T. 592; see title INCOME TAX, Vol. XVI., p. 634.

(*d*) And each successive lessee can deduct the tax from the rent payable to his immediate landlord; see Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 17. Differences between the landlord and tenant may be settled by the commissioners (*ibid.*, s. 18). See, further, titles DISTRESS, Vol. XI., p. 158, note (*d*); LAND TAX, pp. 307 *et seq.*, *ante*.

(*e*) See *Hyde* v. *Hill* (1789), 3 Term Rep. 377, 379; *Whitfield* v. *Brandwood* (1818), 2 Stark. 440; *Stubbs* v. *Parsons* (1820), 3 B. & Ald. 516, 519; *Ward* v. *Const* (1830), 10 B. & C. 635, 648, 654.

(*f*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 35; compare *Cranston* v. *Clarke* (1753), Say. 78.

(*g*) See p. 489, *post*; and compare *Bradbury* v. *Wright* (1781), 2 Doug. (K. B.) 624. If the tenant is liable to pay the tax, or any part of it, and the tax is redeemed by the reversioner, the whole or the portion payable by the tenant remains on foot for the benefit of the reversioner, and is recoverable as rent reserved (Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 126; *Ward* v. *Const*, *supra*; compare *Faulkner* v. *Llewellin* (1863), 9 L. T. 251, 557, C. A.).

(*h*) *Andrew* v. *Hancock* (1819), 1 Brod. & Bing. 37; *Stubbs* v. *Parsons*, *supra*, at p. 520; see *Spragg* v. *Hammond* (1820), 2 Brod. & Bing. 59; *Saunderson* v. *Hanson* (1828), 3 C. & P. 314; and the tenant has no remedy in equity (*Wildey* v. *Coopers' Co.* (1713), 3 P. Wms. 127, n.; *Atwood* v. *Lamprey* (1719), 3 P. Wms. 127, n.).

(*i*) The overpayment is a voluntary payment, and if there is no mistake of fact it cannot be recovered (*Andrew* v. *Hancock*, *supra*; but see *Stubbs* v. *Parsons*, *supra*, at p. 520, *contra*).

(*k*) *Bramston* v. *Robins* (1826), 4 Bing. 11.

(*l*) *Waller* v. *Andrews* (1838), 3 M. & W. 312.

(*m*) 18 & 19 Vict. c. 120; ss. 73, 105.

(*n*) 25 & 26 Vict. c. 102, s. 96; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 198 *et seq.*

SECT. 3. Deductions allowed.

If payment is required from the occupier, he can deduct the amount so paid from the rent from time to time becoming due in respect of the premises (*o*). But this right of deduction is subject to any contract between the landlord and tenant; and if the tenant has agreed to pay such expenses, his right of deduction is gone (*p*).

Other expenses of local authorities: (i.) Drainage work; (ii.) Paving and lighting;

954. Under the Public Health Act, 1875 (*a*), the local authority may require drainage and other works to be done, and in default may do the work itself, and may either recover the expenses summarily from the owner, or may declare them to be private improvement expenses (*b*). Similar provision is made with regard to the expenses of paving and lighting private streets (*c*). Where such expenses are declared to be private improvement expenses, they may be recovered by levying on the occupier a private improvement rate for a period not exceeding thirty years (*d*), and the occupier, if he holds at a rack-rent (*e*), can deduct three-fourths of the rate from his rent, and if he holds at a rent less than a rack-rent, he can deduct from his rent such proportion of three-fourths of the rate as his rent bears to the rack-rent; and the landlord, if he is a leaseholder holding for a term of which less than twenty years is unexpired, can make a corresponding deduction from the rent payable by him (*f*); but this right is subject to any contract between the landlord and tenant (*g*). Under the Public Health Act, 1875 (*h*), and the Public Health (London) Act, 1891 (*i*), provision is made for the abatement of nuisances, and, if the local authority does the work, it can recover the expenses from the occupier, who, in the absence of agreement to the contrary, may deduct the amount from his rent (*k*). The tenant may also, in the absence of such agreement, deduct the landlord's proportion of a sewers rate (*l*).

(iii.) Abatement of nuisances.

(*o*) But deductions under this and similar statutes can only be made from the current year's rent; see title DISTRESS, Vol. XI., p. 158, note (*d*).

(*p*) See title DISTRESS, Vol. XI., p. 158, note (*f*).

(*a*) 38 & 39 Vict. c. 55. See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 215 *et seq.*

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 23, 36, 41, 62; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 224 *et seq.*

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150. Paving expenses under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), are recoverable in the same manner as private improvement expenses under the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 213.

(*e*) *I.e.*, a rent which is not less than two-thirds of the full net annual value of the premises (*ibid.*, s. 4).

(*f*) *Ibid.*, s. 214.

(*g*) *Ibid.*, s. 226.

(*h*) *Ibid.*, ss. 94, 95, 96, 98, 104.

(*i*) 54 & 55 Vict. c. 76, ss. 3, 4, 5, 11, 121; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) And as to the deductions from rent of expenses which have been declared a charge on the premises, see generally Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257.

(*l*) *Smith* v. *Humble* (1854), 15 C. B. 321; *Tidswell* v. *Whitworth* (1867), L. R. 2 C. P. 326, 336; Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 38; and see title LAND IMPROVEMENT, p. 298, *ante*.

SECT. 3. Deductions allowed.

Party walls.

955. Where an occupier of premises has paid any expenses to an adjoining owner in respect of party walls under the London Building Act, 1894 (*m*), he can deduct the amount from any rent payable by him to the owner of the premises.

Copyhold rentcharges.

956 An occupying tenant who properly pays, on account of a rentcharge created under the Copyhold Act, 1894 (*n*), any money which as between him and his landlord he is not liable to pay, can either recover it from the landlord or deduct it from the next rent payable; and an intermediate landlord, who pays or allows such a sum, has the like remedy as regards his superior landlord (*o*).

Agricultural compensation.

957. The amount of compensation for any improvement du under the Agricultural Holdings Act, 1908 (*p*), or any enactment repealed by that Act, or under custom or agreement, may be set off against rent (*q*).

Licensing compensation rate.

958. Where a compensation charge has been imposed on licensed premises, a licence-holder who pays the charge may, notwithstanding any agreement to the contrary, make a deduction from his rent according to a scale varying inversely with the length of his unexpired term; and a similar deduction may be made by any person from whose rent a deduction has been made (*r*).

SECT. 4.—*Suspension.*

Eviction.

959. The lessee is not liable for rent accruing due after (*s*) he has been evicted from the premises either by the landlord, or by a person lawfully claiming by title paramount, so long as the eviction continues (*a*).

(*m*) 57 & 58 Vict. c. ccxiii., s. 173; see *Earle* v. *Maugham* (1863), 14 C. B. (N. S.) 626, on the corresponding provision of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), now repealed.

(*n*) 57 & 58 Vict. c. 46.

(*o*) *Ibid.*, s. 27. As to enfranchisement rentcharge, see title COPYHOLDS, Vol. VIII., pp. 111 *et seq.*

(*p*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28).

(*q*) *Ibid.*, s. 31; and see, further, title AGRICULTURE, Vol. I., p. 256.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21 (3), Sched. III., Part II.; and see title INTOXICATING LIQUORS, p. 74, *ante*.

(*s*) He remains liable for rent accrued due before the eviction, and hence, in resisting a claim for rent, he must show that it accrued due after the eviction (*Boodle* v. *Cambell* (1844), 7 Man. & G. 386; *Selby* v. *Browne* (1845), 7 Q. B. 620; *Newport* v. *Hardy* (1845), 2 Dow. & L. 921).

(*a*) *Tomlinson* v. *Day* (1821), 2 Brod. & Bing. 680; *Prentice* v. *Elliott* (1839), 5 M. & W. 606. If the landlord brings ejectment for a forfeiture, he cannot recover rent accruing after the issue of the writ; his remedy is in damages for the detention of the premises (*Birch* v. *Wright* (1786), 1 Term Rep. 378; *Jones* v. *Carter* (1846), 15 M. & W. 718). An eviction by the landlord, in addition to stopping the rent, prevents him from forfeiting the lease for non-performance of covenants (*Pellatt* v. *Boosey* (1862), 31 L. J. (C. P.) 281); but it does not discharge the tenant from his covenants other than for payment of rent, or put

SECT. 4. **Suspension.**

What acts amount to eviction.

To constitute an eviction for this purpose, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the demised premises, or any part thereof, will operate as an eviction (*b*). Thus there is an eviction if the landlord enters and uses the premises, the tenant remaining in possession (*c*); though a mere trespass by the landlord is not sufficient (*d*). It seems that it will be an eviction if the landlord induces the undertenants to leave by notice to quit, so that the premises are left unoccupied (*e*).

Abandonment and reletting.

960. The mere abandonment of the premises by the tenant does not affect his liability to pay rent. If, however, the landlord subsequently enters and uses the premises for his own purposes, this is equivalent to an eviction, and he cannot recover rent subsequently accruing due (*f*). And so, if the landlord relets the premises to another tenant who goes into possession, this operates as an eviction of the previous tenant, from whom the landlord cannot recover any rent which falls due after the reletting (*g*), even in respect of a subsequent period when the premises are unoccupied (*h*). But the landlord can protect himself by reletting on the tenant's account, and giving notice to him accordingly (*i*); and it is no eviction if he merely enters for the purpose of protecting the house (*k*), or puts in a caretaker for the same purpose (*l*), or puts up a notice for reletting (*m*).

Eviction under title paramount.

961. Similarly, in order to constitute an eviction by a person claiming under title paramount, it is not necessary that the tenant should be put out of possession, or that ejectment should be brought (*n*). A threat of eviction is sufficient, and if the tenant, in

an end to the tenancy (*Morrison* v. *Chadwick* (1849), 7 C. B. 266; *Newton* v. *Allin* (1841), 1 Q. B. 518).

(*b*) *Upton* v. *Townend* (1855), 17 C. B. 30; *Henderson* v. *Mears* (1859), 7 W. R. 554; *Baynton* v. *Morgan* (1888), 22 Q. B. D. 74, C. A.; see *Wheeler* v. *Stevenson* (1860), 6 H. & N. 155; notes to *Salmon* v. *Smith* (1669), 1 Wms. Saund. (ed. 1871) 206. As to the alteration of tolls after a demise of them, see *Harris* v. *Morrice* (1842), 10 M. & W. 260.

(*c*) *Smith* v. *Raleigh* (1814), 3 Camp. 513; *Griffith* v. *Hodges* (1824), 1 C. & P. 419, 420.

(*d*) *Hunt* v. *Cope* (1775), 1 Cowp. 242; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, 51, C. A.

(*e*) *Burn* v. *Phelps* (1815), 1 Stark. 94.

(*f*) *Bird* v. *Defonvielle* (1846), 2 Car. & Kir. 415; *Gray* v. *Owen*, [1910] 1 K. B. 622 (where, however, the landlord recovered damages for breach of agreement of tenancy).

(*g*) *Hall* v. *Burgess* (1826), 5 B. & C. 332, 333.

(*h*) *Walls* v. *Atcheson* (1826), 3 Bing. 462. Formerly where the reletting took place between two rent days, the landlord could not recover the rent from the previous rent day up to the reletting (*Hall* v. *Burgess*, *supra*); but apparently the rent would now be apportionable for this purpose; see p. 482, *post*.

(*i*) *Walls* v. *Atcheson*, *supra*.

(*k*) *Smith* v. *Raleigh*, *supra*; *Griffith* v. *Hodges*, *supra*.

(*l*) *Bird* v. *Defonvielle*, *supra*.

(*m*) *Redpath* v. *Roberts* (1800), 3 Esp. 225.

(*n*) *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307, 315.

consequence of such threat, attorns to the claimant, he can set this up as an eviction by way of defence to an action for rent (*o*), subject to his proving the evictor's title (*p*). But there is no eviction if the tenant gives up possession voluntarily (*q*).

Premises becoming uninhabitable.

962. The tenant takes the demised premises subject to any defects existing in them at the time of the letting, and to any events which subsequently affect their value. Hence, unless the lease contains express provision to the contrary (*r*), and with certain statutory exceptions (*s*), the rent continues to be payable notwithstanding that, in the case of a dwelling-house, it is at the time of letting (*t*), or subsequently (*u*) unfit for habitation; or, in the case of land near the seashore, that it is of no value (*a*); or, in the case of agricultural land, that it is unsuitable for the intended use (*b*); or that the premises are subsequently destroyed by fire (*c*), or carried away by a flood (*d*), or inundated by fresh water (*e*); or occupied by an alien enemy (*f*); or that, by the landlord's neglect

(*o*) *Poole Corporation* v. *Whitt* (1846), 15 M. & W. 571; *Carpenter* v. *Parker* (1857), 3 C. B. (N. S.) 206, 234, 235.

(*p*) *Jordan* v. *Twells* (1735), Lee *temp.* Hard. 171; *Simons* v. *Farren* (1834), 1 Bing. (N. C.) 272; *Poole Corporation* v. *Whitt*, *supra*. But where the lessee sues on the covenant for quiet enjoyment, it is sufficient for him to allege generally that the evictor entered lawfully claiming title under the lessor, without setting out particulars of his title (*Foster* v. *Pierson* (1792), 4 Term Rep. 617; *Hodgson* v. *East India Co.* (1799), 8 Term Rep. 278; see *Simons* v. *Farren*, *supra*, at p. 278).

(*q*) *Re Emery and Barnett* (1858), 4 C. B. (N. S.) 423. This is on account of the danger of collusion (*Delaney* v. *Fox* (1857), 2 C. B. (N. S.) 768, 778; see *Dunn* v. *Di Nuovo* (1841), 3 Man. & G. 105).

(*r*) See *Bennett* v. *Ireland* (1858), E. B. & E. 326; and a provision for suspension of rent only applies to the events specified in the provision (*Saner* v. *Bilton* (1878), 7 Ch. D. 815; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507).

(*s*) As to the statutory conditions as to fitness for habitation in the case of small dwelling-houses, see p. 503, *post*.

(*t*) *Hart* v. *Windsor* (1843), 12 M. & W. 68. This applies only to unfurnished houses; as to furnished houses, see p. 569, *post*.

(*u*) *Arden* v. *Pullen* (1842), 10 M. & W. 321, 328; *Murray* v. *Mace* (1874), 8 I. R. C. L. 396; *Collins* v. *Barrow* (1831), 1 Mood. & R. 112, *contra*, is not law.

(*a*) *Meath* (*Earl*) v. *Cuthbert* (1876), 10 I. R. C. L. 395.

(*b*) *Sutton* v. *Temple* (1843), 12 M. & W. 52, 62; compare *Conolly* v. *Baxter* (1819), 2 Stark. 525.

(*c*) *Monk* v. *Cooper* (1727), 2 Stra. 763; *Baker* v. *Holtpzaffell* (1811), 4 Taunt. 45; *Izon* v. *Gorton* (1839), 5 Bing. (N. C.) 501; *Marshall* v. *Schofield & Co.* (1882), 52 L. J. (Q. B.) 58, C. A. The rule is the same notwithstanding that the tenant has covenanted to repair, damage by fire excepted (*Belfour* v. *Weston* (1786), 1 Term Rep. 310; *Hare* v. *Groves* (1796), 3 Anst. 687); and though the landlord refuses to lay out insurance money which he has received in rebuilding (*Leeds* v. *Cheetham* (1827), 1 Sim. 146; *Lofft* v. *Dennis* (1859), 1 E. & E. 474); see p. 520, *post*. Consequently the landlord will not be restrained from suing for the rent (*Holtzapffel* v. *Baker* (1811), 18 Ves. 115; *Leeds* v. *Cheetham*, *supra*). But in the case of furnished lodgings the rent may be treated by the parties as accruing from day to day, and then the rent will stop if the lodgings become useless through fire (*Packer* v. *Gibbins* (1841), 1 Q. B. 421).

(*d*) *Carter* v. *Cummins* (1666), cited 1 Cas. in Ch. 84.

(*e*) Since, it is said, the lessee has the fish and usually the land can be reclaimed; but it is different in case of invasion by the sea, since the right to fish is in the public, and usually the land cannot be reclaimed (1 Roll. Abr. 236).

(*f*) *Paradine* v. *Jane* (1647), Aleyn, 26. In such cases the tenant is bound

SECT. 4. Suspension.

of an obligation to repair, the premises have become useless to the tenant (*g*).

Minerals exhausted.

Similarly, a fixed rent reserved by a mining lease continues to be payable throughout the term, notwithstanding that the minerals have been worked out (*h*), or are not worth the cost of working (*i*). If, however, no rent is fixed, but the lessee has covenanted to get a minimum amount of minerals, he is not liable to pay royalty on this amount if in fact it does not exist in the land (*k*).

SECT. 5.—*Apportionment.*

Apportionment in respect of time.

963. Rent, whether reserved or made payable under an instrument in writing or otherwise, is considered as accruing from day to day, and is apportionable in respect of time accordingly (*l*). But

by his express contract, notwithstanding accident by inevitable necessity; *contra*, where an obligation is only imposed by law (*ibid.*); compare *Harrison* v. *North* (*Lord*) (1667), 1 Cas. in Ch. 83 (where no decision is reported, but the Lord Chancellor said that he would relieve if he could).

(*g*) *Surplice* v. *Farnsworth* (1844), 7 Man. & G. 576; but a lodger if he leaves abruptly through the landlord's misconduct is perhaps only liable for rent for the time of actual occupation; see *Kirkman* v. *Jarvis* (1839), 7 Dowl. 678.

(*h*) *Bute* (*Marquis*) v. *Thompson* (1844), 13 M. & W. 487, 493.

(*i*) *Mellers* v. *Devonshire* (*Duke*) (1852), 16 Beav. 252; *Ridgway* v. *Sneyd* (1854, Kay, 627, 636; *Strelley* v. *Pearson* (1880), 15 Ch. D. 113, 119; see title MINES, MINERALS, AND QUARRIES.

(*k*) *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577, 587, 588.

(*l*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2. At common law there was no apportionment of rent in respect of time, since the rent only became payable on the expiration of the full quarterly or other period in respect of which it was reserved (*Clun's Case* (1613), 10 Co. Rep. 127 a). Consequently when the landlord was a tenant for life without power of leasing, and died between two rent days, the rent up to his death was not recoverable, and the remainderman had an action for use and occupation only for the rent since the death (*Jenner* v. *Morgan* (1718), 1 P. Wms. 392; see *Barwick* v. *Foster* (1609), Cro. Jac. 227; *Hay* v. *Palmer* (1728), 2 P. Wms. 501). This was remedied by the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 15, which enabled the executors or administrators of the tenant for life to recover an apportioned part of the rent up to the death; see *Re Smyth, a Lunatic, Ex parte Smyth* (1818), 1 Swan. 337; title EQUITY, Vol. XIII., p. 29. But the statute only applied where the lease determined by the death of a tenant for life, and if the lease was by an owner seized in fee simple, or by a limited owner with power of leasing, the next rent due after the death went to the heir-at-law or devisee, or to the remainderman, and the personal representatives of the lessor could claim no part of it; see note to *Re Smyth, a Lunatic, Ex parte Smyth, supra.* This case was provided for as regards tenants for life by the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), s. 2, and the same Act (*ibid.*, s. 1), extended the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), to all cases where leases were determined by the death of the lessor, although not strictly tenant for life. As to the construction of the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), see *Plummer* v. *Whiteley* (1859), John. 585, 590; *St. Aubyn* v. *St. Aubyn* (1861), 1 Drew. & Sm. 611; *Donaldson* v. *Donaldson* (1870), L. R. 10 Eq. 635, 639; *Re Anglesey's* (*Marquis*) *Estate, Paget* v. *Anglesey* (1874), L. R. 17 Eq. 283. But the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), did not enable an apportionment to be made between the personal representatives and the heir or devisee of a lessor who was entitled in fee simple (*Browne* v. *Amyot* (1844), 3 Hare, 173; *Beer* v. *Beer* (1852), 12 C. B. 60; *Re Clulow's Estates* (1857), 3 K. & J. 689); nor did it apply where the rent had not been reserved by an instrument in writing (*Re Markby, a Lunatic* (1839), 4 My. & Cr. 484; *Mills* v. *Trumper* (1869), 4 Ch App. 320); and it might be excluded by express stipulation (Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), s. 3); see *Tyrrell* v. *Clark*

the apportionment does not accelerate the time for payment of the apportioned part. In the case of a continuing rent, the apportioned part becomes payable when the entire portion of which it forms a part becomes payable, and not before; and in the case of a rent which is determined by death, re-entry, or otherwise, it becomes payable when the next entire portion of the rent would have been payable, and not before (*m*). But apportionment is allowed only of rent accruing due at the date of the event which necessitates the apportionment. Sums made payable in advance, and already due before such event, are not apportioned (*n*).

Recovery of apportioned rent.

Persons entitled to the apportioned parts of the rent have respectively the same remedies for recovering the same, when payable, as they would have had for recovering the entire portion of rent if entitled thereto respectively; but the lessee or the land is not to be resorted to for an apportioned part of an entire or continuing rent specifically. The entire or continuing rent, including the apportioned part, is to be recovered by the heir or other person then entitled apart from apportionment, and the apportioned part is recoverable from the heir or other person by the executors or other parties entitled thereto (*o*).

Apportionment against tenant.

An apportionment can be made, not only as between the persons entitled to the rent, but also as against a tenant whose liability for rent ceases (*p*), or changes its character (*q*), between two rent days; and after the day when the entire portion of rent has, or would have, fallen due, the proportionate part is recoverable against the tenant as rent due under the lease (*r*). Consequently a lessee who surrenders his lease between two rent days is liable for rent up to the surrender, and a lessee on whom a lessor lawfully re-enters is liable for rent up to the re-entry (*s*). But he is not liable if he is wrongfully evicted (*t*).

(1854), 2 Drew. 86. The Apportionment Act, 1870 (33 & 34 Vict. c. 35) (which also can be excluded by express stipulation (*ibid.*, s. 47; see *Re Meredith, Stone* v. *Meredith* (1898), 67 L. J. (CH.) 409), meets these cases, and makes rent apportionable generally (see *Roseingrave* v. *Burke* (1873), 7 I. R. Eq. 186, 189); and it applies whether the instrument came into operation before or after the commencement of the Act (*Re Cline's Estate* (1874), L. R. 18 Eq. 213; *Hasluck* v. *Pedley* (1874), L. R. 19 Eq. 271; *Lawrence* v. *Lawrence* (1884), 26 Ch. D. 795); but it seems that it does not alter the construction of a will previously made (*Jones* v. *Ogle* (1872), 8 Ch. App. 192).

(*m*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 3; *Re United Club and Hotel Co.* (1889), 60 L. T. 665; see *Re Lucas, Parish* v. *Hudson* (1885), 55 L. J. (CH.) 101, C. A.

(*n*) *Ellis* v. *Rowbotham*, [1900] 1 Q. B. 740, C. A.

(*o*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 4.

(*p*) *Swansea Bank* v. *Thomas* (1879), 4 Ex. D. 94; *Hartcup & Co.* v. *Bell* (1883), Cab. & El. 19; *Re Johnson, Ex parte Blackett* (1894), 70 L. T. 381; including the case of eviction by title paramount (*Elvidge* v. *Meldon* (1889), 24 L. R. Ir. 91).

(*q*) See title DISTRESS, Vol. XI., pp. 172—174 (company in liquidation).

(*r*) See *Re Wilson, Ex parte Haslings* (*Lord*) (1893), 62 L. J. (Q. B.) 628, 632; and it has been held that an assignee is only liable for the apportioned rent from the assignment (*Glass* v. *Patterson*, [1902] 2 I. R. 660).

(*s*) Formerly this was otherwise; see *Grimman* v. *Legge* (1828), 8 B. & C. 324; compare *Slack* v. *Sharpe* (1838), 8 Ad. & El. 366 (as to surrender); and see *Oldershaw* v. *Holt* (1840), 12 Ad. & El. 590 (as to re-entry).

(*t*) *Clapham* v. *Draper* (1885), Cab. & El. 484; compare p. 480, *ante*.

SECT. 5. Apportionment.

Apportionment in respect of estate.

964. Rent is apportionable in respect of the demised premises; and this may become necessary either because the reversion has been severed so that different portions of the rent are payable to different persons, or because the lessee has ceased to be in possession of the whole of the demised premises.

Severance of reversion.

Rent is apportionable upon a severance of the reversion, whether this takes place by the act of the parties or the act of the law (*a*). Thus it is apportionable where the reversion is severed by grant of a part to a stranger or to the lessee (*b*); and where it is severed on the death of the lessor, whether under his will (*c*), or by virtue of his intestacy (*d*). But in order that the apportionment may be binding on the lessee, it must be made with his consent or by judicial process (*e*).

Cessation of possession of part of premises.

The rent is apportionable where the lessee ceases to have possession of part of the demised premises, provided this is not due to unlawful eviction by the lessor. Thus it is apportionable where the lessee surrenders part of the premises (*f*); or where the lessor re-enters upon part for a forfeiture under a special condition for re-entry allowing this to be done (*g*), or where the lessee is evicted from part by a person lawfully claiming under title paramount (*h*), or where a part of the premises is destroyed by an inundation of the sea (*i*). The lessee claiming apportionment on any of these grounds must prove the apportioned value of the land withdrawn

(*a*) Littleton's Tenures, s. 122; Co. Litt. 148 a; *Collins and Harding's Case* (1597), 13 Co. Rep. 57; see *Hartley* v. *Maddocks*, [1899] 2 Ch. 199; and now, on severance of the reversion, rent is annexed to the severed portions by statute; see p. 597, *post*.

(*b*) *West* v. *Lassels* (1601), Cro. Eliz. 851.

(*c*) *Ewer* v. *Moyle* (1600), Cro. Eliz. 771.

(*d*) *I.e.*, where the lease includes freehold and leasehold premises (*Moodie* v. *Garnance* (1617), 3 Bulst. 153. Similarly, where the rent is reserved in respect of a house and furniture, and these devolve upon different persons, the rent is apportioned, notwithstanding that it issues only out of the house (*Salmon* v. *Matthews* (1841), 8 M. & W. 827; see p. 466, *ante*).

(*e*) *Bliss* v. *Collins* (1822), 5 B. & Ald. 876; *Swansea Corporation* v. *Thomas* (1882), 10 Q. B. D. 48, 51; see *Collins and Harding's Case*, *supra*. In case of co-lessees both should be parties to an action for apportionment (*Stafford* v. *London* (*City*) (1718), 1 Stra. 95). As to apportionment of a rent-charge, see Co. Litt. 148 b; *Hartley* v. *Maddocks*, *supra*.

(*f*) *Smith* v. *Malings* (1607), Cro. Jac. 160; Co. Litt. 148 a.

(*g*) *Walker's Case* (1587), 3 Co. Rep. 22 a, 22 b; Co. Litt. 148 a. Under certain statutes the lessor may resume possession of part of the lands, or part of the lands may be taken for public purposes, and provision is made for apportionment of the rent; see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 23; title AGRICULTURE, Vol. I., p. 242; Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 138, 147; as to land taken under the Church Building Acts, see Church Building Act, 1854 (17 & 18 Vict. c. 32), s. 1; or for sites for schools under School Sites Acts, 1841 (4 & 5 Vict. c. 38) and 1844 (7 & 8 Vict. c. 37), see titles ECCLESIASTICAL LAW, Vol. XI., pp. 425, 724; EDUCATION, Vol. XII., pp. 118 *et seq.* As to allotments, see title ALLOTMENTS, Vol. I., pp. 332 *et seq.* As to provisions in the lease for resumption of possession, see p. 459, *ante*.

(*h*) *Walker's Case*, *supra*; *Smith* v. *Malings*, *supra*; see *Stevenson* v. *Lambard* (1802), 2 East, 575; *Doe* d. *Vaughan* v. *Meyler* (1814), 2 M. & S. 276; *Tomlinson* v. *Day* (1821), 2 Brod. & Bing. 680; *Hartley* v. *Maddocks* (1899), 47 W. R. 573.

(*i*) 1 Roll. Abr. 236; see p. 481, *ante*.

from the demise (*j*), ascertained at the date of such withdrawal (*k*); and the right to apportionment depends on the person claiming it being in possession of the land, whether as original lessee or as assignee; that is, the rent must be payable under a contract real, or under a contract arising out of privity of estate (*l*). Where the lessee has assigned the lease and is sued on his personal contract, he may possibly be liable for the whole rent, notwithstanding that the assignee has surrendered part of the premises (*m*).

Unlawful eviction.

But there is no apportionment in favour of a landlord who unlawfully evicts the tenant from part of the demised premises, and no part of the rent is recoverable so long as the eviction continues (*n*); nor can the landlord recover in an action for use and occupation in respect of the part of the premises retained by the tenant (*o*). Similarly, where the lease includes land and chattels and the lessee is unlawfully evicted from the land, there is no apportionment (*p*).

Inability to take possession.

Where part of the premises is held by a third person rightfully claiming under a title adverse to the lessor, so that the lessee cannot obtain possession, the result is the same as in the case of unlawful eviction by the lessor, and no part of the rent is recoverable (*q*). And so, too, where the lease is by parol, and part of the premises is held under a prior lease made by the same lessor, since the parol lease carries no interest in the reversion (*r*). But where the later lease is under seal, it carries the reversion in the part of the premises already let, as well as the immediate possession of the rest, and the whole rent is recoverable (*s*).

SECT. 6.—*Recovery.*

SUB-SECT. 1.—*Distress.*

Distress.

965. The landlord has, as incident to his reversion, a right to distrain for arrears of rent upon all goods found upon the premises, which right, together with the exceptions thereto and the restrictions thereon, is fully dealt with elsewhere (*t*). In certain cases, moreover,

(*j*) *Smith* v. *Malings* (1607), Cro. Jac. 160; Co. Litt. 148 a.

(*k*) *Salts* v. *Battersby*, [1910] 2 K. B. 155.

(*l*) *West* v. *Lassels* (1601), Cro. Eliz. 851; see *Walker's Case* (1587), 3 Co. Rep. 22 a, 22 b.

(*m*) *Stevenson* v. *Lambard* (1802), 2 East, 575; see *Baynton* v. *Morgan* (1888), 22 Q. B. D. 74, C. A.; but compare *Swansea Corporation* v. *Thomas* (1882), 10 Q. B. D. 48.

(*n*) *Morrison* v. *Chadwick* (1849), 7 C. B. 266; see *Furnivall* v. *Grove* (1860), 8 C. B. (N. S.) 496.

(*o*) *Upton* v. *Townend* (1855), 17 C. B. 30; see *Reeve* v. *Bird* (1834), 1 Cr. M. & R. 31, 36; *Hutchinson* v. *Taylor* (1884), 77 L. T. Jo. 120 (in the county court); *Wilson* v. *Burne* (1889), 24 L. R. Ir. 14, 27, C. A.; *contra*, *Stoker* v. *Cooper* (1814), 3 Camp. 514, n.; *Smith* v. *Raleigh* (1814), 3 Camp. 513.

(*p*) In this case there is the further reason that the rent issues wholly out of the land, and is therefore gone (*Emott* v. *Cole* (1591), Cro. Eliz. 255; see *Read* v. *Lawnse* (1562), Dyer, 212 b (see p. 466, *ante*); though this reason is not operative where the title to the land and goods is lawfully severed; see *Salmon* v. *Matthews* (1841), 8 M. & W. 827.

(*q*) *Holgate* v. *Kay* (1844), 1 Car. & Kir. 341.

(*r*) *Neale* v. *Mackenzie* (1836), 1 M. & W. 747, Ex. Ch.; *Watson* v. *Waud* (1853), 8 Exch. 335, 339.

(*s*) *Ecclesiastical Commissioners of Ireland* v. *O'Connor* (1858), 9 I. C. L. R. 242; see p. 404, *ante*.

(*t*) See title DISTRESS, Vol. XI., pp. 115 *et seq.*

SECT. 6. Recovery.

the landlord may distrain on goods which are not upon the demised premises (*a*).

SUB-SECT. 2.—*Action.*

Action to recover rent.

966. Where the lease is by deed, an action for arrears of rent can be brought (*b*) on the express covenant for payment of rent contained in the lease, or, if there is no express covenant, on the covenant implied by the reservation of rent (*c*); and similarly, where the lease is by parol, an action can be brought on the express or implied agreement for payment of rent. In these actions the rent is recoverable by virtue of the contract, and, save where the tenancy is at will (*d*), it is not necessary to show that the tenant has been in occupation (*e*). In order that an action may be brought on a guarantee for rent, the guarantee must be in writing, and must be given to the landlord (*f*).

Action for use and occupation.

967. Provided there is no lease under seal the landlord may also bring an action for use and occupation to recover a reasonable satisfaction for the lands held or occupied by the tenant (*g*). This remedy is available where a person has been in occupation of land without an agreement fixing the amount of rent; but the action may also be brought when a certain rent has been reserved by a verbal contract or by an agreement not under seal (*h*). In either

(*a*) See note (*t*), p. 485, *ante*.

(*b*) As to the effect of distress upon the remedy by action, and as to the effect of obtaining judgment upon the right to distrain, see title DISTRESS, Vol. XI., pp. 152, 153, 181.

(*c*) See p. 467, *ante*. As to the recovery of interest, see Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28; and as to actions, see title ACTION, Vol. I., pp. 1 *et seq.* For the time limit on actions, see title LIMITATION OF ACTIONS.

(*d*) See p. 434, *ante*. As to recovering rent by specially indorsed writ, see title PRACTICE AND PROCEDURE.

(*e*) See *Bellasis* v. *Burbrick* (1696), 1 Salk. 209. But the rent will not be payable if the lessee has abstained from entering until performance by the lessor of a condition precedent, such as obtaining a licence from the superior landlord to carry on a particular trade (*Brook* v. *Fletcher & Co.* (1877), 37 L. T. 100).

(*f*) *Nash* v. *Spencer* (1896), 13 T. L. R. 78. See title GUARANTEE, Vol. XV., pp. 448 *et seq.* For form of guarantee, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 248 *et seq.*

(*g*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 14. An action of debt for use and occupation lies at common law, and is not defeated by proof of a demise not under seal reserving a certain rent. The statute established the action for use and occupation, but did not introduce it (*Gibson* v. *Kirk* (1841), 1 Q. B. 850; see *Beverley* v. *Lincoln Gas Light and Coke Co.* (1837), 6 Ad. & El. 829, 839; and compare *Hall* v. *Burgess* (1826), 5 B. & C. 332). As to signing judgment in the action on admissions in the pleadings, see *Hanmer (Lord)* v. *Flight* (1876), 36 L. T. 279, C. A. Where a rentcharge issues out of land a tenant for years cannot be made personally liable to pay it (*Re Herbage Rents, Greenwich Charity Commissioners* v. *Green*, [1896] 2 Ch. 811); see title RENTCHARGES AND ANNUITIES.

(*h*) Or perhaps by an ineffectual demise under seal (*Elliott* v. *Rogers* (1801), 4 Esp. 59); and as to the form of action, see *Arden* v. *Pullen* (1842), 9 M. & W. 430. A tenancy is created by occupation and payment of rent so as to enable the action to be brought (*Jenkins* v. *Hill* (1854), 2 W. R. 268; see *Hardon* v. *Hesketh* (1859), 4 H. & N. 175); and the action lies where a tenant holds over under such circumstances that a yearly tenancy (see p. 440, *ante*) is created (*Hellier* v. *Sillcox* (1850), 19 L. J. (Q. B.) 295); or holds over without such tenancy (*Hurley* v. *Hanrahan* (1867), 15 W. R. 990); but an accidental holding

case the compensation is recovered as damages for breach of an express or implied agreement to pay for the use of the land, and, where the rent has been fixed, this is evidence of the amount of damages to be recovered (*i*), and is usually decisive (*j*). The action only lies if the tenant has actually entered on the premises (*k*), and if he has entered without any period for the tenancy being fixed, the landlord can only recover in respect of the period of occupation (*l*); but if he has entered under a contract fixing the period, the compensation is recoverable in respect of the whole period, notwithstanding that the occupation has not lasted so long (*m*). Since the action is based on occupation, the landlord cannot recover in it a rent payable in advance (*n*); and to maintain it he must show an express or implied contract with himself (*o*), and he must have the legal estate (*p*). But a legal title by estoppel

over for a short time does not make the tenant liable for the whole quarter (*Gray* v. *Bompas* (1862), 11 C. B. (N. S.) 520; or where there is permissive occupation without any demise (*Blundell* v. *Drummond* (1848), 14 Jur. 573, n.; *Bayley* v. *Bradley* (1848), 5 C. B. 396); or where, without any surrender of a previous lease, a substituted tenant has been accepted by the landlord (*Phipps* v. *Sculthorpe* (1817), 1 B. & Ald. 50; *Hyde* v. *Moakes* (1831), 5 C. & P. 42; *Drury-Lane Co.* v. *Chapman* (1843), 1 Car. & Kir. 14). Occupation in anticipation of an intended lease will render the occupier liable (*Cogga* v. *Warwicker* (1852), 3 Car. & Kir. 40; *Smith* v. *Eldridge* (1854), 15 C. B. 236; *Dawes* v. *Dowling* (1874), 31 L. T. 65); unless the lease goes off through the lessor's fault (*Rumball* v. *Wright* (1824), 1 C. & P. 589); and see p. 435, *ante*.

(*i*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 14.

(*j*) See *Gretton* v. *Mees* (1878), 7 Ch. D. 839. But where the tenant has not had full enjoyment of the premises, the jury may disregard the rent reserved (*Tomlinson* v. *Day* (1821), 2 Brod. & Bing. 680); and if no rent has been agreed on they must give such a sum as the occupation is worth (*Thetford Corporation* v. *Tyler* (1845), 8 Q. B. 95, 100). Evidence may be given of a parol agreement for the purpose of ascertaining the rent, notwithstanding that by reason of the Statute of Frauds (29 Car. 2, c. 3) it is unenforceable (*De Medina* v. *Polson* (1815), Holt (N. P.), 47).

(*k*) *Edge* v. *Strafford* (1831), 1 Cr. & J. 391; *Clarke* v. *Webb* (1834), 1 Cr. M. & R. 29; *How* v. *Kennett* (1835), 3 Ad. & El. 659, 666; *Woolley* v. *Watling* (1837), 7 C. & P. 610; *Lowe* v. *Ross* (1850), 5 Exch. 553. The words of the statute "held or occupied" (see the text, *supra*) do not recognise a holding as distinct from an occupation (see *Lowe* v. *Ross*, *supra*, overruling the contrary *dictum* of TINDAL, C.J. in *Atkins* v. *Humphrey* (1846), 2 C. B. 654, 657). Putting up a board for letting (*Sullivan* v. *Jones* (1829), 3 C. & P. 579), or sending in persons to clean and decorate the premises, is evidence of occupation (*Smith* v. *Twoart* (1841), 2 Man. & G. 841; see also *Towne* v. *D'Heinrich* (1853), 13 C. B. 892); and occupation by an under-tenant is sufficient (*Bull* v. *Sibbs* (1799), 8 Term Rep. 327; *Neal* v. *Swind* (1832), 2 Cr. & J. 377), or by a co-tenant (*Christy* v. *Tancred* (1840), 7 M. & W. 127; *Electric Telegraph Co.* v. *Moore* (1861), 2 F. & F. 363).

(*l*) *Gibson* v. *Kirk* (1841), 1 Q. B. 850, 856.

(*m*) *Smallwood* v. *Sheppards*, [1895] 2 Q. B. 627, 629; see *Pinero* v. *Judson* (1829), 6 Bing. 206; *Jones* v. *Reynolds* (1836), 7 C. & P. 335.

(*n*) *Angell* v. *Randall* (1867), 16 L. T. 498.

(*o*) The action for use and occupation is one of contract, and is founded on the relation of landlord and tenant, and therefore requires evidence of an occupation by the permission of, and under a contract with, the plaintiff (*Churchward* v. *Ford* (1857), 26 L. J. (EX.) 354; *Sloper* v. *Saunders* (1860), 29 L. J. (EX.) 275).

(*p*) *Cobb* v. *Carpenter* (1809), 2 Camp. 13, n.; *Harris* v. *Booker* (1827), 4 Bing. 96. A *cestui que trust* should not sue (*Morgell* v. *Paul* (1823), 2 Man. & Ry. (K. B.) 303).

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is sufficient, where, for instance, he has let the premises to the defendant (*q*), or where the latter has recognised his title by payment of rent (*r*).

Statutes of Limitation affecting rent.

968. An action to recover rent reserved by a lease under seal is subject to a limitation of twenty years, and consequently arrears for that period can be recovered (*s*); in other cases only six years' arrears are recoverable (*t*).

Part VII.—Rates and Taxes.

SECT. 1.—*Liability in the Absence of Agreement.*

General liability for rates and taxes.

969. Rates, taxes, and other burdens on land and buildings imposed by public authority are either taxes imposed directly by Parliament, or rates and charges imposed by local authorities acting under statutory powers. Taxes of the former kind include income tax (*u*) and land tax (*a*).

The ordinary rates levied by local authorities are the poor rate and general district rate, and these are in general assessed upon and payable by the occupier (*b*); but where premises are let

(*q*) Hence an auctioneer may sue if he has let as principal (*Fisher* v. *Marsh* (1865), 6 B. & S. 411); but not if he is known to let only as agent (*Evans* v. *Evans* (1835), 3 Ad. & El. 132).

(*r*) *Dolby* v. *Iles* (1840), 11 Ad. & El. 335; see *Allason* v. *Stark* (1838), 9 Ad. & El. 255.

(*s*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3; *Darley* v. *Tennant* (1885), 53 L. T. 257; *Donegan* v. *Neill* (1885), 16 L. R. Ir. 309.

(*t*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42; see title LIMITATION OF ACTIONS, where the subject is fully discussed.

(*u*) See, generally, title INCOME TAX, Vol. XVI., pp. 607 *et seq.*

(*a*) See title LAND TAX, pp. 307 *et seq.*, *ante*.

(*b*) Where the rateable value does not exceed in London £20, in Liverpool £13, in Manchester or Birmingham £10, and elsewhere £8, the owner may agree with the overseers to be liable for the poor rates, whether the premises are occupied or not, and he may be allowed a commission not exceeding 25 per cent. on the amount of the rate (Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3); or the overseers may, as regards such premises (provided they include a dwelling-house), assess the rate on the owners instead of the occupiers, allowing an abatement of 15 per cent., and if the owner is willing to be rated whether the premises are occupied or not, a further abatement not exceeding 15 per cent. (*ibid.*, s. 4; see *Norwood Overseers* v. *Salter*, [1892] 2 Q. B. 118). This Act impliedly repealed the Poor Relief Act, 1819 (59 Geo. 3, c. 12) (Sturges Bourne's Act), s. 19 (*West Ham* (*Churchwardens etc.*) v. *Fourth City Mutual Building Society*, [1892] 1 Q. B. 654; compare *West Ham Overseers* v. *Iles* (1883), 8 App. Cas. 386; and see titles POOR LAW; RATES AND RATING). Similar provision is made by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, as to the general district rate. The owner instead of the occupier may at the option of the urban authority be rated (1) where the rateable value of the premises does not exceed £10; (2) where the premises are let to weekly or monthly tenants; and (3) where the premises are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly. The rating in such cases is on not less than two-thirds or more than four-fifths of the net annual value, or, if the premises are rated, whether occupied or unoccupied, at one-half the rate which an occupier would

SECT. 1. Liability in the Absence of Agreement.

to the occupier for a term not exceeding three months, he is entitled to deduct the amount paid by him in respect of poor rate from the rent due or accruing due to the owner (*c*).

Special charges may be imposed by local authorities for paving, lighting, and drainage expenses, or for the abatement of nuisances. A local authority usually has the option of recovering these from the owner or the occupier, but the occupier, if he is required to pay, is entitled to deduct the whole, or a specified proportion, of the amount from his rent (*d*). Where under a local Act a drainage rate is payable in the first instance by the tenant, with the right to deduct the amount from his rent, and the rate is recoverable by distress, the tenant to be charged is the tenant in whose time the rate accrued due, and not the tenant for the time being (*e*).

SECT. 2.—*Construction of Covenants for Payment of Rates and Taxes.*

Liability may usually be determined by agreement.

970. Any agreement depriving the tenant of his right to deduct the landlord's property tax from his rent is void (*f*), and in certain other cases the landlord is debarred by statute from shifting a burden, which the legislature has imposed upon him, to the tenant (*g*); but in general, where a tax or rent is *primâ facie* to be borne by one party, it is competent for the parties to agree that it shall be borne by the other. Thus, while drainage and paving expenses, and expenses of the abatement of nuisances, under the statutes already referred to (*h*), if recovered from the occupier, are to be deducted from rent, yet in each case the right of the occupier to deduct the amount paid by him from his rent is subject

pay (*R.* v. *Barclay* (1882), 8 Q. B. D. 486, C. A.). See, further, title RATES AND RATING.

(*c*) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 1.

(*d*) See p. 477, *ante*, and titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 201 *et seq.*, 211 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION. The tenant can recover from the owner the cost of abating a nuisance arising from structural defect as to which the sanitary authority serve a notice under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) (*Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452).

(*e*) *Dawson* v. *Linton* (1822), 5 B. & Ald. 521; and compare *Spencer* v. *Parry* (1835), 3 Ad. & El. 331. As to such drainage rates, see title LAND IMPROVEMENT, pp. 275 *et seq.*, *ante*.

(*f*) As to landlord's property tax (*i.e.*, income tax), and as to tithe rentcharge, see p. 476, *ante*). As to whether a covenant for payment of rates and taxes formerly included tithe rentcharge, see *Parish* v. *Sleeman* (1860), 1 De G. F. & J. 326; *Jeffrey* v. *Neale* (1871), L. R. 6 C. P. 240; *Lockwood* v. *Wilson* (1874), 43 L. J. (C. P.) 179.

(*g*) *E.g.*, the right of the tenant of a public-house to deduct from his rent a certain proportion of the compensation charge cannot be excluded by agreement (see title INTOXICATING LIQUORS, p. 74, *ante*, and see p. 479, *ante*). Where, as in this case, a burden is imposed by statute on the landlord "notwithstanding any agreement to the contrary," these words include agreements made after the passing of the statute (*Wooler* v. *North Eastern Breweries*, [1910] 1 K. B. 247, where the *dictum* of PARKE, B., to the contrary in *Re Knight*, *Gwynne* v. *Knight* (1848), 1 Exch. 802, was not accepted).

(*h*) *I.e.*, Metropolis Management Act, 1855 (18 & 19 Vict. c. 120); Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 96; Public Health Act, 1875 (38 & 39 Vict. c. 55); Private Street Works Act, 1892 (55 & 56 Vict. c. 57); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); see pp. 477, 478, *ante*.

SECT. 2. Construction of Covenants for Payment.

to any agreement to the contrary (*i*). But an agreement by the tenant to pay outgoings will not extend to rates or taxes of a new kind imposed by virtue of subsequent legislation, unless it is expressly provided that it shall include both present and future outgoings (*k*).

Meaning of "tax."

971. The word "tax" in its widest sense includes all money raised by taxation (*l*); and it may, therefore, include parliamentary taxes—that is, taxes levied directly by Parliament, usually for the benefit of the whole kingdom (*m*), and also rates and other charges levied by local authorities under statutory powers (*n*); but, as a rule, it denotes parliamentary taxes, and an agreement by the tenant to pay taxes will bind him to pay the landlord's proportion of the land tax, and also other parliamentary taxes which are payable by the landlord, in the absence of agreement to the contrary (*o*).

Landlord's covenant to pay rates and taxes.

972. Under an agreement for letting at a specified yearly rent, "including all rates and taxes," the tenant is entitled to deduct from his rent the whole of the poor rates paid by him (*p*). But where the landlord covenants to pay the land tax and the premises are let at a ground rent, and subsequently the tenant builds and obtains an improved rent, so that the land tax is increased, the covenant

(*i*) As to deducting the expenses from rent under these statutes, see p. 477, *ante*.

(*k*) *Mile End Old Town* (*Vestry*) v. *Whitby* (1898), 78 L. T. 80; compare *Sion College* v. *London Corporation*, [1901] 1 K. B. 617, C. A.

(*l*) *Mitchell* v. *Fordham* (1827), 6 B. & C. 274, 277.

(*m*) *Bedford Union Guardians* v. *Bedford Improvement Commissioners* (1852), 7 Exch. 777, 779; such as the land tax (*Brewster* v. *Kidgell* (1698), Carth. 438; *Manning* v. *Lunn* (1845), 2 Car. & Kir. 13); see *Christ's Hospital* (*Governors*) v. *Harrild* (1841), 2 Man. & G. 707; but a county or municipal or other rate (*Bedford Union Guardians* v. *Bedford Improvement Commissioners*, *supra*; *Palmer* v. *Earith* (1845), 14 M. & W. 428), or a rate levied under statute on persons liable for the repair of a bridge (*Baker* v. *Greenhill* (1842), 3 Q. B. 148), is not a parliamentary tax.

(*n*) Thus, "parochial taxes" include poor rates (*R.* v. *Toms* (1780), 1 Doug. (K. B.) 401); and other rates raised out of poor rates (*R.* v. *Aylesbury with Walton* (*Inhabitants*) (1846), 9 Q. B. 261); but though "taxes" by itself may include poor rates (*Mitchell* v. *Fordham*, *supra*), yet poor rates are not included in a covenant by the lessor to pay "all taxes on the land demised," since the poor rate is not a tax on the land, but a personal charge on the occupier in respect of the land (*Theed* v. *Starkey* (1724), 8 Mod. Rep. 314; *Rowls* v. *Gells* (1776), 2 Cowp. 451, 452).

(*o*) *Arran* (*Count*) v. *Crisp* (1694), 12 Mod. Rep. 54; *Amfield* v. *White* (1825), Ry. & M. 246; see *Hopwood* v. *Barefoot* (1709), 11 Mod. Rep. 237. The agreement throwing landlord's taxes on the tenant may be verbal (*Amfield* v. *White*, *supra*). A covenant by the lessee to pay all parliamentary taxes and assessments will include a rentcharge representing redeemed land tax (*Christ's Hospital* (*Governors*) v. *Harrild*, *supra*; compare *Murray* v. *Parker* (1854), 19 Beav. 305). Where rent is to be paid free from all taxes, the effect is to relieve the lessor of all burdens which can be legally thrown on the lessee (*Giles* v. *Hooper* (1691), Carth. 135; see *Parish* v. *Sleeman* (1860), 1 De G. F. & J. 326 (rent payable "free of all outgoings")), except burdens of a new kind imposed after the creation of the tenancy (*Mile End Old Town* (*Vestry*) v. *Whitby*, *supra*). A contract by the landlord to pay rates is a contract of indemnity, and covers damages for imprisonment resulting from his default (*Atkins* v. *Hutton* (1909), 103 L. T. 514, C. A.).

(*p*) *Barcroft* v. *Welland* (1883), 12 L. R. Ir. 35; and similarly where a net rent is to be paid (*Bennett* v. *Womack* (1828), 7 B. & C. 627, 629; 3 C. & P. 96; see *Bradbury* v. *Wright* (1781), 2 Doug. (K. B.) 624).

only extends to the part proportionate to the ground rent (*q*); and where the landlord covenants to pay rates in respect of the ground demised, and buildings are subsequently erected, so that the subject-matter of assessment is changed, and the assessment increased, the landlord is only liable to pay rates in respect of the ground, and not the part attributable to the buildings (*r*). Where, however, the lessor's covenant extends to all rates and taxes at the date of the lease, or subsequently, payable in respect of the premises, and the assessment is afterwards increased without any change in the premises, the lessor is liable for the increased rates (*s*).

Increased assessment.

973. The lessee usually covenants to pay all rates, taxes, and assessments payable in respect of the demised premises during the term; and in cases of long leases, and sometimes also in short tenancies, the covenant is extended so as to include liabilities which are described by one or more of the words "duties," "outgoings," "impositions," "burdens," or "charges"; and it is expressed so as to include such liabilities "now or hereafter" imposed, and whether they are imposed "on the demised premises or on the landlord or tenant in respect thereof" (*t*).

Usual covenants in lease as to rates, taxes, and outgoings.

974. In general the tenant should be liable to bear all expenses which are of a regularly recurring nature and which are incident to the occupation of the premises; the landlord should be liable for expenses which are incurred for the permanent improvement of the premises, save that in tenancies exceeding three years a share depending on the length of the tenancy should be borne by the tenant; and the covenant will not be construed so as to throw expenses of permanent improvement on the tenant unless there are words clearly requiring such a result. In each case, however, the construction of the covenant depends on the words used, and upon any other provisions in the lease which may properly be regarded as assisting the construction. The usual charges for improvements of a permanent nature are those for drainage and paving expenses and for the abatement of nuisances under the statutes already referred to (*u*).

Charges for permanent improvements.

In the case of paving expenses under the Metropolis Management Acts, 1855 (*x*) and 1862 (*a*), the expenses are raised by direct assessment; that is, the work is undertaken by the local authority and

Direct and indirect assessment.

(*q*) *Hyde* v. *Hill* (1789), 3 Term Rep. 377; *Smith* v. *Humble* (1854), 15 C. B. 321; *Mansfield* v. *Relf*, [1908] 1 K. B. 71, C. A.; see *Yaw* v. *Leman* (1743), 1 Wils. 21; *Whitfield* v. *Brandwood* (1818), 2 Stark. 440; *Ward* v. *Const* (1830), 10 B. & C. 635.

(*r*) *Watson* v. *Home* (1827), 7 B. & C. 285. Similarly, where the lessor covenants to pay all taxes now chargeable on the demised premises, and the lessee covenants to pay all fresh taxes hereafter charged, the lessee pays fresh taxes, and also any increment in the old taxes which is occasioned by the improved value of the premises (*Watson* v. *Atkins* (1820), 3 B. & Ald. 647; see *Graham* v. *Wade* (1812), 16 East, 29).

(*s*) *Salaman* v. *Holford*, [1909] 2 Ch. 602, C. A.

(*t*) See *Thompson* v. *Lapworth* (1868), L. R. 3 C. P. 149, 157; *Wilkinson* v. *Collyer* (1884), 13 Q. B. D. 1. For form of covenant, see Encyclopædia of Forms and Precedents, Vol. VII., p. 191.

(*u*) See note (*h*), p. 489, *ante*.

(*x*) 18 & 19 Vict. c. 120.

(*a*) 25 & 26 Vict. c. 102.

SECT. 2. Construction of Covenants for Payment.

the expenses are met by a rate levied on the owners or occupiers affected. In the case of other expenses under the statutes referred to (*b*), except the abatement of nuisances, the option of doing the work is given to the owner, and it is only on his omitting to exercise the option that the work is done by the local authority and the expense recovered from the owner or occupier. This may be distinguished as indirect assessment. Another form of indirect assessment occurs in respect of the abatement of nuisances under the Public Health Act, 1875 (*c*), and the Public Health (London) Act, 1891 (*d*). The notice served by the local authority is followed, in case of default, by a justices' order, and it is only on this second default that the local authority is empowered to do the work itself and recover the expenses (*e*).

Covenant to pay "rates, taxes, and assessments."

975. If the covenant binds the lessee to pay "rates, taxes, and assessments," it refers only to rates and assessments of a recurring nature, and not to expenses representing the permanent improvement of the premises, whether these are directly assessed in respect of the premises, or are assessed in consequence of the failure of the owner to do the work. Consequently they do not include paving expenses (*f*) under the Metropolis Management Acts, 1855 (*g*) and 1862 (*h*), nor similar expenses (*i*) under the Public Health Act, 1875 (*c*), nor expenses of abating a nuisance under the latter Act (*j*). The covenant does not refer only to sums payable by the landlord, and if the lessee omits to pay the poor rate this is a breach of the covenant (*k*). A covenant by the lessor to pay rates includes a water rate in respect of water supplied for domestic purposes, at least if the rate as levied extends to other premises belonging to the same landlord (*l*).

(*b*) See note (*h*), p. 489, *ante*.

(*c*) 38 & 39 Vict. c. 55.

(*d*) 54 & 55 Vict. c. 76.

(*e*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION; compare title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 211 *et seq.*, 221 *et seq.*

(*f*) *Wilkinson* v. *Collyer* (1884), 13 Q. B. D. 1; *Aldridge* v. *Ferne* (1886), 17 Q. B D. 212, 214. A covenant to pay main drainage and sewers rates does not include drainage expenses incurred under the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120) and 1862 (25 & 26 Vict. c. 102); nor are such expenses payable by the tenant because the rent is payable "without deduction" (*Home and Colonial Stores* v. *Todd* (1891), 63 L. T. 829; see *Skinner* v. *Hunt*, [1904] 2 K. B. 452, 459, C. A.).

(*g*) 18 & 19 Vict. c. 120.

(*h*) 25 & 26 Vict. c. 102.

(*i*) *Baylis* v. *Jiggens*, [1898] 2 Q. B. 315; *Lumby* v. *Faupel* (1903), 51 W. R. 522.

(*j*) *Lyon* v. *Greenhow* (1892), 8 T. L. R. 457.

(*k*) *Hurst* v. *Hurst* (1849), 4 Exch. 571. It seems that demand by the collector is not necessary to constitute a breach of the covenant; the publication of the rate creates the obligation to pay it (*Davis* v. *Burrell* (1851), 10 C. B. 821, 826). As to the recovery by the landlord of taxes which the tenant has undertaken to pay, see *Spencer* v. *Parry* (1835), 3 Ad. & El. 331.

(*l*) *Spanish Telegraph Co.* v. *Shepherd* (1884), 13 Q. B. D. 202; *Bourne and Tant* v. *Salmon and Gluckstein, Ltd.*, [1907] 1 Ch. 616, C. A. When the rate is assessed separately in respect of the demised premises, the result may be different (see *Badcock* v. *Hunt* (1888), 22 Q. B. D. 145, C. A.); and the lessor's covenant will not extend to water supplied for trade purposes (*Re Floyd, Floyd* v. *Lyons (J.) & Co.*, [1897] 1 Ch. 633, C. A.).

SECT. 2. Construction of Covenants for Payment.

976. If the covenant on the part of the lessee to pay rates and taxes includes any of the words "duties," "outgoings," "impositions" or "burdens," the effect is to carry the lessee's liability beyond annual assessments, and to make him liable to pay all sums of money payable in respect of the demised premises under the above and similar statutes, notwithstanding that they are expenses of permanent improvements. Thus the word "duties" binds the lessee to pay paving (*m*) and drainage (*n*) expenses incurred by the lessor under the Metropolis Management Acts, 1855 and 1862 (*o*); expenses incurred in abating a nuisance under the Public Health Act, 1875 (*p*), whether the landlord does the work or the local authority does it on his default (*q*), or under the Public Health (London) Act, 1891 (*r*); and expenses incurred in protecting a theatre against fire under the Metropolis Management and Buildings Acts Amendment Act, 1878 (*s*).

"Duties."

The word "outgoings" is as wide as "duties" (*t*), and applies equally to charges incurred by direct and indirect assessment (*u*). It binds the lessee to pay paving expenses under the Metropolis Management Acts, 1855 and 1862 (*v*), and the Public Health Act, 1875 (*a*); drainage expenses and the expenses of remedying sanitary defects under the Public Health Act, 1875 (*b*), and the Public Health (London) Act, 1891 (*c*); and, perhaps, expenses of alterations to an underground bakehouse under the Factory and Workshop Act, 1901 (*d*).

"Outgoings."

(*m*) *Thompson* v. *Lapworth* (1868), L. R. 3 C. P. 149; and see *Payne* v. *Burridge* (1844), 12 M. & W. 727, as to similar expenses under a local Act.

(*n*) *Farlow* v. *Stevenson*, [1900] 1 Ch. 128, C. A.; see *Sweet* v. *Seager* (1857), 2 C. B. (N. S.) 119. The effect of the word "duties" is not restricted because they are referred to as "payable" in respect of the premises (*Clayton* v. *Smith* (1895), 11 T. L. R. 374).

(*o*) 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102.

(*p*) 38 & 39 Vict. c. 35.

(*q*) *Budd* v. *Marshall* (1880), 5 C. P. D. 481, C. A.

(*r*) 54 & 55 Vict. c. 76; see *Brett* v. *Rogers*, [1897] 1 Q. B. 525.

(*s*) 41 & 42 Vict. c. 32, s. 11; see *Re Robertson and Thorne* (1883), 47 J. P. 566.

(*t*) *Aldridge* v. *Ferne* (1886), 17 Q. B. D. 212. It includes the additional licence duties payable under the Finance (1909-10) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 8) (*Wauer* v. *Hoare & Co.* (1910), 27 T. L. R. 16).

(*u*) *Crosse* v. *Raw* (1874), L. R. 9 Exch. 209; see *per* BRAMWELL, B., at p. 212.

(*v*) 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102; see *Aldridge* v. *Ferne*, *supra*; *Batchelor* v. *Bigger* (1889), 60 L. T. 416; and similarly as to paving expenses under a local Act (*Gardner* v. *Furness Rail. Co.* (1883), 47 J. P. 232).

(*a*) 38 & 39 Vict. c. 55; see *Weldon* v. *Clayton-le-Moors Urban District Council* (1902), 86 L. T. 584; *Greaves* v. *Whitmarsh, Watson & Co., Ltd.*, [1906] 2 K. B. 340.

(*b*) 38 & 39 Vict. c. 55; see *Crosse* v. *Raw*, *supra*, decided under the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 10, now repealed and replaced by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23.

(*c*) 54 & 55 Vict. c. 76; see *Re Bettingham, Melhado* v. *Woodcock* (1892), 9 T. L. R. 48; *Antil* v. *Godwin* (1899), 15 T. L. R. 462; *Stockdale* v. *Ascherberg*, [1904] 1 K. B. 447, C. A. But it has been held that where the owner abates a nuisance after an "intimation" under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 3, without waiting for a mandatory notice, this is a voluntary expense, and not an "outgoing" within the meaning of the covenant (*Harris* v. *Hickman*, [1904] 1 K. B. 13), but the decision appears to be of doubtful authority.

(*d*) 1 Edw. 7, c. 22, s. 101; see *Goldstein* v. *Hollingsworth*, [1904] 2 K. B.

SECT. 2. Construction of Covenants for Payment.

"Impositions." "Burdens." "Charges."

No distinction can be drawn in this connection between a "duty" and an "imposition." A "duty imposed" means a sum of money payable in respect of a duty imposed, and "imposition" has a similar meaning (*e*). Hence a covenant by the lessee to pay "impositions" binds him to pay expenses incurred by the landlord in complying with an order to abate a nuisance or remedy drainage defects under the Public Health (London) Act, 1891 (*f*). The word "burdens" is equivalent to "impositions."

The word "charges" has the same effect as "impositions" (*g*); but where the covenant binds the lessee to pay impositions "charged upon the premises," he is not liable unless a charge is actually created (*h*). In the case of paving expenses under the Public Health Act, 1875 (*i*), and the Private Street Works Act, 1892 (*j*), a charge on the premises is created as soon as the work is completed; the charge is not deferred until the expenses of the local authority have been apportioned (*i*). Further, the charge must be created after the commencement of the tenancy, since the covenant only contemplates subsequent burdens. Consequently, if the work has been completed before this date, the lessee is not liable, notwithstanding that the apportionment is made afterwards (*k*). To make the covenant apply where there is no charge on the premises the words should be "charged on the demised premises or on the landlord or tenant in respect thereof." The covenant will then include paving expenses under the Metropolis Management Acts, 1855 and 1862 (*l*), which, though not a charge on the premises,

578; *Morris* v. *Beal*, [1904] 2 K. B. 585; but see *Stuckey* v. *Hooke*, [1906] 2 K. B. 20, 26, C. A.; and in effect these cases, so far as they throw the whole cost on the lessee, are overruled. As to cases arising under this statute, see title FACTORIES AND SHOPS, Vol. XIV., pp. 460, 469, 470; and as to the provision of fire protection under the London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), see title FACTORIES AND SHOPS, Vol. XIV., p. 470; and title METROPOLIS.

(*e*) *Foulger* v. *Arding*, [1902] 1 K. B. 700, 710, C. A.

(*f*) 54 & 55 Vict. c. 76; see *Smith* v. *Robinson*, [1893] 2 Q. B. 53; *Foulger* v. *Arding*, *supra*; *Re Warriner*, *Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367. Formerly it was held that a covenant to pay "impositions payable in respect of the demised premises" only included money imposed by way of direct assessment; and did not include moneys recoverable by way of indirect assessment, that is, where the local authority does the work on the owner's default (*Tidswell* v. *Whitworth* (1867), L. R. 2 C. P. 326; *Rawlins* v. *Briggs* (1878), 3 C. P. D. 368); but these cases are overruled; see *Greaves* v. *Whitmarsh*, *Watson & Co., Ltd.*, [1906] 2 K. B. 340.

(*g*) *George* v. *Coates* (1903), 88 L. T. 48, C. A.; compare *Smith* v. *Robinson*, *supra*.

(*h*) See *Bird* v. *Elwes* (1868), L. R. 3 Exch. 225; *Hartley* v. *Hudson* (1879), 4 C. P. D. 367.

(*i*) 38 & 39 Vict. c. 55, s. 257; see *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226, C. A.; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 225.

(*j*) 55 & 56 Vict. c. 57.

(*k*) *Surtees* v. *Woodhouse*, [1903] 1 K. B. 396, C. A.; *Lumby* v. *Faupel* (1904), 90 L. T. 140, C. A.

(*l*) 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102, s. 77; see *Smith* v. *Robinson* *supra*. Thus, if the apportionment precedes the execution of the works, the lessee may be liable although the works are not executed until after the determination of the tenancy (*Wix* v. *Rutson*, [1899] 1 Q. B. 474).

become a charge on the owner upon apportionment; but the effect of the words "imposed upon the demised premises or on the occupier in respect thereof" will not throw upon the lessee such paving expenses, since these are imposed on the owner, and not on the premises nor on the occupier (*m*).

Outgoings "in respect of the demised premises."

In all the above cases, however, whether the covenant is in the restricted form—"rates, taxes, and assessments"—or whether it is extended by the use of one or more of the words "duties," "outgoings," "impositions," "burdens," or "charges," if it defines these as existing "in respect of the demised premises," this is enough to determine the scope of the covenant; and it is immaterial whether the words "or on the landlord or tenant in respect thereof" are also inserted (*n*).

Covenant construed by reference to circumstances.

977. The word "impositions" and other similar words, referred to in the preceding paragraph, will not be construed so widely as to include obligations which cannot reasonably be supposed to have been within the contemplation of the parties (*o*); and their effect may be restricted by other provisions of the lease which specifically throw upon the landlord expenses which they would otherwise include. Thus an agreement by the landlord to do outside repairs may relieve a tenant who has agreed to pay "impositions" from liability for the expenses of the abatement of a nuisance arising from outside drains (*p*); and similarly a covenant by a lessee to pay a fair share of statutory charges will relieve him from liability to pay the whole under a covenant to pay outgoings (*q*). But the fact that the lessee has not covenanted to repair (*r*), or has entered into a restricted covenant to repair (*s*), will not relieve him from liability under his covenant to pay outgoings; nor will his liability under such a covenant be restricted because in the reddendum the

(*m*) *Allum* v. *Dickinson* (1882), 9 Q. B. D. 632, C. A.

(*n*) As to the restricted form, see *Wilkinson* v. *Collyer* (1884), 13 Q. B. D. 1; *Home and Colonial Stores* v. *Todd* (1891), 63 L. T. 829 ("in respect of the premises"); *Baylis* v. *Jiggens*, [1898] 2 Q. B. 315; *Lyon* v. *Greenhow* (1892), 8 T. L. R. 457; *Lumby* v. *Faupel* (1903), 51 W. R. 522 ("on the landlord or tenant in respect thereof"). As to the wider form, the words "in respect of the premises" alone occurred in *Brett* v. *Rogers*, [1897] 1 Q. B, 525; *Antil* v. *Godwin* (1899), 15 T. L. R. 462; *Farlow* v. *Stevenson*, [1900] 1 Ch. 128, C. A.; *Stockdale* v. *Ascherberg*, [1904] 1 K. B. 447, C. A.; and in *Re Warriner, Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367, it was expressly decided that the words "imposed on the landlord or tenant" were not necessary to give the wide meaning to the covenant (see *Foulger* v. *Arding*, [1902] 1 K. B. 700, 708, C. A.; *Greaves* v. *Whitmarsh, Watson & Co., Ltd.*, [1906] 2 K. B. 340). *Hill* v. *Edward* (1885), Cab. & El. 481, *contra*, is overruled.

(*o*) *Foulger* v. *Arding*, *supra*, at pp. 707, 711; obligations, that is, which are quite outside the relation of landlord and tenant, such as an obligation to pull down premises and rebuild them in conformity with a building line (*ibid.*).

(*p*) *Hearn* v. *Hovinden* (1903), referred to in Encyclopædia of Forms and Precedents, Vol. VII., p. 99.

(*q*) *Arding* v. *Economic Printing and Publishing Co.* (1898), 79 L. T. 622, C. A. (expenses of fire-escape appliances under the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 7).

(*r*) *Foulger* v. *Arding*, *supra*.

(*s*) *Re Bettingham, Melhado* v. *Woodcock* (1892), 9 T. L. R. 48; *Re Warriner, Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367; compare *Smith* v. *Robinson*, [1893] 2 Q. B. 53.

SECT. 2. Construction of Covenants for Payment.

Short terms.

rent is reserved clear of all "rates, taxes, and deductions," without mention of outgoings (*t*); and the full effect will be given to a covenant expressed in the usual general terms in a three years' agreement, notwithstanding the shortness of the tenancy (*a*); though not, perhaps, in the case of a yearly tenancy, where the outgoings are excessive compared to the yearly value of the premises (*b*). On the other hand, where the covenant is to pay "rates, taxes, and assessments," a further covenant by the lessee to make and repair drains will not render him liable for drainage expenses under the Public Health Act, 1875 (*c*).

Part VIII.—Liability to Repair.

SECT. 1.—*Liability for Waste.*

Nature of waste: (i.) Voluntary; (ii.) Permissive.

978. Waste is either voluntary or permissive. Voluntary waste implies the doing of some act which tends to the destruction of the premises, as by pulling down houses, or removing fixtures (*d*); or to the changing of their nature (*e*), as the conversion of pasture land into arable (*f*), or pulling down buildings and erecting new buildings, even though of greater value (*g*). Permissive waste implies an omission whereby damage results to the premises, where, for instance, houses are suffered to fall into decay (*h*).

(*t*) *Gardner* v. *Furness Rail. Co.* (1883), 47 J. P. 232.

(*a*) *Batchelor* v. *Bigger* (1889), 60 L. T. 416; *Stockdale* v. *Ascherberg*, [1903] 1 K. B. 873; *Re Warriner, Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367.

(*b*) *Valpy* v. *St. Leonard's' Wharf Co.* (1903), 67 J. P. 402; and the wide covenant to pay outgoings is so inconsistent with a yearly tenancy that it will not be implied against a tenant who holds over and pays rent (*Harris* v. *Hickman*, [1904] 1 K. B. 13).

(*c*) 38 & 39 Vict. c. 55; see *Lyon* v. *Greenhow* (1892), 8 T. L. R. 457.

(*d*) Co. Litt. 53 a; *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54, 58; see *Edge* v. *Pemberton* (1843), 12 M. & W. 187. There can be no partition of a leasehold house, since this would require interference with doors and walls (*North* v. *Guinan* (1829), Beat. 342). Similarly sowing pernicious crops is waste (*Pratt* v. *Brett* (1817), 2 Madd. 62); and see title AGRICULTURE, Vol. I., p. 251. As to the liability of a tenant for life for waste, see title SETTLEMENTS.

(*e*) *Darcy* (*Lord*) v. *Askwith* (1618), Hob. 234; *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624, 635.

(*f*) This changes both the course of the husbandry and the evidence of title (Co. Litt. 53 b; *Simmons* v. *Norton* (1831), 7 Bing. 640, 647, 648; see *Goring* v. *Goring* (1676), 3 Swan. 661; *Martin* v. *Coggan* (1824), 1 Hog. 120; *Carden* v. *Butler* (1832), Hayes & Jo. 112; *Murphy* v. *Daly* (1860), 13 I. C. L. R. 239; *Rush* v. *Lucas*, [1910] 1 Ch. 437. Similarly as to the conversion of arable land to wood (Co. Litt. 53 b); or the inclosing of waste land (*Queen's College, Oxford (Provost etc.)* v. *Hallett* (1811), 14 East, 489); or turning a corn-mill into a fulling-mill (*London Corporation* v. *Greyme* (1607), Cro. Jac. 181). See, further, as to ploughing up meadow for building, *Grey De Wilton* (*Lord*) v. *Saxon* (1801), 6 Ves. 106; for allotments, *Doe* d. *Hopkinson* v. *Ferrand* (1851), 20 L. J. (C. P.) 202; for a cemetery, *Hunt* v. *Browne* (1837), Sau. & Sc. 174.

(*g*) *Cole* v. *Green* (1671), 1 Lev. 309; S. C. *sub nom. Cole* v. *Forth* (1672), 1 Mod. Rep. 94; *London Corporation* v. *Greyme*, *supra*.

(*h*) 2 Co. Inst. 145; *Herne* v. *Bembow* (1813), 4 Taunt. 764; but it is not waste to leave land uncultivated (*Hutton* v. *Warren* (1836), 1 M. & W. 466, 472); and if a house is in a ruinous condition at the commencement of the lease, as when

SECT. 1. **Liability for Waste.**

But to constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; it is not waste if the premises are destroyed in the course of reasonable user, and any user is reasonable if it is for a purpose for which the property was intended to be used, and if the mode and extent of the user is apparently proper, having regard to the nature of the property and what the tenant knows of it, and, in the case of business premises, to what, as an ordinary business man, he ought to know of it (*i*).

Reasonable user.

979. Though changing the nature of the demised premises is technically waste, yet this is not so if the change has been expressly sanctioned by the lessor (*k*); and the mere change is not waste unless it is in fact injurious to the inheritance (*l*), either by diminishing the value of the estate, or by increasing the burden upon it, or by impairing the evidence of title (*m*). At any rate, in the case of acts which may be technically waste, but in fact improve the inheritance—acts, as they are termed, of meliorating waste—the court will not interfere to restrain them by injunction (*n*); nor will they be a ground of forfeiture under a proviso for re-entry on commission of waste (*o*); nor, in general, can

Meliorating waste.

it is roofless, it is not waste to leave it to fall down (Co. Litt. 53 a). As to committing waste by destroying timber, see pp. 430 *et seq.*, *ante*.

(*i*) *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507, 512; or, more shortly, "no user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste" (*Saner* v. *Bilton* (1878), 7 Ch. D. 815, 821); in these cases a warehouse was injured or destroyed by the weight of goods placed in it.

(*k*) *Meux* v. *Cobley*, [1892] 2 Ch. 253, 262; and, generally, the consent of the lessor to an act of waste saves the lessee from the consequences of waste, such as forfeiture, even though the lessee has failed to comply with a condition that he should repair the damage due to the waste (*Doe* d. *Wood* v. *Morris* (1809), 2 Taunt. 52).

(*l*) *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539, 541; see *Tucker* v. *Linger* (1882), 21 Ch. D. 18, 29, C. A.; but see the text, *infra*.

(*m*) *Doe* d. *Grubb* v. *Burlington* (*Earl*) (1833), 5 B. & Ad. 507, 517; see *Barret* v. *Barret* (1627), Het. 34. The evidence of title is affected if the identity of the property is destroyed; but this has been said to be "a very peculiar head of the law, which has not been extended in modern times (*Jones* v. *Chappell*, *supra*, at p. 542); indeed, having regard to the improved means of identifying a property by maps, the supposed injury to title is now a "theoretical absurdity" (*Doherty* v. *Allman* (1878), 3 App. Cas. 709, *per* Lord BLACKBURN, at p. 735).

(*n*) *Jones* v. *Chappell*, *supra* (erection of a building without the consent of the lessor); *Doherty* v. *Allman*, *supra*, at p. 722 (converting stone buildings into dwelling-houses, under a lease for 999 years); *Re McIntosh and Pontypridd Improvements Co.* (1891), 61 L. J. (Q. B.) 164 (pulling down a building with a view to rebuilding); *Meux* v. *Cobley*, *supra* (conversion of arable and pasture land near London into a market garden and erection of glass-houses); see title AGRICULTURE, Vol. I., p. 246; and see *Grand Canal Co.* v. *M'Namee* (1891), 29 L. R. Ir. 131, C. A., where the acts complained of were partly meliorative and partly trivial, and an injunction was refused. For the remedy of injunction, see, generally, title INJUNCTION, Vol. XVII., pp. 244 *et seq.*

(*o*) *Doe* d. *Darlington* (*Earl*) v. *Bond* (1826), 5 B. & C. 855; even though the premises are not improved, there is no forfeiture if the damage is very small (see *Doe* d. *Grubb* v. *Burlington* (*Earl*) (1833), 5 B. & Ad. 507, 516).

SECT. 1. Liability for Waste.

damages be recovered in respect of them (*p*). But apparently a substantial alteration in the character of the demised premises will be treated as waste and restrained by injunction, notwithstanding that the value will be thereby increased (*q*), and the lessee is not entitled to pull down a house and build another which the lessor dislikes (*r*); and a breach of an express covenant against making alterations or erecting new buildings will be enforced by injunction (*s*). In general the covenant will be construed so as only to forbid alterations which would affect the form or structure of the building (*t*).

Accidental injury.

980. Since the liability for waste is a liability created by law, the lessee is not liable for loss caused by inevitable accident, when, for instance, a house is destroyed by fire or tempest; but when the liability arises by contract the lessee in such cases is liable (*a*).

Liability for waste.

981. The liability of the tenant for the maintenance of the premises depends, in the absence of express agreement, partly on the doctrine of waste (*b*), and partly on an implied contract to use the premises in a tenantlike manner (*c*).

Tenants at will.

A tenant at will is not liable for either voluntary or permissive

(*p*) *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539, 541.

(*q*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624; compare title AGRICULTURE, Vol. I., p. 251.

(*r*) *Smyth* v. *Carter* (1853), 18 Beav. 78.

(*s*) *Perry* v. *Davis* (1858), 3 C. B. (N. S.) 769 (covenant not to make any external alterations nor any internal alterations that might lessen the value of the premises without the lessor's consent in writing); see as to breaches of covenants not to erect new buildings, *Haigh* v. *Waterman* (1867), 16 L. T. 375 (erection of greenhouse); *Pocock* v. *Gilham* (1883), Cab. & El. 104 (fixing advertisement hoardings to the premises); *Wood* v. *Cooper*, [1894] 3 Ch. 671 (erecting permanent trellis work); and see *Doherty* v. *Allman* (1878), 3 App. Cas. 709, 720; *Re McIntosh and Pontypridd Improvements Co.* (1891), 61 L. J. (Q. B.) 164; *Rose* v. *Spicer, Rose* v. *Hyman*, [1911] 2 K. B. 234, 249, C. A. The fact that the lessor stands by and sees the lessee making alterations in breach of covenant is not necessarily a waiver of the covenant (*Perry* v. *Davis*, *supra*).

(*t*) *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158, C. A.

(*a*) *Paradine* v. *Jane* (1647), Aleyn, 26, 27; *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217, 223.

(*b*) At common law there was no action for waste, either voluntary or permissive, against a lessee, whether for life, or for years, or from year to year, or at will, the reason assigned being that the lessee took the land by the act of the lessor, and it was the folly of the lessor not to restrain the waste by express covenant (*Shrewsbury's (Countess) Case* (1600), 5 Co. Rep. 13 b; 2 Co. Inst. 300). The liability for waste in the case of lessees was first imposed by the Statute of Marlbridge (1267) (52 Hen. 3, c. 23), and the writ of waste, under which the tenant was liable to forfeiture and treble damages, was introduced by the Statute of Gloucester (1278) (6 Edw. 1, c. 5) (repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59)). An action on the case was in practice substituted for the writ of waste, which was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36; but it was only the remedy that was changed, the rights and liabilities of the parties remaining as before (see notes to *Greene* v. *Cole* (1670), 2 Wms. Saund. (ed. 1871), 644; *Bacon* v. *Smith* (1841), 1 Q. B. 345). Apparently the above statutes extended to permissive, as well as voluntary waste (2 Co. Inst. 145); but this has been disputed (*Jones* v. *Hill* (1817), 7 Taunt. 392). See also title ACTION, Vol. I., pp. 34 41, 45.

(*c*) See p. 500, *post*.

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waste as such (*d*), though since voluntary waste terminates the tenancy, and renders him liable in trespass (*e*), he is in fact liable for damage to the premises caused by his own wilful act (*f*).

Lessees for years, or from year to year, or for any other period, are liable for voluntary waste, whether committed by themselves or any other person, for, if committed by another, it is their duty, and they are presumed to be able, to withstand it (*g*).

Lessees for years, or from year to year.

Lessees for years are liable for permissive waste (*h*), and consequently must do such repairs as are necessary to preserve the premises in as good a state as at the beginning of the tenancy; and so also, it would seem, are tenants from year to year, though as regards them the liability has been limited, and has been, in practice, defined rather by reference to what is reasonable having regard to the nature of the tenancy, than by reference to the doctrine of waste (*i*). Thus while a tenant from year to year must not commit any waste (*k*), he is only bound to do such slight repairs as are necessary to prevent waste and decay of the premises, such, for instance, as are required to keep the premises wind and water tight (*l*), and to repair breakages to doors and windows (*m*). He is not liable to do substantial repairs, such as to re-roof the house, or to renew main timbers (*n*), nor need he make good the results of ordinary wear and tear, as by replacing doors, windows, or stairs worn out with age (*o*).

(*d*) The Statute of Marlbridge (1267) (52 Hen. 3, c. 23), applies to "fermors during their term." The word "fermors" is equivalent to lessees, but in the case of a tenant at will there is no term (see p. 434, *ante*).

(*e*) *Shrewsbury's (Countess) Case* (1600), 5 Co. Rep. 13 b.

(*f*) Thus a tenant at will is not liable for permissive waste; see *Panton* v. *Isham* (1693), 3 Lev. 359 (destruction by negligently keeping fire); *Harnett* v. *Maitland* (1847), 16 M. & W. 257.

(*g*) See *Attersoll* v. *Stevens* (1808), 1 Taunt. 183, 196; 2 Wms. Saund. (ed. 1871), 658, n. (m). The liability on a covenant to repair and the liability for voluntary waste are distinct (*Edge* v. *Pemberton* (1843), 12 M. & W. 187).

(*h*) This is in accordance with the Statute of Marlbridge (1267) (52 Hen. 3, c. 23), if Sir E. Coke was right in saying that that statute applied to permissive waste; and it seems to be the better opinion (*Harnett* v. *Maitland, supra*; *Yellowly* v. *Gower* (1855), 11 Exch. 274, 294; *Davies* v. *Davies* (1888), 38 Ch. D. 499). On the other hand, the same reasoning would make tenants for life liable (*Yellowly* v. *Gower, supra*; *Barnes* v. *Dowling* (1881), 44 L. T. 809); but it has been held that they are not liable (*Re Cartwright, Avis* v. *Newman* (1889), 41 Ch. D. 532; see *Powys* v. *Blagrave* (1854), 4 De G. M. & G. 448). If, however, a tenancy for life is created on condition of keeping the premises in repair, the tenant is liable for permissive waste by reason of the condition apart from the statute (*Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404); and see title SETTLEMENTS.

(*i*) *Yellowly* v. *Gower, supra*. In *Torriano* v. *Young* (1833), 6 C. & P. 8, it was said that a tenant from year to year was not liable for permissive waste; but the correct view seems to be that he is liable, though, as stated in *Yellowly* v. *Gower, supra*, in practice the liability has been limited. See also *Martin* v. *Gilham* (1837), 7 Ad. & El. 540.

(*k*) *Ferguson* v. —— (1797), 2 Esp. 590.

(*l*) *Auworth* v. *Johnson* (1832), 5 C. & P. 239; *Leach* v. *Thomas* (1835), 7 C. & P. 327.

(*m*) *Ferguson* v. ——, *supra*.

(*n*) *Ferguson* v. ——, *supra*; *Horsefall* v. *Mather* (1815), Holt (N. P.), 7; *Leach* v. *Thomas, supra*.

(*o*) *Auworth* v. *Johnson, supra*; see *Torriano* v. *Young, supra*; *Martin* v.

SECT. 1. **Liability for Waste.**

Implied obligation.

982. Lessees of all kinds, in addition to their liability for waste, are under an implied contract to use the premises in a tenant-like manner (*p*), but this implied contract is excluded where there is an express contract to repair (*q*).

Remedy.

983. Whether the liability of the tenant is founded on waste or on implied contract, it can be enforced either by an injunction (*r*) or damages (*s*); and damages can be given for waste completed at the time of the action, and an injunction against further waste (*t*). An injunction can be obtained at the suit of the lessor against an underlessee (*a*), but damages, unless given in lieu of an injunction (*b*), can only be recovered against the immediate lessee. To obtain an injunction against waste, it is necessary to show that the waste will cause substantial injury to the reversion (*c*), though damages may be given in a case where an injunction would be refused (*d*).

Measure of damages

In an action for waste the measure of damages is not the sum which it would cost to restore the property to its original state, less a discount for immediate payment; this shows the utmost limit of the damages, but the true measure is the injury done to the value of the reversion (*e*).

Gilham (1837), 7 Ad. & El. 540; see *Dixon* v. *Mowbray & Co.* (1908), referred to, 52 Sol. Jo. 616.

(*p*) See *Horsefall* v. *Mather* (1815), Holt (N. P.), 7.

(*q*) *Standen* v. *Christmas* (1847), 10 Q. B. 135. The effect of an express contract in excluding an implied contract was overlooked in *White* v. *Nicholson* (1842), 4 Man. & G. 95. The liability for waste is not founded on contract, and accordingly it is not excluded on the ground that there is an express covenant dealing with the same matter (see *Kinlyside* v. *Thornton* (1776), 2 Wm. Bl. 1111; *Marker* v. *Kenrick* (1853), 13 C. B. 188); and similarly the liability for waste cannot be ascertained by reference to an express covenant (*Jones* v. *Hill* (1817), 7 Taunt. 392).

(*r*) See *Kimpton* v. *Eve* (1813), 2 Ves. & B. 349; *Pratt* v. *Brett* (1817), 2 Madd. 62; compare *Lathropp* v. *Marsh* (1800), 5 Ves. 259; *London Corporation* v *Hedger* (1810), 18 Ves. 355; and, generally, see title INJUNCTION, Vol. XVII., pp. 199 *et seq.* An injunction can be granted against a tenant for lives renewable for ever, but only where the waste is actually injurious (*Coppinger* v. *Gubbins* (1846), 3 Jo. & Lat. 397, 402).

(*s*) For the law relating to damages generally, see title DAMAGES, Vol. X., pp. 302 *et seq.* The action must be supported by specific evidence as to the particulars of dilapidations (*Smith* v. *Douglas* (1855), 16 C. B. 31).

(*t*) *Hindley* v. *Emery* (1865), L. R. 1 Eq. 52.

(*a*) *Farrant* v. *Lovel* (1750), 3 Atk. 723.

(*b*) See title INJUNCTION, Vol. XVII., p. 212.

(*c*) See p. 497, *ante*.

(*d*) But if the damages are merely nominal, judgment will be entered for the defendant (*Harrow School* (*Governors etc.*) v. *Alderton* (1800), 2 Bos. & P. 86; *Doherty* v. *Allman* (1878), 3 App. Cas. 709, 725, 733). In cases on the Statute of Gloucester (1278) (6 Edw. 1, c. 5) a judgment for the plaintiff would have involved a forfeiture, and this seems to have been the reason for refusing him judgment; but the fact that the injury was nominal would seem to show that there was no actionable waste (*Rigg* v. *Parsons* (1801), cited 2 East, 156).

(*e*) *Whitham* v. *Kershaw* (1885), 16 Q. B. D. 613, 617, 618, C. A.; compare p. 512, *post*. Even though the jury find that the premises are not damaged, as where a new outer door is opened without weakening the house, the possibility of injury to the reversion makes it essential that the question to the jury should be as to damage to the reversion and not to the premises (*Young* v. *Spencer* (1829), 10 B. & C. 145). But in that case the only injury suggested was injury to the evidence of title, as to which see p. 497, *ante*.

An action can be brought after the expiration of the term for waste done during the term (*f*); and where a tenant holds over after the expiration of notice to quit and commits waste, the landlord's reversionary estate is treated as continuing, so as to entitle him to sue for the waste (*g*).

SECT. 2.—*Liability of Landlord to Repair.*

SUB-SECT. 1.—*In General.*

Landlord's liability to repair.

984. In the absence of express stipulation, or of a statutory duty, the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy (*h*), nor to do repairs during the continuance of the tenancy (*i*). This rule applies equally whether the letting is from year to year (*k*) or for a term of years (*l*). The fact that the tenant has covenanted to repair, "fair wear and tear excepted" (*m*), or "damage by fire and tempest excepted" (*n*), does not imply a covenant by the landlord to make such fair wear and tear or damage good.

No warranty of fitness.

Similarly, in the case of a demise of land, there is no implied warranty by the landlord that it shall be fit for the purpose for which it is taken (*o*).

Where landlord occupies part of premises.

Where the landlord occupies a part of the premises and lets the remainder, the rule that he is not bound to do repairs equally applies, and hence he is not liable to keep the premises in repair so as to make the demised part habitable (*p*); and if he retains control of a part of the premises where water collects, such as the roof (*q*), or a cistern, and there is an escape of water whereby the premises or goods of the tenant are damaged, the landlord is not liable in the absence of negligence (*r*).

(*f*) *Kinlyside* v. *Thornton* (1776), 2 Wm. Bl. 1111.

(*g*) *Burchell* v. *Hornsby* (1808), 1 Camp. 360; and, as to holding over, see pp. 441 *et seq.*, *ante*.

(*h*) As to the statutory duty, see p. 503, *post*; as to furnished houses, see p. 569, *post*.

(*i*) When the landlord voluntarily sends in workmen to do repairs and the tenant suffers loss through the negligence of the workmen, the extent of the obligation incurred by the landlord has been said to be a question of fact (*Miles* v. *Holton* (1857), 2 H. & N. 14.

(*k*) *Gott* v. *Gandy* (1853), 2 E. & B. 845, 847.

(*l*) *Arden* v. *Pullen* (1842), 10 M. & W. 321. Where the lessor fails to perform a covenant to repair, and the lessee has entered, the lessee should not quit but sue for the breach (*Hunt* v. *Silk* (1804), 5 East, 449).

(*m*) See *Arden* v. *Pullen*, *supra*.

(*n*) *Weigall* v. *Waters* (1795), 6 Term Rep. 488.

(*o*) *Sutton* v. *Temple* (1843), 12 M. & W. 52; and as to agricultural leases, see title AGRICULTURE, Vol. I., p. 243.

(*p*) *Colebeck* v. *Girdlers Co.* (1876), 1 Q. B. D. 234; see notes to *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. (ed. 1871) 557; *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217, 223.

(*q*) *Carstairs* v. *Taylor*, *supra*.

(*r*) *Blake* v. *Woolf*, [1898] 2 Q. B. 426. The rule in *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, is excluded in such a case, because the water is brought on the premises for the benefit of all parties (*Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602, C. A.). Similarly, a tenant of part of premises is not, in the absence of negligence, liable for an overflow of water on to the part

Liability of Landlord to Repair.

Unfurnished dwelling-houses.

985. The rule referred to in the preceeing paragraph applies to the letting of an unfurnished dwelling-house, and there is no implied warranty on the part of the landlord that it is in a reasonably fit state for habitation (*s*). The intending tenant is presumed to make his own inquiries as to its condition, and, in the absence of special stipulation, he takes the house as it stands (*t*). This is so, apparently, notwithstanding that the house is, to the landlord's knowledge, required for immediate occupation (*a*). If the house is, in fact, uninhabitable, the tenant, after accepting the lease, is without remedy save in a case where he has obtained a warranty of fitness, or where he has been induced to take the lease by active deceit on the part of the landlord. The mere omission of the landlord to disclose defects is not such deceit (*b*) But if the contract is still executory, it will not be enforced if the condition of the house is such that it is dangerous to health or otherwise uninhabitable (*c*).

Warranty of fitness.

986. A warranty at or before the making of a lease that a house is in a fit state for habitation, whether as regards repair or drainage, may be given as an express contract, or may be implied from a representation as to the state of the house. A representation by the lessor will cease to be a mere representation, and will constitute a warranty if it is intended to be the basis of the contractual relation between the parties (*d*). Hence, if the intending tenant declines to take the lease unless the landlord gives an assurance that the drains are in order, and the landlord gives this assurance, he is bound by the warranty (*e*). The warranty is both a warranty and a condition; hence a breach gives the tenant a claim for

demised to another tenant (*Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661). As to negligence generally, see title NEGLIGENCE.

(*s*) This is in accordance with the general rule that, upon the letting of real property, there is no implied warranty that it is fit for the purpose for which it is intended (*Hart* v. *Windsor* (1843), 12 M. & W. 68, 86, where the court refused to distinguish in this respect between agricultural land and unfurnished houses). But an agreement to supply power for a machine on the demised premises is not within the rule, and the power supplied must be reasonably fit for the purpose (*Bentley Bros.* v. *Metcalfe & Co.*, [1906] 2 K. B. 548, C. A.).

(*t*) *Chappell* v. *Gregory* (1864), 34 Beav. 250. "Fraud apart, there is no law against letting a tumble-down house" (*Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 240).

(*a*) *Hart* v. *Windsor*, *supra*. In *Bunn* v. *Harrison* (1886), 3 T. L. R. 146, C. A., this seems to have been treated as an open question.

(*b*) *Keates* v. *Cadogan* (*Earl*) (1851), 10 C. B. 591. To give rise to an action for deceit, the misstatement must be intentionally false or must be made recklessly (*Bartram* v. *Aldous* (1886), 2 T. L. R. 237; *Saunders* v. *Pawley* (1886), 2 T. L. R. 590, C. A.; *Butler* v. *Goundry* (1888), 4 T. L. R. 711, C. A.); and see title MISREPRESENTATION AND FRAUD.

(*c*) *Chester* v. *Powell*, *Powell* v. *Chester* (1885), 52 L. T. 722.

(*d*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, 222, C. A.); see *Best* v. *Edwards* (1895), 60 J. P. 9. Statements as to the condition of the house were held to be mere representations in *Kennard* v. *Ashman* (1894), 10 T. L. R. 213 and *Green* v. *Symons* (1897), 13 T. L. R. 301, C. A. In *Best* v. *Edwards*, *supra*, the jury found to the same effect.

(*e*) *De Lassalle* v. *Guildford*, *supra*.

damages, and also entitles him to repudiate the lease within a reasonable time (*f*). Such a warranty is collateral to the lease, and it is no objection that it is not contained in the lease, or is verbal, unless the lease also deals with the same matter, in which case the contract contained in the lease cannot be varied by a parol agreement (*g*).

Implied condition on letting of small houses.

987. In contracts for the letting of a house or part of a house for habitation for persons of the working classes there is implied by the Housing of the Working Classes Act, 1890 (*h*), a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation (*i*). If there is a breach of this condition the tenant can sue the landlord for damages, as well as abandon his tenancy (*k*). The statute applies where the house or part of a house is let at a rent not exceeding, in London, £20; in Liverpool, £13; in Manchester or Birmingham, £10; and elsewhere £8 (*l*); and it cannot be excluded by stipulation (*m*). By the Housing, Town Planning, etc. Act, 1909 (*n*), the same condition is implied where the rent does not exceed, in the administrative county of London, £40; in a borough or urban district, with a population according to the last census for the time being of 50,000 or upwards, £26; and elsewhere £16; but under the statute the condition is not implied where the premises are let for a term of not less than three years upon the terms that they shall be put by the lessee into a condition reasonably fit for occupation, and the lease is not determinable at the option of either party before the expiration of that term (*o*).

(*f*) *Bunn* v. *Harrison* (1886), 3 T. L. R. 146, C. A. But if a lease is set aside on the ground of innocent misrepresentation, the lessee does not recover damages, but only such sums as are necessary to indemnify him against liabilities incurred under the lease (*Whittington* v. *Seale-Hayne* (1900), 82 L. T. 49).

(*g*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, 222, C. A. Previously it had been considered that the tenant could not sue on the warranty unless it was contained in the lease (*Burtsal* v. *Bianchi* (1891), 65 L. T. 678; *Longman* v. *Blount* (1896), 12 T. L. R. 520). As to collateral parol agreements, see titles CONTRACT, Vol. VII., p. 383; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447; compare title GUARANTEE, Vol. XV., p. 439, note (*f*). The collateral contract must precede the lease, otherwise it can form no part of the consideration for taking the lease (*Bristol Tramways etc. Carriage Co., Ltd.* v. *Fiat Motors, Ltd.*, [1910] 2 K. B. 831, 838, C. A.).

(*h*) 53 & 54 Vict. c. 70.

(*i*) *Ibid.*, s. 75.

(*k*) *Walker* v. *Hobbs & Co.* (1889), 23 Q. B. D. 458, on the corresponding provision in the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 12 (now repealed).

(*l*) These are the limits of value defined by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 75, by reference to the limits for the composition of rates under the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41); see p. 488, *ante*.

(*m*) *I.e.*, as regards contracts made after the 14th August, 1903 (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 12).

(*n*) 9 Edw. 7, c. 44.

(*o*) *Ibid.*, s. 14. There is no provision excluding contracting out corresponding to that in the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39).

SECT. 2. **Liability of Landlord to Repair.**

Implied undertaking to keep in repair.

988. In cases where a condition that the house is at the commencement of the holding fit for habitation is implied under the Housing, Town Planning etc., Act, 1909 (*p*), the condition includes an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation (*q*). Either the landlord, or the local authority, or his or its agents authorised in writing, may enter on the premises at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, for the purpose of viewing the state and condition of the premises (*r*). If it appears to the local authority that the implied undertaking has not been complied with, and if a closing order is not made, it may require the landlord to execute the necessary works, but the landlord has the option of closing the house. If the landlord neither executes the repairs nor closes the house, the local authority may do the work and recover the expenses from the landlord (*s*).

SUB-SECT. 3.—*Liability to Third Persons.*

Liability to public for nuisance.

989. Where premises are out of repair in such a manner as to constitute a nuisance to the public, and a member of the public is injured in passing, the tenant, as occupier, is *primâ facie* liable for the injury (*t*); but the liability is shifted to the landlord if the want of repair existed at the time when the premises were let or relet (*u*); and also if the want of repair arises during the tenancy and the landlord has contracted with the tenant to do repairs (*a*);

(*p*) 9 Edw. 7, c. 44.

(*q*) *Ibid.*, s. 15 (1), in which provision "house" includes part of a house. *ibid.*, s. 15 (7). Contracting-out is not forbidden.

(*r*) *Ibid.*, s. 15 (2).

(*s*) *Ibid.*, s. 15 (3), (5), which see also as to the notice to the landlord and the recovery of expenses. The landlord can appeal to the Local Government Board against the notice and against any demand for the recovery of expenses, and no proceedings can be taken while the appeal is pending (*ibid.*, s. 15 (6)). The remedies given by *ibid.*, s. 15, for non-compliance with the implied undertaking do not preclude any other remedy available to the tenant against the landlord (*ibid.*, s. 15 (9)); and see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) *Payne* v. *Rogers* (1794), 2 Hy. Bl. 349; *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311, 313; *Norris* v. *Catmur* (1885), Cab. & El. 576; notwithstanding that he has employed competent persons to repair and that the injury is due to their neglect (*Tarry* v. *Ashton* (1876), 1 Q. B. D. 314).

(*u*) *R.* v. *Pedly* (1834), 1 Ad. & El. 822; *Gandy* v. *Jubber* (1864), 5 B. & S. 78. The landlord is also liable for a nuisance caused by the tenant if it is the natural consequence of the user for which the premises were let (*Harris* v. *James* (1876), 45 L. J. (Q. B.) 545; and see title NUISANCE), but not otherwise (see *Rich* v. *Basterfield* (1847), 4 C. B. 783; *Gandy* v. *Jubber*, *supra*, at p. 88); and the occupier is liable for the acts of his licensee (*White* v. *Jameson* (1874), L. R. 18 Eq. 303). As to liability for damage owing to non-repair of fences, see p. 514, *post*.

(*a*) *Payne* v. *Rogers*, *supra*; *Mills* v. *Temple-West* (1885), 1 T. L. R. 503; see *Leslie* v. *Pounds* (1812), 4 Taunt. 649. As to both grounds of liability, see *Nelson* v. *Liverpool Brewery Co.*, *supra*; and compare *Burt* v. *Victoria Graving Dock Co., Ltd., and London and St. Katherine's Dock Co.* (1882), 47 L. T. 378.

provided in each case the landlord has notice of the defect (*b*). In the former case the liability of the landlord is based upon his misfeasance in letting the premises in such a condition (*c*); in the latter case the landlord is held liable in order to avoid circuity of action, since the tenant, if liable in the first instance, would have a remedy over against him (*d*). But where the premises are out of repair at the time of letting, the landlord is not liable if he imposes an obligation to repair on the tenant (*e*).

Liability to tenant's family and guests.

990. The liability of the landlord for injury caused by non-repair of the premises does not extend to persons who are using the premises, whether the tenant's family, or guests, or customers, or workmen; and accordingly the landlord is not liable for accidents happening to any of such persons during the term (*f*). Nor is he liable to any person except the tenant himself if he has contracted to repair the premises, and the injury happens in consequence of his breach of contract, since no person except the tenant can sue on the contract (*g*).

SECT. 3.—*Construction of Covenants to Repair.*

Covenant construed with reference to original condition of premises.

991. A covenant for general repair, such as a covenant to repair the demised premises and to yield them up in good and substantial repair and condition (*h*); or to keep and leave them in good and tenantable order and repair (*i*); or, as often as occasion shall require, well and substantially to repair, uphold, and keep them, and the same so well and substantially repaired, upheld, and kept, to yield up at the end of the term (*k*); is construed with reference to the condition of the premises at the commencement of the lease (*l*). The tenant is not bound to leave for his landlord a new house, but the house which he took, in a state of fit repair as such house (*m*);

(*b*) See *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658; *Broggi* v. *Robins* (1899), 15 T. L. R. 224, C. A.; *Tredway* v. *Mechin* ((1904), 53 W. R. 136, C. A. But in *Broggi* v. *Robins*, *supra*, and *Tredway* v. *Mechin*, *supra*, the injured persons were members of the tenant's family, and were on that ground not entitled to succeed; see note (*f*), *infra*.

(*c*) *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377, 389. A tenancy from year to year does not recommence each year so as to render the landlord liable to the public for non-repair at the beginning of every year, but goes on without break (*Gandy* v. *Jubber* (1865), 9 B. & S. 15, Ex. Ch.); and it is the same with a weekly tenancy (*Bowen* v. *Anderson*, [1894] 1 Q. B. 164, disapproving *Sandford* v. *Clarke* (1888), 21 Q. B. D. 398).

(*d*) *Payne* v. *Rogers* (1794), 2 Hy. Bl. 349.

(*e*) *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, *supra*.

(*f*) *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 240; *Lane* v. *Cox*, [1897] 1 Q. B. 415, C. A. See, further, p. 570, *post*, and title NEGLIGENCE.

(*g*) *Cavalier* v. *Pope*, [1906] A. C. 428; *Cameron* v. *Young*, [1908] A. C. 176; see *Copp* v. *Aldridge & Co.* (1895), 11 T. L. R. 411; *Malone* v. *Laskey*, [1907] 2 K. B. 141, C. A.

(*h*) *Harris* v. *Jones* (1832), 1 Mood. & R. 173.

(*i*) *Stanley* v. *Towgood* (1836), 3 Bing. (N. C.) 4; see *Mantz* v. *Goring* (1838), 4 Bing. (N. C.) 451; *Woolcock* v. *Dew* (1858), 1 F. & F. 337.

(*k*) *Lister* v. *Lane and Nesham*, [1893] 2 Q. B. 212, C. A.

(*l*) *Walker* v. *Hatton* (1842), 10 M. & W. 249, 258; see *Burdett* v. *Withers* (1837), 7 Ad. & El. 136.

(*m*) *Scales* v. *Lawrence* (1860), 2 F. & F. 289. Thus, where the house is an

SECT. 3. Construction of Covenants to Repair.

and he is not bound to leave it in the same state as at the commencement of the lease, for the deterioration in the condition of the house as a whole which is brought about by the natural operation of time and the elements falls upon the landlord. But the tenant is bound to keep the premises habitable. He must take care that the buildings do not suffer more damage than the operation of time and the elements would effect, and he must by seasonable applications of labour keep the house as nearly as possible in the same condition as when it was demised (*n*); and he must replace any parts which are worn out or have become unsuitable, where the replacing is necessary to maintain the house in a habitable state (*o*). Moreover, he must rebuild or restore the whole or any parts of the premises which are destroyed by fire or other exceptional cause, unless the covenant exempts him from liability in these cases (*p*).

Inherent defects in premises.

992. Consequently the tenant discharges his liability if he keeps the buildings in substantial repair according to their age and nature. If owing to their nature they have an inherent defect, the result of which develops in course of time and necessitates the rebuilding of the house, the tenant is not liable under his covenant to pay the expense of such rebuilding (*q*). Similarly, where a drain is unsuitable and the local authority constructs a new one, this is not an expense which falls on the tenant under a covenant to repair drains (*r*); and, generally, he is not liable for improvements in the original structure of a house, such as the mode of laying joists, which the landlord effects in making repairs (*s*); nor, where he has undertaken to repair a road of one kind, is he liable if the landlord converts it into a road requiring repairs of a different nature (*t*), and regard must always be had to the condition of the road in estimating the tenant's liability (*u*).

Improvements effected by landlord.

Suitable repairs.

993. But while the tenant is not bound, under his covenant to repair, to improve the building so as to give the landlord something different from what he demised, yet he must do such repairs as are

old one, the tenant is only bound to keep it up as an old house, and he need not give the landlord the benefit of new work (*Harris* v. *Jones* (1832), 1 Mood. & R. 173, 175); but, in the absence of evidence to the contrary, the premises will be presumed to have been in a tenantable condition when the tenant went in (*Brown* v. *Trumper* (1858), 26 Beav. 11, 15).

(*n*) *Gutteridge* v. *Munyard* (1834), 1 Mood. & R. 334, *per* TINDAL, C.J., at p. 336.

(*o*) *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K. B. 905, C. A.; and see this case as to the *dictum* of TINDAL, C.J., in *Gutteridge* v. *Munyard*, *supra*.

(*p*) *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507, 513; see *Brecknock and Abergavenny Canal Navigation Co.* v. *Pritchard* (1796), 6 Term Rep. 750. As to destruction by fire, see p. 520, *post*, and compare p. 501, *ante*.

(*q*) *Lister* v. *Lane and Nesham*, [1893] 2 Q. B. 212, C. A.

(*r*) *Lyon* v. *Greenhow* (1892), 8 T. L. R. 457. Similarly the tenant is not bound to remedy structural defects, but only to keep the existing drains in repair (*Huggall* v. *McKean* (1884), Cab. & El. 391; affirmed *sub nom. Hugall* v. *M'Lean* (1885), 53 L. T. 94, C. A.).

(*s*) *Soward* v. *Leggatt* (1836), 7 C. & P. 613.

(*t*) *London Corporation* v. *Barnes* (1896), 12 T. L. R. 135, C. A.; and a covenant to contribute to repairing a road does not extend to entire reconstruction (*Scott* v. *Brown* (1904), 69 J. P. 89, C. A.).

(*u*) *Scott* v. *Brown*, *supra*.

suitable for the building having regard to its age and class; and he must replace any parts, including the floors, or roof, or external walls, which become defective or dangerous owing to the lapse of time or the effect of the elements (*v*). If he has expressly covenanted to put a house into tenantable repair and to keep it in such repair, and it is not in tenantable repair at the commencement of the tenancy, he must do the necessary repairs, notwithstanding that the building is thereby put in a better condition than when the landlord let it (*a*). The effect is the same if, without expressly covenanting to put it into repair, the tenant only covenants to keep the house in tenantable repair. Such a covenant presupposes the putting the house in such repair, and the keeping it in repair during the term (*b*). The construction of the covenant is the same whether the covenant specifies "tenantable" or "habitable" or "good" repair (*c*). A general covenant to repair without any such words is satisfied if the premises are kept in a substantial state of repair (*d*).

Tenantable repair.

The repairs which must be done in order to keep a house in tenantable repair vary according to the circumstances of the building. "Good tenantable repair" is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it (*e*); accordingly the lessee must do such repairs as are necessary to preserve the premises and to make them suitable for a new tenant (*e*). He must do both outside and inside painting at suitable times (*f*), but he is not necessarily bound to repaper and paint throughout the house at the end of the term (*g*), nor to leave the house in the same state of decorative repair as when he took it (*h*). If "reasonable wear and tear" are excepted, the tenant is not bound to make good dilapidations caused by the friction of the air, and by exposure and ordinary

Good tenantable repair.

(*v*) *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K. B. 905, C. A.; see *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42, 54, C. A.; and as to maintenance of the substructure of a large building such as a market, see *Re London Corporation, London Corporation* v. *Great Western and Metropolitan Railways*, [1910] 2 Ch. 314.

(*a*) A covenant to put premises into repair "forthwith" is performed if the repairs are done with reasonable speed (*Doe* d. *Pittman* v. *Sutton* (1841), 9 C. & P. 706; *Belcher* v. *M'Intosh* (1839), 8 C. & P. 720 (habitable repair)).

(*b*) *Payne* v. *Haine* (1847), 16 M. & W. 541 ("good repair"); see *Woolcock* v. *Dew* (1858), 1 F. & F. 337; *Lurcott* v. *Wakely and Wheeler*, *supra*.

(*c*) *Proudfoot* v. *Hart*, *supra*, at p. 51, C. A. Under a covenant to do "necessary repairs," the tenant must do all repairs which are necessary during the term (*Truscott* v. *Diamond Rock Boring Co.* (1882), 20 Ch. D. 251, C. A.). Under an agreement by the tenant to leave a farm in as good a condition as he found it, he must leave it in tenantable repair if he found it so (*Winn* v. *White* (1772), 2 Wm. Bl. 840). As to furniture, see *Stanley* v. *Agnew* (1844), 12 M. & W. 827.

(*d*) *Harris* v. *Jones* (1832), 1 Mood. & R. 173.

(*e*) *Proudfoot* v. *Hart*, *supra*, at p. 52; see *Belcher* v. *M'Intosh*, *supra*; *Payne* v. *Haine*, *supra*; *Saner* v. *Bilton* (1878), 7 Ch. D. 815, 821.

(*f*) *Monk* v. *Noyes* (1824), 1 C. & P. 265 (covenant to "substantially repair, uphold and maintain" requires inside painting to be done).

(*g*) *Moxon* v. *Townshend* (*Marquis*) (1886), 2 T. L. R. 717; affirmed (1887), 3 T. L. R. 392, C. A.

(*h*) *Crawford* v. *Newton* (1887), 36 W. R. 54, C. A.

SECT. 3. Construction of Covenants to Repair.

use (*i*). Covenants of this nature must be reasonably construed. The landlord is not to claim for slight defects (*k*), and, under a covenant to repair and paint, the tenant is not bound to fill up cracks in plaster and holes made by nails within the period for redecorating (*l*). An actual omission to repair is not excused because the tenant has employed persons whom in good faith he relied upon to do the repairs (*m*).

Pulling down premises.

994. It is a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them (*n*), unless in the course of making additions or improvements which are permitted by the lease (*o*).

Repair of buildings erected subsequent to demise.

995. A covenant to repair may expressly extend to buildings erected subsequently to the demise (*p*), but without express mention of such buildings a covenant to repair the demised premises extends to all things which are for the time being a part of the premises included in the lease (*q*). Consequently it extends to additional buildings (*r*) and to other fixtures (*s*). But a covenant to repair "the demised buildings" applies only to buildings existing at the time of the demise (*t*). A covenant to repair and yield up in repair, since it extends to all fixtures, deprives the tenant of his ordinary right to remove tenant's fixtures, unless these are expressly excluded from the covenant (*a*).

Covenant to rebuild.

996. A covenant which binds the lessee specifically to rebuild is not satisfied by merely repairing; hence, where it extends to several houses, it is not sufficient for the lessee to rebuild some and repair others (*b*). But if the covenant is a general covenant

(*i*) *Terrell* v. *Murray* (1901), 17 T. L. R. 570; see *Manchester Bonded Warehouse* v. *Carr* (1880), 5 C. P. D. 507, 513; *Scales* v. *Lawrence* (1860), 2 F. & F. 289.

(*k*) *Scales* v. *Lawrence*, *supra*.

(*l*) *Perry* v. *Chotzner* (1893), 9 T. L. R. 488.

(*m*) *Nokes* v. *Gibbon* (1856), 3 Drew. 681.

(*n*) *E.g.*, by opening a doorway in a wall (*Doe* d. *Vickery* v. *Jackson* (1817), 2 Stark. 293; *Gange* v. *Lockwood* (1860), 2 F. & F. 115), or pulling down a partition wall in the courtyard (*Doe* d. *Wetherell* v. *Bird* (1833), 6 C. & P. 195; see *Borgnis* v. *Edwards* (1860), 2 F. & F. 111); *Rose* v. *Spicer*, *Rose* v. *Hyman*, [1911] 2 K. B. 234, C. A.

(*o*) See *Doe* d. *Dalton* v. *Jones* (1832), 4 B. & Ad. 126.

(*p*) *Hudson* v. *Williams* (1878), 39 L. T. 632.

(*q*) See *Pyot* v. *St. John* (*Lady*) (1613), Cro. Jac. 329 (pavement of a courtyard).

(*r*) *Cornish* v. *Cleife* (1864), 34 L. J. (EX.) 19, 22; see *Brown* v. *Blunden* (1683), Skin. 121; *Douse* v. *Earle* (1690), 3 Lev. 264. The covenant will extend to a farmhouse erected by permission of the lessor, who is lord of the manor, on adjoining waste (*White* v. *Wakley* (No. 1) (1858), 26 Beav. 177).

(*s*) *E.g.*, the mill-wheel of a mill (*Openshaw* v. *Evans* (1884), 50 L. T. 156); or a verandah attached to posts fixed in the ground (*Penry* v. *Brown* (1818), 2 Stark. 403); and see *Thresher* v. *East London Water Works Co.* (1824), 2 B. & C. 608.

(*t*) *Doe* d. *Worcester Trustees* v. *Rowlands* (1841), 9 C. & P. 734, 740; *Smith* v. *Mills* (1899), 16 T. L. R. 59; *Cornish* v. *Cleife* (1864), 3 H. & C. 446. In special circumstances the covenant to repair has been held to apply to after-erected buildings only (*Lant* v. *Norris* (1757), 1 Burr. 287).

(*a*) See p. 427, *ante*.

(*b*) *London* (*City*) v. *Nash* (1747), 3 Atk. 512.

to repair houses and to rebuild within a specified time as occasion may require, it is enough if the lessee repairs so as to make the houses substantially as good as new (*c*). A covenant to pull down a house and build a new one does not require that the new one should be similar in construction and elevation to the old one (*d*).

Covenant conditional on landlord putting premises in repair.

997. The liability of the tenant to repair may be made conditional upon the landlord first putting the premises in repair (*e*), or upon his doing some other act, such as providing materials for repair (*f*). In the former case the complete performance of the condition by the landlord is essential to make the tenant liable for the repair of any part of the premises (*g*); in the latter case it is sufficient if the landlord is ready to supply the material when required (*h*). The previous repair of the premises by the landlord (*i*), or the supply of material by him (*j*), may also be provided for by means of a covenant on his part, and, on his default, the tenant is entitled to sue for breach of the covenant (*k*).

Repair to surveyor's satisfaction.

998. If the tenant covenants to do work, whether of repair (*l*), or of building (*m*), to the satisfaction of a surveyor to be appointed by the landlord, such appointment is a condition precedent to the tenant's liability; but it has been held to be otherwise where the work is to be subject to the superintendence of specified persons, and then such superintendence is not a condition precedent (*n*). Where a surveyor is appointed, and expresses dissatisfaction, there is no breach of the covenant on the lessee's part if it is shown at the trial that the surveyor ought to have been satisfied (*o*).

(*c*) *Evelyn* v. *Raddish* (1817), 7 Taunt. 411.

(*d*) *Low* v. *Innes* (1864), 4 De G. J. & Sm. 286.

(*e*) *Slater* v. *Stone* (1622), Cro. Jac. 645; *Neale* v. *Ratcliff* (1850), 15 Q. B. 916.

(*f*) *Thomas* v. *Cadwallader* (1744), Willes, 496; compare *Mucklestone* v. *Thomas* (1739), Willes, 146.

(*g*) *Neale* v. *Radcliff* (1850), 15 Q. B. 916; see *Counter* v. *Macpherson* (1845), 5 Moo. P. C. C. 83; *Cannock* v. *Jones* (1849), 3 Exch. 233; *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153.

(*h*) *Martyn* v. *Clue* (1852), 18 Q. B. 661. But a covenant by the tenant to repair "taking sufficient housebote etc. without committing waste," does not incorporate a condition that there shall be a sufficient supply of suitable timber on the land, and the covenant is absolute (*Bristol* (*Dean and Chapter*) v. *Jones* (1859), 1 E. & E. 484).

(*i*) *Cannock* v. *Jones*, *supra*, where words of condition were construed as creating a covenant; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 478.

(*j*) *Tucker* v. *Linger* (1882), 21 Ch. D. 18, C. A. As to when such covenants are independent, and when the performance of the landlord's covenant is a condition for the liability on the lessee's covenant, see title DEEDS AND OTHER INSTRUMENTS, VOL. X., p. 489. As to assignment of timber for house-bote, see *Courtenay* v. *Fisher* (1826), 4 Bing. 3.

(*k*) And the failure of the lessor to perform his covenant may be taken into account in assessing the damages on the breach of the tenant's covenant to leave the buildings in repair (*Haldane* v. *Newcomb* (1863), 12 W. R. 135).

(*l*) *Coombe* v. *Greene* (1843), 11 M. & W. 480.

(*m*) *Hunt* v. *Bishop* (1853), 8 Exch. 675, 679.

(*n*) *Cannock* v. *Jones*, *supra*, affirmed (1850), 5 Exch. 713, Ex. Ch.; (1852), 3 H. L. Cas. 700.

(*o*) *Doe* d. *Baker* v. *Jones* (1848), 2 Car. & Kir. 743. Where the tenant is

SECT. 3. Construction of Covenants to Repair.

Covenant to repair on notice.

999. Formerly it was usual to insert in the lease a general covenant by the lessee to repair, and also a covenant to repair on notice; that is, to do within a prescribed time repairs covered by the general covenant, of which the lessor should give notice (*p*). Such covenants, if grammatically separate, were construed as independent covenants (*q*), the first being broken by the mere want of repair (*r*), and the second by the failure to comply with the notice. A notice given in accordance with the second covenant —that is, to repair specified defects within the prescribed time— operated as a waiver of any forfeiture for breach of the general covenant (*s*); but if the notice departed from the terms of the second covenant, and required repair "forthwith" (*t*), or "in accordance with the covenants of the lease" (*a*), it was deemed to be given under the general covenant, though not strictly necessary, and there was no waiver. Under the Conveyancing and Law of Property Act, 1881 (*b*), notice specifying the nature of the breach of the covenant to repair must be served in all cases, and there must be failure to repair within a reasonable time before the landlord can re-enter for the forfeiture. Consequently a separate covenant to repair on notice has become needless (*c*). But where the covenant is a covenant to repair on notice, and to leave in repair at the end of the term, these constitute distinct liabilities, and notice is not necessary to enable the lessor to sue on the covenant at the end of the term (*d*). Negotiations for the sale by the lessee of his interest in the premises to the lessor will suspend the notice during their currency (*e*).

Remedy for breach.

1000. The remedy upon a covenant to repair is in damages; specific performance of the covenant will not be ordered (*f*). A

to retain out of rent the expenses of improvements executed to the approval of the landlord, this approval is not a condition precedent to the retention of the expenses (*Dallman* v. *King* (1837), 4 Bing. (N. C.) 105).

(*p*) There is no breach of this covenant till the prescribed time has elapsed (*Williams* v. *Williams* (1874), L. R. 9 C. P. 659).

(*q*) *Horsefall* v. *Testar* (1817), 7 Taunt. 385, 388; *Baylis* v. *Le Gros* (1858), 4 C. B. (N. S.) 537.

(*r*) *Baylis* v. *Le Gros*, *supra*.

(*s*) *Doe* d. *Morecraft* v. *Meux* (1825), 4 B. & C. 606; see *Doe* d. *de Rutzen* (*Baron and Baroness*) v. *Lewis* (1836), 5 Ad. & El. 277.

(*t*) *Roe* d. *Goatly* v. *Paine* (1810), 2 Camp. 520.

(*a*) *Few* v. *Perkins* (1867), L. R. 2 Exch. 92.

(*b*) 44 & 45 Vict. c. 41, s. 14.

(*c*) See Encyclopædia of Forms and Precedents, Vol. VII., p. 104.

(*d*) *Harslet* v. *Butcher* (1622), Cro. Jac. 644.

(*e*) *Hughes* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 439; see *Doe* d. *Rankin* v. *Brindley* (1832), 4 B. & Ad. 84; *Doe* d. *de Rutzen* (*Baron and Baroness*) v. *Lewis*, *supra*.

(*f*) *Hill* v. *Barclay* (1810), 16 Ves. 402, 406; see title SPECIFIC PERFORMANCE. Damages are only recoverable from the lessee or assignee. A *cestui que trust* in occupation of the premises is not liable (*Ramage* v. *Womack*, [1900] 1 Q. B. 116). Acceptance of a tenancy on the terms of a special agreement as to repairs is a sufficient consideration for the agreement (*Dietrichsen* v. *Giubile* (1845), 14 M. & W. 845). In suing on the covenant to repair any special terms, such as an exception of damage by fire, were, according to the old practice, required to be stated (*Tempany* v. *Burnand* (1814), 4 Camp. 20; *Browne* v. *Knill* (1821), 2 Brod. & B. 395), and it is still convenient to do so.

Covenants to put into, and keep in repair.

covenant to put premises into repair admits of only a single breach, and when damages have been recovered there is no further remedy on the covenant (*g*). Under a covenant to keep in repair, the lessee is bound to have the premises at all times in proper repair, and if they are out of repair an action on the covenant can be brought during the term (*h*). The breach of the covenant, if not made good, is a continuing breach (*i*), and the recovery of damages in one action does not prevent the recovery of damages in a subsequent action; but in assessing the later damages, the amount recovered in the earlier action is taken into account (*k*). Where there are covenants to erect specified buildings and then to keep them in repair, the lessee or his assignee will be liable for a breach of the latter covenant notwithstanding that the buildings have not been erected, and that the lessor has, by waiver of the breach or otherwise, lost his remedy on the former covenant (*l*). Although the former covenant, being single, has gone, yet the covenant to repair will necessitate the erection of the buildings (*m*).

Covenant by landlord to repair.

1001. The liability of a lessor under a covenant on his part to repair is subject to the same rules of construction as a covenant by the lessee. It has to be construed with reference to the state of the premises at the commencement of the demise, and the lessor is not bound to give to the lessee during the term a different thing from that which the lessee took from him at the commencement of the tenancy. Consequently he is not bound to make good defects which

(*g*) See *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153. Similarly a covenant by the lessor to make a new street within a year, is finally broken on default at the end of the year (*Morris* v. *Kennedy*, [1896] 2 I. R. 247, C. A.).

(*h*) *Luxmore* v. *Robson* (1818), 1 B. & Ald. 584, 585; and see the cases cited in note (*b*), p. 507, *ante*. But where a lessee is bound to repair and deliver up in repair at the end of the term, the removal of fixtures which he does not immediately replace is not a breach of the covenant if they can be replaced before the end of the term (*Doe* d. *Burrell* v. *Davis* (1851), 15 Jur. 155).

(*i*) Where, after the notice to repair, the premises are condemned by the local authority and pulled down, there is a continuing breach until the demolition (*Re Serle, Gregory* v. *Serle*, [1898] 1 Ch. 652).

(*k*) *Coward* v. *Gregory, supra*. In order that the action for non-repair under the general covenant may be maintained, the premises must be out of repair at the commencement of the action; hence, if the lessor does the repairs himself, he cannot recover damages (*Williams* v. *Williams* (1874), L. R. 9 C. P. 659). Moreover, if the lease provides for his recovering the expenses of repair, he waives the forfeiture for breach of the covenant (*Doe* d. *de Rutzen* (*Baron and Baroness*) v. *Lewis* (1836), 5 Ad. & El. 277). But he may be able to recover on the special covenant if proper notice has been given (*Williams* v. *Williams, supra*, where a sub-lessor did repairs to avoid forfeiture of the head lease, and then sued the underlessee; and see *Colley* v. *Streeton* (1823), 2 B. & C. 273; *Joyner* v. *Weekes*, [1891] 2 Q. B. 31; reversed on the facts, *ibid.*, C. A., as to recovery of the expense of such repairs).

(*l*) *Bennett* v. *Herring* (1857), 3 C. B. (N. S.) 370; *Jacob* v. *Down*, [1900] 2 Ch. 156. In *Bennett* v. *Herring* the lease had been assigned, and since the breach of the covenant to build was complete before the assignment the assignee was not liable on that covenant, but he was liable on the covenant to keep in repair. In *Jacob* v. *Down, supra*, the lessor had waived the breach of the covenant to build, but was still liable on the covenant to repair. Similarly a waiver of a covenant to build may not be a waiver of the covenant to deliver up the additional buildings (*Nonalie* v. *Flight* (1844), 7 Beav. 521).

(*m*) *Jacob* v. *Down, supra*.

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affect the stability of the premises as a whole, and are due to some inherent fault (*n*); nor is he bound to do any repairs until notice of the want of repair has been given by the lessee (*o*). A covenant by the lessor to repair the external parts of the demised premises includes a partition wall (*p*). A covenant by the landlord to put premises into repair does not bind him to put them in repair for a special purpose not mentioned in the agreement (*q*).

SECT. 4.—*Measure of Damages.*

Measure of damages during term.

1002. When an action is brought during the term for breach of a covenant to repair, the damages are not nominal (*r*), but the measure is the diminution in the value of the reversion which results from the breach (*s*). Practically, this is the amount by which the saleable value of the premises is injured by the non-repair of the premises (*t*), and it depends on the length of the unexpired term (*u*). But this rule is not of universal application. All the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the lessor has sustained by the breach of the covenant (*a*). When he is the freeholder, and is entitled to the reversion free from any liability on his part, the injury to saleable value furnishes the proper test (*b*), but when he is himself a lessee, and is under a

(*n*) *Torrens* v. *Walker*, [1906] 2 Ch. 166; see p. 506, *ante*.

(*o*) *Makin* v. *Watkinson* (1870), L. R. 6 Exch. 25; *London and South Western Rail. Co.* v. *Flower* (1875), 1 C. P. D. 77, 85; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507; *Hugall* v. *M'Lean* (1885), 53 L. T. 94, C. A.; *Torrens* v. *Walker*, *supra*; see *Tredway* v. *Mechin* (1904), 53 W. R. 136, C. A. If the lessee has to leave the premises while they are being repaired he cannot recover the expenses of taking and fitting up other premises (*Green* v. *Eales* (1841), 2 Q. B. 225).

(*p*) *Green* v. *Eales*, *supra* (where the adjoining premises were demolished under a local statute, but this circumstance did not prevent the lessor from being liable). As to a covenant for contribution by the lessee to costs of improvements, see *Beer* v. *Santer* (1861), 10 C. B. (N. S.) 435.

(*q*) *McClure* v. *Little* (1868), 19 L. T. 287. An agreement by the landlord to repair the demised premises does not bind him to cleanse ornamental water (*Bird* v. *Elwes* (1868), L. R. 3 Exch. 225). As to the effect of a lessor's covenant to repair part of the premises, see *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153.

(*r*) *Smith* v. *Peat* (1853), 9 Exch. 161; *Bell* v. *Hayden* (1859), 9 I. C. L. R. 301 (*Marriott* v. *Cotton* (1848), 2 Car. & Kir. 553, *contra*, is overruled). Where, however, the lessee has repaired after action the damages may be nominal (*Morony* v. *Ferguson* (1874), 8 I. R. C. L. 551).

(*s*) *Doe* d. *Worcester Trustees* v. *Rowlands* (1841), 9 C. & P. 734; *Turner* v. *Lamb* (1845), 14 M. & W. 412; *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79; *Henderson* v. *Thorn*, [1893] 2 Q. B. 164. In *Vivian* v. *Champion* (1705), 2 Ld. Raym. 1125, Lord HOLT defined the measure of damages as the amount required to put the premises into repair, but this has been overruled; compare *Wigsell* v. *School for Indigent Blind* (1882), 8 Q. B. D. 357; though where the lessor, with the consent of the lessee, does the repairs himself, he can recover the amount properly expended (*Colley* v. *Streeton* (1823), 2 B. & C. 273; compare *Williams* v. *Williams* (1874), L. R. 9 C. P. 659).

(*t*) *Smith* v. *Peat*, *supra*; compare *Metge* v. *Kavanagh* (1877), 11 I. R. C. L. 431; and, as to the identity of the premises, see *Mapleton* v. *Rawlings* (1854) 3 C. L. R. 237; and see title DAMAGES, Vol. X., p. 339.

(*u*) *Turner* v. *Lamb*, *supra*; *Conquest* v. *Ebbetts*, [1896] A. C. 490.

(*a*) *Conquest* v. *Ebbetts*, *supra*, *per* Lord HERSCHELL, at p. 494.

(*b*) *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, 386, C. A.

covenant with the superior landlord to repair, his liability under this covenant must be taken into account in ascertaining the amount payable to him by the sub-lessee (*c*).

After determination of term.

1003. After the term is expired, the lessor's action will be brought on the covenant to yield up the premises in repair, and since he is entitled to possession of the premises in that state, the measure of damages is the sum which it would take to put the premises in the state of repair in which the lessee ought, under the covenant, to leave them (*d*). This test is applied, although in fact the lessor does not require that the premises should be restored to their former condition; where, for instance, owing to changes in the character of the neighbourhood, repairs of a less expensive nature will be equally effective to secure the letting of the property (*e*); or where the lessor is himself effecting structural alterations (*f*); or where he has relet the property upon terms which render the repairs unnecessary, so that he cannot suffer any actual loss (*g*). But if the lessor has, during the term, already recovered damages for breach of the covenant to keep in repair, these will be deducted from the sum which the lessee would otherwise pay as damages for breach of the covenant to leave in repair (*h*).

SECT. 5.—*Right of Entry to View and Repair.*

Right of entry.

1004. The lessor by the granting of the lease deprives himself of the right to possession of the premises during its currency, and if he enters without the permission of the lessee, or without reserving to himself the right to do so, he is liable to be treated as a trespasser. Hence, in the absence of special stipulation (*i*), he cannot enter to do repairs (*k*). It makes no difference that he is himself a lessee, and is liable to forfeiture for breach of the covenant to repair in the head lease; or that he has the consent of the sub-lessee's tenants (*l*).

(*c*) *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, 386, C. A.; *Conquest* v. *Ebbetts*, [1896] A. C. 490, where it was held that if the sub-lease has only a short time to run, and the sub-lessor has only a nominal reversion, the measure is properly applied by ascertaining the sum which the repairs will cost, and then allowing a discount for present payment; and see *Williams* v. *Williams* (1874), L. R. 9 C. P. 659.

(*d*) *Joyner* v. *Weeks*, [1891] 2 Q. B. 31, 43, C. A. The lessor can also recover compensation for the loss of the use of the premises during the repairs (*Woods* v. *Pope* (1835), 6 C. & P. 782; 1 Bing. (N. C.) 467; see *Birch* v. *Clifford* (1891), 8 T. L. R. 103), notwithstanding, perhaps, that part of the repairs should have been done by himself (*Woods* v. *Pope*, *supra*). See also title DAMAGES, Vol. X., p. 339; and see *Clare* v. *Dobson*, [1911] 1 K. B. 53 (where an underlessor, who, after breach of covenant to repair, executed the repairs and obtained relief from forfeiture, failed to recover from his underlessee, who failed to do the repairs, the cost of the proceedings for relief).

(*e*) *Morgan* v. *Hardy* (1886), 17 Q. B. D. 770; reversed on another point (1887), 18 Q. B. D. 646, C. A.; *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351.

(*f*) *Inderwick* v. *Leech* (1884), Cab. & El. 412.

(*g*) *Joyner* v. *Weeks*, *supra*; see *Rawlings* v. *Morgan* (1865), 18 C. B. (N. S.) 776.

(*h*) *Henderson* v. *Thorn*, [1893] 2 Q. B. 164; *Ebbetts* v. *Conquest* (1900), 82 L. T. 560.

(*i*) *Barker* v. *Barker* (1829), 3 C. & P. 557. For form of reservation of right of entry, see Encyclopædia of Forms and Precedents, Vol. VII., p. 201.

(*k*) See *Neale* v. *Wyllie* (1824), 3 B. & C. 533.

(*l*) *Stocker* v. *Planet Building Society* (1879), 27 W. R. 877, C. A. (where the

SECT. 5. **Right of Entry to View and Repair.**

Where the lessor has covenanted with the lessee to repair, a licence by the lessee is implied for him to enter for a reasonable time to do the repairs (*m*). But, in general, a right to enter and view the state of repair is expressly reserved by the lease, and the lessor is entitled to have this inserted when the lease is granted in pursuance of an agreement to grant a lease with the "usual provisions" (*n*).

Implied right of entry to repair.

SECT. 6.—*Liability to Repair Fences.*

Duty of tenant to fence.

1005. The relation of landlord and tenant imposes on the tenant as part of the contract an obligation to keep adjoining property of his own distinct from the demised premises during the tenancy, and to leave these premises clearly distinct at the end of the term and not in any way confounded with his own property (*o*). If, therefore, the tenant has thrown the lands together, the landlord is entitled during the term to have the boundary ascertained by the court (*p*); and if the confusion is such that at the end of the tenancy the tenant cannot render up specifically the landlord's land, and the true boundary cannot be ascertained, he must restore land of the same value as the demised premises; and for this purpose the land will be valued fairly, but to the utmost as against the tenant who has rendered it impossible for the landlord to have his own (*q*).

Tenants for years are liable for permissive waste, but not tenants at will nor tenants from year to year (*r*). Notwithstanding this distinction, however, it is the duty of the actual occupier to repair the fences, and for this purpose he may take sufficient wood (*s*); and, without any agreement to that effect, the landlord can maintain an action against his tenant for not repairing, upon the ground of the injury done to the inheritance (*t*). Moreover, if injury is caused to a third person through non-repair of the fences, the remedy is against the occupier and not the owner, unless the fences

lessor's entry was restrained by injunction). As to the statutory right of entry in certain cases, see p. 504, *ante*.

(*m*) *Saner* v. *Bolton* (1878), 7 Ch. D. 815.

(*n*) If the landlord is to enter "at convenient times" to view the state of repair, he should give notice of his coming, otherwise he cannot complain of being excluded from some of the rooms (*Doe* d. *Wetherell* v. *Bird* (1833), 6 C. & P. 195). As to "usual provisions," see p. 338, *ante*.

(*o*) *A.-G.* v. *Fullerton* (1813), 2 Ves. & B. 263, *per* Lord ELDON, L.C., at p. 265. As to the presumption of ownership of hedges and ditches, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 124, 125; as to party walls, *ibid.*, pp. 134—138.

(*p*) *Spike* v. *Harding* (1878), 7 Ch. D. 871. The practice is to direct an inquiry in chambers to ascertain the boundaries; see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 115—118; EQUITY, Vol. XIII., p. 39.

(*q*) *A.-G.* v. *Fullerton, supra; Aston* v. *Exeter* (*Lord*) (1801), 6 Ves. 288, 293; and see *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111.

(*r*) See pp. 498, 499, *ante*.

(*s*) Co. Litt. 53 b; see p. 429, *ante; Whitfield* v. *Weedon* (1772), 2 Chit. 685. As to the common law, statutory, and prescriptive liabilities to fence, see titles ANIMALS, Vol. I., pp. 376, 378; BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 129 *et seq.*; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 114, 115; MINES, MINERALS, AND QUARRIES; NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318. If the fall of fences has been caused by excavations made in breach of a covenant in the lease, a mandatory injunction will be granted to restore them (*Newton* v. *Nock* (1880), 43 L. T. 197).

were out of repair when the land was let (*a*), or unless the owner has undertaken to repair the fences (*b*).

SECT. 6. Liability to Repair Fences.

1006. The landlord is under no liability to repair fences (*c*).

Duty of landlord.

Part IX.—Restrictions on Use of Premises.

1007. Where at the time of the letting the premises are to the landlord's knowledge intended to be used for an immoral or illegal purpose, this renders the contract unenforceable, and the landlord cannot recover the rent nor sue upon the lessee's covenants (*d*); and although the landlord is not at first aware of the improper use yet if he has the power of terminating the tenancy and omits to do so after this use has come to his knowledge, he cannot thereafter enforce the lessee's obligations (*e*). Similarly an agreement to let premises is not enforceable if they are to be used for an unlawful purpose (*f*). If the lessee has obtained possession by means of a false representation that he intended to carry on upon the premises a lawful trade, the lessor must have the lease declared void before he can recover possession (*g*).

Use for illegal or immoral purposes.

1008. Leases of buildings, whether dwelling-houses or trade premises, usually contain a covenant by the lessee restricting their use. This may be either a covenant designed to protect neighbouring occupiers from annoyance, or to confine the use of trade premises to certain trades, or to require that a house shall be used only as a private dwelling-house, or only for residential or professional purposes; and such covenants will be enforced by injunction, or the breach of them will be compensated by damages (*h*), or, if there is

Restrictive covenants as to user.

(*a*) *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318.

(*b*) See p. 504, *ante*.

(*c*) *Cheetham* v. *Hampson*, *supra*. As to the landlord's duty, if he retains adjoining land, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 128.

(*d*) As to immoral purposes: *Upfill* v. *Wright*, [1911] 1 K. B. 506 (rent); see *Girardy* v. *Richardson* (1793), 1 Esp. 13, and *Crisp* v. *Churchill* (1794), cited 1 Bos. & P. 340 (use and occupation); *Appleton* v. *Campbell* (1826), 2 C. & P. 347 (board and lodging); and compare *Smith* v. *White* (1866), L. R. 1 Eq. 626 (no action by lessee on covenant of indemnity in assignment). As to illegal purposes: *Gas Light and Coke Co.* v. *Turner* (1840), 6 Bing. (N. C.) 324, Ex. Ch. (use prohibited by statute); see *Flight* v. *Clarke* (1844), 13 M. & W. 155. If the rent is payable immediately, and the intended use is not prohibited till subsequently, the rent continues to be payable (*Gibbons* v. *Chambers* (1885), Cab. & El. 577). As to a subsequent statute making the user illegal, see *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, C. A.

(*e*) *Jennings* v. *Throgmorton* (1825), Ry. & M. 251 (weekly tenancy). If the lease contains a covenant against illegal user, and the lessee is about to break it, the lessor should apply for an injunction, and not himself attempt to exclude the lessee from the premises (*Lilley* v. *Bennett* (1888), 5 T. L. R. 156).

(*f*) *Cowan* v. *Milbourn* (1867), L. R. 2 Exch. 230.

(*g*) Compare *Feret* v. *Hill* (1854), 15 C. B. 207; *Brash* v. *Munro and Hall* (1903), 5 F. (Ct. of Sess.) 1102.

(*h*) As to the necessity for proving damage, see title INJUNCTION, Vol. XVII., p. 241. As to covenants unenforceable on the ground that they are in restraint of trade, see *ibid.*; and see title TRADE AND TRADE UNIONS.

PART IX. Restrictions on Use of Premises.

a right of re-entry, a forfeiture may result (*i*). Moreover, if land let for a specified purpose, its use for other purposes will be restrained by injunction (*j*). But otherwise the lessee is not prohibited from using the premises for any lawful purpose, notwithstanding that it is different from the purpose originally contemplated (*k*), provided there is no fraud on the lessor in taking the lease in an unrestricted form (*l*). Where the covenant is against permitting a specified act and the lessee has parted with possession of the premises, he will not usually be liable for the conduct of the occupier (*m*); but he will be liable if the covenant is an absolute covenant that the prohibited act shall not be done (*a*).

Nuisance or annoyance.

1009. A covenant against causing a "nuisance" to the lessor or to adjoining (*b*) occupiers is perhaps only broken by a nuisance in the technical sense (*c*). Where the covenant is against any act which may lead to "annoyance, nuisance, or damage," it is wider, and is broken by anything which disturbs the reasonable peace of mind of an adjoining occupier. It need not amount to physical detriment to comfort, nor need the adjoining occupier be a tenant of the same lessor (*d*).

Trade or business.

1010. A covenant not to carry on any "trade" refers only to a business conducted by buying and selling (*e*). The word "business" extends the covenant to all cases where work, involving the recourse

(*i*) The lessor is entitled to an injunction, notwithstanding that he has a power of re-entry for forfeiture (*Barret* v. *Blagrave* (1800), 5 Ves. 555).

(*j*) *Kehoe* v. *Lansdowne* (*Marquis*), [1893] A. C. 451. As to the binding effect on underlessees, see pp. 407 *et seq.*, *ante*, and on assignees, see pp. 588 *et seq.*, *post*.

(*k*) *Grand Canal Co.* v. *M'Namee* (1891), 29 L. R. Ir. 131, C. A.

(*l*) *Bonnett* v. *Sadler* (1808), 14 Ves. 526.

(*m*) See *Moses* v. *Taylor* (1862), 11 W. R. 81; *Toleman* v. *Portbury* (1870), L. R. 5 Q. B. 288, Ex. Ch.; *Toleman* v. *Portbury* (1872), L. R. 7 Q. B. 344, Ex. Ch.; *Prothero* v. *Bell* (1906), 22 T. L. R. 370; *contra*, if an underlease expressly authorises a breach of covenant (*Tritton* v. *Bankart* (1887), 56 L. T. 306).

(*a*) *Prothero* v. *Bell*, *supra*; see p. 572, *post*. As to evidence of the lessor's consent to user in violation of the restriction, see *Toleman* v. *Portbury*, *supra*.

(*b*) As to "adjoining," see *Vale & Sons* v. *Moorgate-Street and Broad-Street Buildings, Ltd., and A. Baker & Co., Ltd.* (1899), 80 L. T. 487.

(*c*) *Harrison* v. *Good* (1871), L. R. 11 Eq. 338 (the establishment of an elementary school not a breach). This restriction of the word was doubted in *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80, C. A. As to the technical meaning of "nuisance," see *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315, 322; and title NUISANCE. As to boxing entertainments at a private club, see *Seaward* v. *Paterson* (1896), 12 T. L. R. 525; as to unlawful games, see *Fairtlough* v. *Whitmore* (1895), 11 T. L. R. 288; and title GAMING AND WAGERING, Vol. XV. pp. 284 *et seq.*

(*d*) *Tod-Heatly* v. *Benham*, *supra*, at pp. 98, 99; see *Macher* v. *Foundling Hospital* (1813), 1 Ves. & B. 188. The establishment of a hospital for outdoor patients is a breach (*Tod-Heatly* v. *Benham*, *supra*; see *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691). The use of premises as a bill-posting station may be an annoyance or offensive (*Nussey* v. *Provincial Bill-posting Co. and Eddison*, [1909] 1 Ch. 734, C. A.; compare *Heard* v. *Stuart* (1907), 24 T. L. R. 104).

(*e*) *Doe* d. *Wetherell* v. *Bird* (1834), 2 Ad. & El. 161 (a private lunatic asylum is no breach). A covenant against carrying on a particular rade may be restricted to the covenantor personally notwithstanding it is entered into in consideration of a periodical payment to him and his executors (*Cook* v. *Colcraft* (1773), 2 Wm. Bl. 856). For form of such covenant, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 195, 353.

of numerous persons to the premises, is done for payment (*f*), or even without payment where the result is in effect the same as if a charge were made (*g*). The making of profit is not essential to constitute a business; nor, on the other hand, does payment necessarily constitute one (*h*). Any such user of the premises is excluded where the covenant requires them to be used as a private residence only (*i*). A covenant against affixing any outward mark of business is broken by exhibiting the name of a firm carrying on business on the premises (*k*).

A covenant against the exercise of a particular trade forbids the carrying on of any part of such trade (*l*); and the trade cannot be carried on as an accessory to the tenant's main business, though for the convenience of customers (*m*); but the covenant is not broken where the tenant, who carries on a business of a different class, merely sells, as incident to his own business, some articles which are sold in the prohibited business (*n*); nor where the premises are let to an auctioneer for the purpose of selling goods appropriate to the prohibited trade (*o*). Where the covenant is not to carry on a

(*f*) For instance, the business of a school (*Doe* d. *Bish* v. *Keeling* (1813), 1 M. & S. 95, 99; *Kemp* v. *Sober* (1851), 1 Sim (N. S.) 517; *Wickenden* v. *Webster* (1856), 6 E. & B. 387; *Johnstone* v. *Hall* (1856), 2 K. & J. 414; *Wauton* v. *Coppard*, [1899] 1 Ch. 92); or a hospital for poor persons who pay according to their means (*Bramwell* v. *Lacy* (1879), 10 Ch. D. 691). As to teaching music, see *Tritton* v. *Bankart* (1887), 56 L. T. 306. The use of the external walls of a house as a bill-posting station is a breach of a covenant against carrying on any trade or business (*Tubbs* v. *Esser* (1909), 26 T. L. R. 145); see also *Nussey* v. *Provincial Bill-posting Co. and Eddison*, [1909] 1 Ch. 734, C. A. (where the covenant was not to carry on an offensive trade or calling).

(*g*) Thus a "home" where working girls are boarded without payment is in effect the business of a lodging-house (*Rolls* v. *Miller* (1884), 27 Ch. D. 71, C. A.).

(*h*) *Rolls* v. *Miller*, *supra*; see *Portman* v. *Home Hospital Association* (1879), 27 Ch. D. 81, n.

(*i*) *German* v. *Chapman* (1877), 7 Ch. D. 271, C. A. (charitable institution for the residence and education of children); *Hobson* v. *Tulloch*, [1898] 1 Ch. 424 (boarding-house in connection with a school). A covenant to build a house as a private dwelling-house requires also that it shall be kept as such (*Bray* v. *Fogarty* (1870), 4 I. R. Eq. 544). As to a covenant not to build a dwelling-house, see *Domvile* v. *Colville* (1873), 7 I. R. C. L. 68.

(*k*) *Evans* v. *Davis* (1878), 10 Ch. D. 747; see *Wilkinson* v. *Rogers* (1863), 12 W. R. 119. Apparently conversion of a private dwelling-house into a shop may be effected by user without structural alteration (*Wilkinson* v. *Rogers* (1864), 2 De G. J. & Sm. 62, C. A.), but see *Milch* v. *Coburn* (1911), 55 Sol. Jo. 441, C. A. An auction of furniture belonging to the house is not a breach of a covenant to use as a private house (*Reeves* v. *Cattell* (1876), 24 W. R. 485); but it is a breach of an express covenant not to permit a sale by auction on the premises (*Toleman* v. *Portbury* (1870), L. R. 5 Q. B. 288, Ex. Ch.; *Toleman* v. *Portbury* (1872), L. R. 7 Q. B., Ex. Ch.). A sale by auction is allowable in a shop if not specially prohibited (*Keith* v. *Reid* (1870), L. R. 2 Sc. & Div. 39).

(*l*) *Doe* d. *Gaskell* v. *Spry* (1818), 1 B. & Ald. 617, 619; see *Doe* d. *Davis* v. *Elsam* (1828), Mood. & M. 189. Premises which are to be used only for a post-office can be used for business ordinarily carried on by post officials in connection with revenue (*Wadham* v. *Postmaster General* (1871), L. R. 6 Q. B. 644).

(*m*) *Fitz* v. *Iles*, [1893] 1 Ch. 77, C. A. (supplying of light refreshments by grocer, held to be a breach of a covenant against user as a coffee-house).

(*n*) *Stuart* v. *Diplock* (1889), 43 Ch. D. 343; see *Lumley* v. *Metropolitan Rail. Co.* (1876), 34 L. T. 774.

(*o*) *Wills* v. *Adams* (1908), 25 T. L. R. 85 (covenant against business of draper not broken by letting to auctioneer to sell furs and fur-lined goods).

PART IX. Restrictions on Use of Premises.

business similar to the specified business of another person, it is broken if the businesses are sufficiently alike to compete (*p*).

Dangerous trade.

1011. A covenant against carrying on a noisome or offensive trade or business is not broken by carrying on a dangerous trade which is neither noisome nor offensive (*q*). Whether a particular business is prohibited by the covenant will depend to some extent on whether it was carried on upon the premises at the time of the demise (*r*). Where the covenant extends to trades causing "annoyance" it is not broken by putting up prominent advertisements if the premises are in a business neighbourhood (*s*).

Public-house or tavern.

1012. A covenant against the use of premises as a "public-house, tavern, or beershop," is broken by the sale under an off-licence of beer not to be drunk on the premises (*a*); and a covenant against carrying on the trade of an innkeeper, publican, or seller by retail of wine, spirits, or beer, is broken by the sale of these liquors by a grocer in the course of his trade (*b*), or by the lessee of a theatre (*c*);

(*p*) *Drew* v. *Guy*, [1894] 3 Ch. 25, C. A.

(*q*) *Hickman* v. *Isaacs* (1861), 4 L. T. 285. As to carrying on a dangerous trade whereby the insurance premium is increased, see *Teape* v. *Douse* (1905), 92 L. T. 319; *Chapman* v. *Mason and Liniline Co.* (1910), 103 L. T. 390; and as to an injunction where the lessee underlets for such a trade in breach of covenant, see *ibid.*

(*r*) *Gutteridge* v. *Munyard* (1834), 7 C. & P. 129. Lime-burning is a noisome business (*Wiltshire* v. *Cosslett* (1889), 5 T. L. R. 410); a fried fish business (*Devonshire* (*Duke*) v. *Brookshaw* (1899), 81 L. T. 83), and the carrying on of mock auctions (*Moses* v. *Taylor* (1862), 11 W. R. 81), may be offensive; so may a private hospital (*Pembroke* (*Earl*) v. *Warren*, [1896] 1 I. R. 76, 104, C. A.); and a boys' school is within the words "injurious, offensive, or disagreeable noise or nuisance" (*Wauton* v. *Coppard*, [1899] 1 Ch. 92); but not the mere use of blinds for a business purpose so as to be inconvenient to others (compare *Gresham Life Assurance Society* v. *Ranger* (1899), 15 T. L. R. 454, C. A.), though the erection of a trellis screen may be an annoyance (*Wood* v. *Cooper*, [1894] 3 Ch. 671). A public-house is not within a covenant not to do anything to the damage, annoyance, or disturbance of the lessor or his tenants, nor is the opening of a public-house a breach of a covenant against trades that may be offensive or lead to annoyance (*Jones* v. *Thorne* (1823), 1 B. & C. 715); but a restriction on carrying on the trade of a public-house is good in law and capable of running with the land (*Zetland* (*Earl*) v. *Hislop* (1882), 7 App. Cas. 427). As to enforcing an agreement for an underlease when the intended user may prove to be a violation of a covenant in the head lease against noxious businesses, see *Reeves* v. *Greenwich Tanning Co.* (1864), 2 Hem. & M. 54; *Teape* v. *Douse*, *supra*.

(*s*) *Our Boys Clothing Co.* v. *Holborn Viaduct Land Co.* (1896), 12 T. L. R. 344.

(*a*) *St. Albans* (*Bishop*) v. *Battersby* (1878), 3 Q. B. D. 359; *London and Suburban Land and Building Co.* v. *Field* (1881), 16 Ch. D. 645, C. A.; *Nicoll* v. *Fenning* (1881), 19 Ch. D. 258). *Contra*, as to "beerhouse" (*St. Albans* (*Bishop*) v. *Battersby*, *supra*; *London and North Western Rail. Co.* v. *Garnett* (1869), L. R. 9 Eq. 26; *Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718); and as to "public-house," see *Pease* v. *Coates* (1866), L. R. 2 Eq. 688. A sale to members of a club for consumption on the premises is not a breach of a covenant against the sale of liquors (*Ranken* v. *Hunt* (1894), 10 R. 249).

(*b*) *Feilden* v. *Slater* (1869), L. R. 7 Eq. 523. A covenant not to carry on the trade of a vintner is not restricted to the sale of wine to be consumed on the premises (*Wells* v. *Attenborough* (1871), 24 L. T. 312). As to the distinction between a retail brewer and a retailer of beer, see *Simons* v. *Farren* (1834), 1 Bing. (N. C.) 126; and see, generally, title INTOXICATING LIQUORS, pp. 1 *et seq.*, *ante*.

(*c*) *Buckle* v. *Fredericks* (1890), 44 Ch. D. 244, C. A.: but the circumstances

but a covenant against a "public-house or beershop," where the premises are used as a private hotel, and no beer is sold, does not prevent the supply of wines and spirits to visitors only (*d*).

Waiver of restrictive covenant.

1013. A covenant restricting the user of premises is a continuing covenant, and there is a new breach every day while the premises are used in violation of it (*e*); but the lessor may waive the covenant partially, so as to allow of the carrying on of a particular trade (*f*). The lessor does not waive the benefit of the covenant by permitting other premises held under a similar lease to be used for the prohibited purpose (*g*). A release of the covenant need not be express. If the lessor is aware of a continuing breach and acquiesces in it for over twenty years—where, for instance, with full knowledge, he receives rent—it will be presumed that he has either released the covenant or granted a licence for the user (*h*).

Part X.—Insurance.

SECT. 1.—*Liability to Rebuild after Fire*

No general liability to rebuild after fire.

1014. Where premises are destroyed by fire in consequence of the negligence of the occupier or his servant, he is liable to make good the loss to the owner (*i*); and formerly he was under the same liability when the fire was accidental (*j*). At the present time no action can be maintained against any person in whose house or other building any fire shall accidentally begin, but this is without

may not be such as to call for an injunction (*Jones* v. *Bone* (1870), L. R. 9 Eq. 674, as explained in *Buckle* v. *Fredericks* (1890), 44 Ch. D. 244, 248).

(*d*) *Devonshire (Duke)* v. *Simmons* (1894), 11 T. L. R. 52.

(*e*) *Doe* d. *Ambler* v. *Woodbridge* (1829), 9 B. & C. 376, 378.

(*f*) *Macher* v. *Foundling Hospital* (1813), 1 Ves. & B. 188. As to the effect of the lessee entering into the covenant after a licence for a particular trade has been given and not acted upon, see *Doe* d. *Foundling Hospital (Governors and Guardians)* v. *Evans* (1825), 4 L. J. (O. S.) (K. B.) 231.

(*g*) *Kemp* v. *Sober* (1851), 1 Sim. (N. S.) 517; compare *Meredith* v. *Wilson* (1893), 69 L. T. 336.

(*h*) *Gibson* v. *Doeg* (1857), 2 H. & N. 615; *Re Summerson, Downie* v. *Summerson*, [1900] 1 Ch. 112, n.; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108; *Gibbon* v. *Payne* (1907), 23 T. L. R. 250, C. A. As to extinguishment of covenants through change in the character of an estate, see title EQUITY, Vol. XIII., p. 102; *Craig* v. *Greer*, [1899] 1 I. R. 258, C. A. As to acquiescence in the breach of covenant, see *Bray* v. *Fogarty* (1870), 4 I. R. Eq. 544; *London, Chatham, and Dover Rail. Co.* v. *Bull* (1882), 47 L. T. 413. There can be no acquiescence without knowledge of the breach on the part of the lessor *Ashcombe* v. *Mitchell* (1895), 12 T. L. R. 17, C. A.; see title EQUITY, Vol. XIII., p. 166).

(*i*) *Filliter* v. *Phippard* (1847), 11 Q. B. 347, 354; see *Hicks* v. *Downing* (1696), 1 Ld. Raym. 99; *Canterbury (Viscount)* v. *A.-G.* (1842), 1 Ph. 306, 310. According to Sir E. COKE, burning of the house by negligence or mischance is waste (Co. Litt. 53 b).

(*j*) As to the insurable interest of a lessee, see title INSURANCE, Vol. XVII., p. 523.

SECT. 1. **Liability to Rebuild after Fire.**

prejudice to any contract between landlord and tenant (*k*). Consequently a tenant who is under no obligation to repair is not liable to the landlord in the event of the destruction of the premises as the result of accident, but if the destruction is the result of negligence he is liable to the landlord in damages.

Effect of covenant to repair by lessee.

1015. If the lease contains a covenant by the tenant to repair, without exception of damage by fire, he is bound to rebuild or repair the premises should they be destroyed or injured by fire during the term (*l*); but if his liability on the covenant requires him only to leave the premises in the same state as when he entered, and the rebuilding will increase the value, the damages will be assessed by deducting the amount of this increase from the cost of rebuilding (*m*). An exception of damage by fire in the covenant to repair exempts the tenant from liability to rebuild, but does not exempt him from payment of rent (*n*).

Landlord's liability.

1016. Unless the landlord has covenanted to repair, he need not rebuild the premises if destroyed by fire during the term (*o*); and, though the tenant has covenanted to repair with an exception of damage by fire, this does not imply an obligation to rebuild on the part of the landlord (*p*). It makes no difference that the landlord has insured and has received the insurance moneys (*q*). Nor does the landlord's covenant for quiet enjoyment require him to reinstate the premises (*r*). A covenant by the lessor that, in case of fire, he will reinstate the premises in the same condition as before the fire does not bind him to restore additions made by the lessee (*s*).

(*k*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86. Though the Act (which is repealed except ss. 83 and 86) applies mainly to the metropolis, s. 86 is of general application (*Richards* v. *Easto* (1846), 15 M. & W. 244, 251; *Filliter* v. *Phippard* (1847), 11 Q. B. 347, 354; and see title INSURANCE, Vol. XVII., p. 542, note (*d*). Earlier provision to the same effect was made by stat. (1707) 6 Anne, c. 58 (c. 31, Ruffhead), made perpetual by stat. (1711) 10 Anne, c. 24 (c. 14, Ruffhead), but repealed by the stat. (1772) 12 Geo. 3, c. 73, s. 46. The word "accidentally" in the statute is opposed to "negligently," and the statute does not apply where the fire is the result of negligence; nor does it apply where a fire is lighted intentionally and mischief results to the demised buildings or to buildings or other property on adjoining premises (*Filliter* v. *Phippard*, *supra*). See title NEGLIGENCE.

(*l*) *Chesterfield* (*Earl*) v. *Bolton* (*Duke*) (1739), Com. 627; *Pym* v. *Blackburn* (1796), 3 Ves. 34, 38; *Bullock* v. *Dommitt* (1796), 6 Term Rep. 650; *Digby* v. *Atkinson* (1815), 4 Camp. 275; *Clark* v. *Glasgow Assurance Co.* (1854), 1 Macq. 668, 678, H. L.; *Morrogh* v. *Alleyne* (1873), 7 I. R. Eq. 487; see *Gregg* v. *Coates*, *Hodgson* v. *Coates* (1856), 23 Beav. 33; and p. 506, *ante*. The liability on the covenant to repair is not limited by a covenant by the lessee to insure, and he may have to expend a greater sum than the amount of the insurance (*Digby* v. *Atkinson*, *supra*). As to destruction of the premises before the lessee could take possession, see *Phillipson* v. *Leigh* (1795), 1 Esp. 398; but this apparently would be no defence.

(*m*) *Yates* v. *Dunster* (1855), 11 Exch. 15.

(*n*) *Belfour* v. *Weston* (1786), 1 Term Rep. 310.

(*o*) *Bayne* v. *Walker* (1815), 3 Dow, 233, H. L.

(*p*) See *Weigall* v. *Waters* (1795), 6 Term Rep. 488.

(*q*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; *Lofft* v. *Dennis* (1859), 1 E. & E. 474.

(*r*) *Brown* v. *Quilter* (1764), 2 Amb. 619, 620.

(*s*) *Loader* v. *Kemp* (1826), 2 C. & P. 375.

SECT. 2.—*Covenant to Insure.*

Usual covenants for insurance.

1017. In leases for less than seven years it is not usual to insert a covenant to insure either on the part of the landlord or the tenant, but in practice the insurance is effected by the landlord at his own expense. In leases for seven years and upwards the liability for insurance is expressly defined by the lease, and a covenant to insure is entered into either by the lessor or the lessee. If the covenant is by the lessor, the insurance will in the first instance be at his own expense (*t*), but provision may be made for transferring the expense to the tenant, and the most effectual way of doing this is to reserve the amount of the insurance as an additional rent. If the covenant is by the lessee, the insurance will be at his expense (*u*).

Stipulations as to office and names.

1018. A covenant to insure by the lessee may require that the insurance shall be in an office either specified or to be approved by the lessor (*v*), and in particular names; but it is not necessary that the office should be specified (*a*), and in the absence of such special requirements the covenant is performed by an insurance for a proper sum by the lessee in his own name with an office selected by him. A covenant to insure in the joint names of the lessor and lessee is broken by an insurance in the name of the lessee only (*b*); and a covenant to insure in the name of the lessor is broken if the lessee adds his own name (*c*); but an insurance in the name of the lessor only, when it should be in the joint names of the lessor and lessee, is a substantial performance of the covenant, since the addition of the lessee's name is only for his own benefit (*d*).

(*t*) Apparently the lessor cannot deduct the premium for the purpose of income tax (*Turner* v. *Carlton*, [1909] 1 K. B. 932).

(*u*) Breach of the covenant is usually a cause of forfeiture, but this may not be so if the lessor is entitled to insure on default, and if the amount of the premium is reserved as additional rent so that he can distrain for it (*Doe* d. *Pittman* v. *Sutton* (1841), 9 C. & P. 706). If the lessor pays the premium this will be a waiver of the forfeiture (*Mills* v. *Griffiths* (1876), 45 L. J. (Q. B.) 771). As to proof of non-insurance, see *Chaplin* v. *Reid* (1858), 1 F. & F. 315. Undisturbed possession by the lessee is evidence that there has been no breach (*Montresor* v. *Williams* (1823), 1 L. J. (O. S.) (CH). 151). Formerly there was no relief against forfeiture for non-insurance (*Green* v. *Bridges* (1830), 4 Sim. 96), but relief is now allowed, see p. 539, *post*. For form of covenant to insure, see Encyclopædia of Forms and Precedents, Vol. VII., p. 194. As to the effect of a covenant not to do anything whereby the premium for insurance may be increased, see *Chapman* v. *Mason and Liniline Co.* (1910), 103 L. T. 390.

(*v*) Where the office is to be named by the lessor, there is probably no breach of covenant by non-insurance unless the lessor has named an office (*Lillie* v. *Legh* (1858), 3 De G. & J. 204). Often the particular office is named in the lease (*Doe* d. *Flower* v. *Peck* (1830), 1 B. & Ad. 428; *Chaplin* v. *Reid*, *supra*).

(*a*) *Doe* d. *Pitt* v. *Shewin* (1811), 3 Camp. 134.

(*b*) *Doe* d. *Knight* v. *Rowe* (1826), Ry. & M. 343; *Doe* d. *Muston* v. *Gladwin* (1845), 6 Q. B. 953. If the insurance is to be in the name of the lessor and his assignee, there can be no breach after assignment of the reversion until notice to the lessee (*Crane* v. *Batten* (1854), 23 L. T. (O. S.) 220).

(*c*) *Penniall* v. *Harborne* (1848), 11 Q. B. 368.

(*d*) *Havens* v. *Middleton* (1853), 10 Hare, 641; and where the insurance is in the lessee's name only, the lessor may have debarred himself by his conduct from recovering for the forfeiture; where, for instance, he has induced the lessee to believe that such insurance would be accepted as a compliance with

SECT. 2. Covenant to Insure.

1019. A covenant by the lessee to insure and keep insured the demised premises requires that the lessee shall effect the insurance within a reasonable time. If the effecting of the insurance is delayed, the onus of showing that the delay is reasonable is on the lessee (*e*).

Breach of covenant to insure.

It is a breach of covenant if any part of the premises are uninsured (*f*), and if the insurance is not subsisting at any time during the term (*g*). So long as there is a failure to keep the premises insured in accordance with the terms of the covenant, there is a continuing breach, and receipt of rent by the lessor only operates as a waiver of the forfeiture until the receipt (*h*). Although no fire has occurred during the period that the premises were uninsured, it is possible that the lessor is entitled to recover more than nominal damages by reason of the risk which he has run (*i*); but the lessee, on remedying the breach, can obtain relief against the forfeiture, and relief may be given without requiring payment by the lessee of any sum by way of compensation (*j*).

Separate insurances by landlord and tenant.

1020. If the lessee has insured in accordance with his covenant, and the lessor effects a separate insurance, the loss will be apportioned by the offices between the two policies. But the lessor cannot in this way deprive the lessee of the benefit of his performance of the covenant, and he must account to the lessee for the moneys received under the policy effected by himself (*k*).

SECT. 3.—*Effect on Rent of Damage by Fire.*

Suspension of rent.

1021. The destruction of the premises by fire does not, in the absence of express stipulation, suspend the liability of the lessee to pay rent (*l*); and even though the lessor has received the insurance

the covenant (*Doe* d. *Knight* v. *Rowe* (1826), Ry. & M. 343); but this may be only a waiver as to past breaches (see *Doe* d. *Muston* v. *Gladwin* (1845), 6 Q. B. 953); and as to waiver generally, see p. 537, *post*.

(*e*) *Doe* d. *Darlington* v. *Ulph* (1849), 13 Q. B. 204. If the delay is short, and the lessor has led the lessee to believe that there was already an existing insurance on the premises, he cannot treat the breach of covenant as a cause of forfeiture (*Doe* d. *Pittman* v. *Sutton* (1841), 9 C. & P. 706).

(*f*) *Penniall* v. *Harborne* (1848), 11 Q. B. 368.

(*g*) *Doe* d. *Flower* v. *Peck* (1830), 1 B. & Ad. 428, 438; *Heckman* v. *Isaac* (1802), 6 L. T. 383. The covenant is broken by non-insurance, although no actual loss may be occasioned to the lessor (*Doe* d. *Pitt* v. *Shewin* (1811), 3 Camp. 134, 137, where a premium not paid within the days of grace was subsequently accepted by the office). See *Wilson* v. *Wilson* (1854), 14 C. B. 616; *Price* v. *Worwood* (1859), 4 H. & N. 512; and compare *Doe* d. *Pitt* v. *Laming* (1814), 4 Camp. 73 (where an indorsement after the death of the lessee in favour of his executors was sufficient, though not made within the stipulated time).

(*h*) *Doe* d. *Muston* v. *Gladwin*, *supra*.

(*i*) *Hey* v. *Wyche* (1842), 12 L. J. (Q. B.) 83, 85.

(*j*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14; see p. 541, *post*. As to the respective rights of a lessee and underlessee when neither had insured and the lease had been consequently forfeited, see *Logan* v. *Hall* (1847), 4 C. B. 598, 614, 623; and see p. 409, *ante*.

(*k*) *Reynard* v. *Arnold* (1875), 10 Ch. App. 386; and see title INSURANCE, Vol. XVII., p. 524.

(*l*) *Baker* v. *Holtpzaffell* (1811), 4 Taunt. 45; *Ixon* v. *Gorton* (1839), 5 Bing.

money and refuses to rebuild, the rent continues to be payable throughout the residue of the term (*m*). This is so notwithstanding that there is a covenant to repair by the lessee which contains an express exception of damage by fire (*n*). But if there is no demise for a term certain, the rent may be treated as accruing from day to day, so that it will stop if the premises are rendered uninhabitable by fire (*o*). In all cases where the duty of insuring is on the landlord, whether by covenant or as a matter of practice, the lease may properly contain a proviso for suspending the rent while the premises are uninhabitable by reason of fire (*p*).

SECT. 3. Effect on Rent of Damage by Fire.

SECT. 4.—*Application of Insurance Money.*

1022. An express covenant to insure, whether by the lessor or the lessee, usually provides that the insurance moneys shall be applied in reinstating the premises (*q*). Where the lessor insures on his own account, without being under express liability to do so, and receives the insurance moneys, he is not bound to apply them in rebuilding (*r*). But the lessee is entitled, at any time before the insurance office has paid the moneys to the lessor (*s*), to require that they shall be spent in restoring the premises (*a*). This does not extend to trade fixtures affixed by the tenant (*b*).

Application of insurance money.

Part XI.—Covenant for Quiet Enjoyment.

SECT. 1.—*Express and Implied Covenants.*

1023. An express covenant for quiet enjoyment may be either restricted—that is, that the lessee shall peaceably hold and enjoy the demised premises during the term (*c*) without interruption by the lessor or persons claiming under him—or absolute, in which case it extends also to interruption by persons claiming by title

Usual form of covenant.

(N. C.) 501; *Marshall* v. *Schofield & Co.* (1882), 52 L. J. (Q. B.) 58, C. A.; see *Monk* v. *Cooper* (1727), 2 Stra. 763; and see p. 481, *ante*.

(*m*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; *Lofft* v. *Dennis* (1859), 1 E. & E. 474.

(*n*) *Belfour* v. *Weston* (1786), 1 Term Rep. 310; *Hare* v. *Groves* (1796), 3 Anst. 687.

(*o*) *Packer* v. *Gibbins* (1841), 1 Q. B. 421 (furnished lodgings).

(*p*) See *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507; and as to a covenant to pay rent, damage by fire excepted, see *Bennett* v. *Ireland* (1858), E. B. & E. 326.

(*q*) See Encyclopædia of Forms and Precedents, Vol. VII., p. 194.

(*r*) See p. 481, *ante*.

(*s*) *Simpson* v. *Scottish Union Insurance Co.* (1863), 1 Hem. & M. 618.

(*a*) See title INSURANCE, Vol. XVII., pp. 542, 543.

(*b*) *Re Barker, Ex parte Gorely* (1864), 4 De G. J. & Sm. 477.

(*c*) That is, during the term which the lessor purports to grant, not the term which he has power to grant (*Evans* v. *Vaughan* (1825), 4 B. & C. 261, 268). A clause whereby the lessor binds himself "to warrant and defend" the lessee against all persons lawfully claiming the premises during the term operates as an express covenant for quiet enjoyment (*Williams* v. *Burrell* (1845), 1 C. B. 402).

SECT. 1. Express and Implied Covenants.

paramount (*d*). The restricted form is usually adopted for insertion in leases, and under it the lessor is not liable for acts of persons claiming by title paramount (*e*), even though those acts are the consequence of his own default. Hence in the case of a sub-lease, if the superior landlord evicts the sub-lessee for non-payment of the head-rent (*f*), or for non-observance by him of a covenant of which he had received no notice from the sub-lessor (*g*), this is not a breach of the covenant for quiet enjoyment. But it is a breach if the sub-lessor submits to judgment in an action of ejectment by a person who has no title to sue, and the sub-lessee is in consequence evicted (*h*).

Effect of covenant.

1024. The covenant usually provides for quiet enjoyment "without interruption by the lessor or any persons rightfully claiming under or in trust for him," or "without any lawful interruption by the lessor or any persons claiming under or in trust for him." Whichever of these forms is used, the covenant only protects against the acts of persons claiming under the lessor so far as they are successors in title to the lessor, or actually have authority from him to do the acts (*i*); and the effect is the same even if the words "rightfully" or "lawful" are not inserted (*k*). The covenant does not extend to acts of a stranger, notwithstanding that he purports

(*d*) See *Foster* v. *Pierson* (1792), 4 Term Rep. 617.

(*e*) *Woodhouse* v. *Jenkins* (1832), 9 Bing. 431. For form of such a covenant, see Encyclopædia of Forms and Precedents, Vol. VII., p. 197.

(*f*) *Kelly* v. *Rogers*, [1892] 1 Q. B. 910, C. A. For a contrary view, see *Stevenson* v. *Powell* (1612), 1 Bulst. 182.

(*g*) *Spenser* v. *Marriott* (1823), 1 B. & C. 457; *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316, Ex. Ch. Nor is there a breach if the lessor omits to pay land tax and distress for arrears is levied on the lessee (*Stanley* v. *Hayes* (1842), 3 Q. B. 105).

(*h*) *Cohen* v. *Tannar*, [1900] 2 Q. B. 609, C. A. But if the lessor has agreed to give an absolute covenant for quiet enjoyment, the lessee is entitled to have such a covenant inserted in the lease, notwithstanding that the lessor has no title to part of the premises (*Onions* v. *Cohen* (1865), 2 Hem. & M. 354).

(*i*) *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, 684, C. A.; see *Sanderson* v. *Berwick on Tweed Corporation* (1884), 13 Q. B. D. 547, 551, C. A.; and compare *Fox* v. *Waters* (1840), 12 Ad. & El. 43. As to the restriction of the terms of a covenant for quiet enjoyment by reference to other covenants in the lease, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 483. The following persons have been held to "claim under" the lessor within the meaning of the covenant:—a person claiming under a settlement made by the settlor under a power (*Carpenter* v. *Parker* (1857), 3 C. B. (N. S.) 206); a remainderman under a settlement made by the lessor before the lease (*Hurd* v. *Fletcher* (1778), 1 Doug. (K. B.) 43; *Evans* v. *Vaughan* (1825), 4 B. & C. 261); the lessor's widow claiming under a fine levied before the lease to the lessor, his wife, and his heirs (*Butler* v. *Swinnerton* (*Lady*) (1623), Cro. Jac. 656); a person claiming under a prior appointment by the lessor and another (*Calvert* v. *Sebright* (1852), 15 Beav. 156). Where the lessor has been a party to a prior lease as trustee the prior lessee claims under him (*Markham* v. *Paget*, [1908] 1 Ch. 697, 711); but an assignee of the reversion, who becomes owner of adjoining land by an independent title, does not claim under the lessor as to such adjoining land so as to be restricted in the use of it by the covenant (*Davis* v. *Town Properties Investment Corporation, Ltd.*, [1903] 1 Ch. 797, C. A.).

(*k*) *Williams* v. *Gabriel*, [1906] 1 K. B. 155. As to excluding in the statement of claim the possibility that the disturbance may be by a person deriving title from the lessee himself, see *Brookes* v. *Humphreys* (1838), 5 Bing. (N. C.) 55.

to claim under the lessor (*l*); nor does it extend to unlawful acts of persons who in fact derive title under the lessor (*m*). But it extends to all acts of the lessor himself which interrupt the enjoyment, whether they are lawful or not (*n*). It is none the less a breach that the lessor has the right to do the act complained of (*o*).

Though in general the covenantor is not taken to covenant against the wrongful acts of strangers (*p*), it is otherwise if a person is specified in the covenant, since the covenantor then knows against whose acts he covenants (*q*).

Acts of lessee claiming under same lessor.

It follows that it is no breach if the interruption is caused by an adjoining lessee whose lease, though granted by the same lessor, does not authorise the act causing the interruption (*r*); nor, in the case of a lease of sporting rights over a farm with a covenant for quiet enjoyment, if the farm tenant interferes with the sporting rights in breach of the terms of his own lease (*s*).

Payment of rent not condition precedent.

1025. The covenant in the lease for quiet enjoyment usually provides that the lessee, paying the rent and performing the covenants, shall quietly enjoy the demised premises; but under such words the payment of the rent is not a condition precedent to the performance of the covenant (*a*).

Implied covenant for quiet enjoyment.

1026. An express covenant for quiet enjoyment excludes an implied covenant to the same effect (*b*), but, in the absence of an express covenant, the word "demise" implies a covenant for quiet enjoyment (*c*); and it is now settled that a like covenant is implied from

(*l*) *Contra*, if the covenant extends to persons "claiming or pretending to claim" (*Chaplain* v. *Southgate* (1717), 10 Mod. Rep. 383).

(*m*) *Tisdale* v. *Essex* (1614), Hob. 34; *Hayes* v. *Bickerstaff* (1669), Vaugh. 118; *Wotton* v. *Hele* (1670), 2 Wms. Saund. (ed. 1871), 524, 525, note (3); *Dudley* v. *Folliott* (1790), 3 Term Rep. 584; see *Anon.* (1774), Lofft, 460.

(*n*) For as against the party himself the court will not consider the word "lawful," or drive the lessee to his action of trespass (*Crosse* v. *Young* (1685), 2 Show. 426, 427; *Andrews* v. *Paradise* (1724), 8 Mod. Rep. 318; compare *Corus* v. —— (1597), Cro. Eliz. 544); but the disturbance must be under a claim of right by the lessor (*Lloyd* v. *Tomkies* (1787), 1 Term Rep. 671).

(*o*) *Andrews* v. *Paradise*, *supra*.

(*p*) *Nash* v. *Palmer* (1816), 5 M. & S. 374, 379.

(*q*) *Foster* v. *Mapes* (1591), Cro. Eliz. 212; *Nash* v. *Palmer*, *supra*, at p. 380; *Fowle* v. *Welsh* (1822), 1 B. & C. 29.

(*r*) *Sanderson* v. *Berwick on Tweed Corporation* (1884), 13 Q. B. D. 547, C. A.

(*s*) *Jeffreys* v. *Evans* (1865), 19 C. B. (N. S.) 246.

(*a*) *Dawson* v. *Dyer* (1833), 5 B. & Ad. 584; *Edge* v. *Boileau* (1885), 16 Q. B. D. 117.

(*b*) *Nokes's Case* (1599), 4 Co. Rep. 80 b; *Merrill* v. *Frame* (1812), 4 Taunt. 329; *Stannard* v. *Forbes* (1837), 6 Ad. & El. 572; *Line* v. *Stephenson* (1838), 5 Bing. (N. C.) 183, Ex. Ch.; *Clayton* v. *Leech* (1889), 41 Ch. D. 103, 107, C. A.; see *Murphy* v. *Bandon Co-operative Agricultural and Dairy Society*, [1909] 2 I. R. 510. But even where there is an express covenant, the lessor may still be liable for acts not covered by it on the principle that he may not derogate from his own grant; consequently he cannot use his adjoining land so as to interfere with the enjoyment of the demised premises (*Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836, C. A.). But for the court to give relief on this ground the interference must be substantial (*Browne* v. *Flower*, [1911] 1 Ch. 219).

(*c*) *Burnett* v. *Lynch* (1826), 5 B. & C. 589, 609; *Iggulden* v. *May* (1804), 9 Ves. 325, 330; *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145;

SECT. 1. Express and Implied Covenants.

"Demise."

the mere contract of letting, in whatever form it is expressed (*d*). The covenant implied from the word "demise" is an absolute covenant, and protects the tenant in the event of disturbance under a paramount title (*e*); but apparently the covenant implied from a contract of letting without the word "demise" is restricted, like the usual express covenant, to the acts of the lessor and persons claiming under him (*f*). Like the express covenant, the implied covenant protects the lessee against all disturbance by the lessor, whether lawful or not, save under a right of re-entry (*g*); but as against other persons it protects the lessee only against lawful disturbance (*h*).

Duration of implied covenant.

1027. The implied covenant for quiet enjoyment does not insure the possession of the lessee during the whole term. It is operative only during the continuance of the estate of the lessor in virtue whereof he was able to give possession to the lessee; and, if this ceases during the currency of the term, the liability on the covenant, save for disturbance already suffered, also ceases. Consequently where a lease is granted by a tenant for life which does not bind the remainderman, and the lessee is evicted after the death of the tenant for life, the lessee has no remedy on the implied covenant (*i*); and an underlessee for a term longer than the residue of the head term has no remedy if he is evicted at the expiration of the head term (*k*).

provided there is an actual demise and not a mere agreement for demise (*Brashier* v. *Jackson* (1840), 6 M. & W. 549); but an agreement is now frequently equivalent to a demise (*Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.; see p. 367, *ante*); and as to implied covenants, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 480.

(*d*) *Granger* v. *Collins* (1840), 6 M. & W. 458; *Messent* v. *Reynolds* (1846), 3 C. B. 194; *Bandy* v. *Cartwright* (1853), 8 Exch. 913; *Hall* v. *City of London Brewery Co.* (1862), 2 B. & S. 737; *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, C. A.; *Hoare* v. *Chambers* (1895), 11 T. L. R. 185; *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351; *Markham* v. *Paget*, [1908] 1 Ch. 697, where the question was reviewed by SWINFEN EADY, J. The *dicta* to the contrary in *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, C. A., have not been accepted as correct. With regard to implied obligations as to quiet enjoyment in cases of disturbance by machinery, where the machinery is contemplated at the time of the letting, see *Lyttelton Times Co.* v. *Warners, Ltd.*, [1907] A. C. 476, P. C.

(*e*) See *Nokes's Case* (1599), 4 Co. Rep. 80 b; *Merrill* v. *Frame* (1812), 4 Taunt. 329. Thus the lessor is bound to protect the lessee from distress by the superior landlord for rent due under the head lease (*Hancock* v. *Coffyn* (1832), 8 Bing. 358, 366), unless the sub-lessee has undertaken to pay such rent (*Upton* v. *Fergusson* (1833), 3 Moo. & S. 88).

(*f*) *Jones* v. *Lavington*, [1903] 1 K. B. 253, C. A. This case appears to be at variance with the previous authorities, see *Markham* v. *Paget*, *supra*, at p. 717.

(*g*) *Andrews' Case of Gray's Inn* (1591), Cro. Eliz. 214.

(*h*) A "covenant in law," *i.e.*, an implied covenant, protects against lawful, not tortious, interruptions, and the reason of the law is solid and clear, because against tortious acts the lessee has proper remedy against the wrongdoers (*Hayes* v. *Bickerstaff* (1669), Vaugh. 118; *Wallis* v. *Hands*, [1893] 2 Ch. 75, 83; see *Granger* v. *Collins* (1840), 6 M. & W. 458); and see title TRESPASS.

(*i*) *Swan* v. *Stransham and Searles* (1566), Dyer, 257 a; *Adams* v. *Gibney* (1830), 6 Bing. 656; *Penfold* v. *Abbott* (1862), 32 L. J. (Q. B.) 67.

(*k*) *Schwartz* v. *Locket* (1889), 61 L. T. 719; *Baynes & Co.* v. *Lloyd & Sons*, [1895] 1 Q. B. 820; affirmed, [1895] 2 Q. B. 610, C. A.

SECT. 1. Express and Implied Covenants.

No implied covenant for title generally.

1028. It has been said that a covenant for title is also implied from the word "demise" (*l*), and from other words of letting (*m*). But this is not a covenant that the lessor is entitled to grant the term which he purports to grant (*n*), but only that he is entitled to grant some term: in effect, it is a covenant that the lessor is entitled to give and will give possession (*o*); and, quite apart from any implied covenant for title, the lessor, by granting the lease, undertakes to put the lessee into possession, and is liable in damages for a breach of this undertaking (*p*). But the lessee cannot sue until he is entitled to possession (*q*); and the action will not lie on an agreement to grant a lease (*r*), unless it is equivalent to an actual lease (*s*).

SECT. 2.—*Breach of Covenant.*

Substantial interference with enjoyment.

1029. The covenant for quiet enjoyment operates according to its terms to secure the lessee, not merely in the possession, but in the enjoyment of the premises for all usual purposes; and where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor or those lawfully claiming under him, the covenant is broken, although neither the title to, nor the possession of, the land, may be otherwise affected (*t*). Whether this interference has taken place is, in each case, a question of fact (*u*).

(*l*) *Burnett* v. *Lynch* (1826), 5 B. & C. 589, 609; *Line* v. *Stephenson* (1838), 5 Bing. (N. C.) 183, Ex. Ch. The judgments in *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, C. A., contain *dicta* to the contrary, but that case is only a reliable authority for the particular point decided. See note (*n*), *infra*.

(*m*) *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145, 152; see *Hart* v. *Windsor* (1843), 12 M. & W. 68, 85.

(*n*) The implied covenant for title, whatever its nature, determines with the lessor's interest (*Baynes & Co.* v. *Lloyd & Sons*, *supra*, at p. 617); hence it cannot be a covenant that the lessor is entitled to grant the lease for the full term; *contra*, *Fraser* v. *Skey* (1773), 2 Chit. 646; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 480.

(*o*) See *Holder* v. *Taylor* (1613), Hob. 12; 39 Sol. Jo. 444.

(*p*) *Coe* v. *Clay* (1829), 5 Bing. 440; *Jinks* v. *Edwards* (1856), 11 Exch. 775; *Smart* v. *Jones* (1864), 15 C. B. (N. S.) 717, 724; and see *Milch* v. *Coburn* (1911), 27 T. L. R. 372, C. A. The damages, apparently, are not limited by the rule in *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158 (see p. 380, *ante*); but, as in the case of breach of the covenant for quiet enjoyment, will represent the actual loss to the lessee (see p. 529, *post*).

(*q*) *Ireland* v. *Bircham* (1835), 2 Bing. (N. C.) 90.

(*r*) *Drury* v. *Macnamara* (1855), 5 E. & B. 612.

(*s*) See note (*b*), p. 367, *ante*.

(*t*) *Sanderson* v. *Berwick on Tweed Corporation* (1884), 13 Q. B. D. 547, 551, C. A.; see *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, 685, C. A.; *Manchester, Sheffield and Lincolnshire Railway* v. *Anderson*, [1898] 2 Ch. 394, C. A.; *Williams* v. *Gabriel*, [1906] 1 K. B. 155. Formerly the covenant was described as a covenant to secure title and possession (*Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316, 326); but the recent decisions have given it the wider scope indicated in the text (*Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, 96, C. A.).

(*u*) *Sanderson* v. *Berwick on Tweed Corporation*, *supra*; *Allport* v. *Securities Co., Ltd.* (1895), 72 L. T. 533. But the mere likelihood of interruption is not enough. Hence it is no breach if a judgment is obtained subjecting land to a right of common, but there is no entry on, or actual disturbance of, the lessee (*Howard* v. *Maitland* (1883), 11 Q. B. D. 695, C. A.). Nor is an action for waste a disturbance (*Morgan* v. *Hunt* (1690), 2 Vent. 213).

SECT. 2. Breach of Covenant.

Acts involving physical interference.

1030. The covenant is not broken by acts, such as noise or disorderly conduct, done on adjoining premises which, though they constitute a nuisance and in that way interfere with the enjoyment of the demised premises, do not involve any actual physical interference with the premises (*a*). But if the act causes physical interference (*b*) with the demised premises, there is a breach of covenant, notwithstanding that the act itself is done off the premises; where, for example, a lower stratum of minerals has been demised, and the lessor works the upper stratum so as to cause the roof of the lower stratum to fall in and the mine to be flooded (*c*); or where, by a heating apparatus off the premises, the premises are overheated so as to become unsuitable for the use contemplated when the lease was granted (*d*).

Covenant does not enlarge grant.

1031. The lessee cannot, however, by means of the covenant for quiet enjoyment, obtain over adjoining property, an easement or right which would not otherwise be included in the demise. The covenant does not enlarge what was previously granted, but gives an additional remedy if the lessee cannot get or is deprived of that which has been previously professed to be granted (*e*). Consequently where the lessee has not acquired a right to light or to the access of air, he cannot complain of interference with light or air as a breach of the covenant (*f*); and the covenant for quiet enjoyment does not prevent the ordinary user of adjoining premises of the lessor unless this is detrimental to the purpose for which the demised premises were let (*g*).

(*a*) *Jenkins* v. *Jackson* (1888), 43 Ch. D. 71; *Jaeger* v. *Mansions Consolidated, Ltd.* (1903), 87 L. T. 690, C. A. The words "peaceably and quietly enjoy" have no reference to noise; they mean "without interference—without interruption of possession" (*Jenkins* v. *Jackson, supra,* at p. 74).

(*b*) "To constitute a breach of such a covenant, there must be some physical interference with the enjoyment of the demised premises" (*Browne* v. *Flower,* [1911] 1 Ch. 219, *per* PARKER, J., at p. 228).

(*c*) *Shaw* v. *Stenton* (1858), 2 H. & N. 858.

(*d*) See *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, C. A.

(*e*) *Leech* v. *Schweder* (1874), 9 Ch. App. 463; *Potts* v. *Smith* (1868), L. R. 6 Eq. 311, 317; *Davis* v. *Town Properties Investment Corporation, Ltd.,* [1903] 1 Ch. 797, C. A.; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 221 *et seq.*

(*f*) *Davis* v. *Town Properties Investment Corporation, Ltd., supra.* In *Tebb* v. *Cave,* [1900] 1 Ch. 642, it was held that building by the lessor on adjoining premises so as to deprive the demised premises of a current of air and cause them to smoke was a breach of the covenant for quiet enjoyment; but this was disapproved of in *Davis* v. *Town Properties Investment Corporation, Ltd., supra.* That the covenant does not confer a right to light so as to prevent the lessor from building on adjoining premises, see *Booth* v. *Alcock* (1873), 8 Ch. App. 663. Where the demised premises form part of a building estate, the circumstances existing at the date of the lease and known to both parties show that the lessor was not to be deprived of the right of building, and this forms a further reason for not construing the covenant so as to deprive him of the right (*Potts* v. *Smith, supra*); especially if the lessee has obtained the premises at a reduced rent on account of the probable erection of adjoining buildings (*Robson* v. *Palace Chambers, Westminster, Co.* (1897), 14 T. L. R. 56).

(*g*) *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, C. A.; and see *Browne* v. *Flower, supra.* Where a lease of shooting and sporting rights over a farm contains a covenant for quiet enjoyment, this does not prevent the tenant of the farm from using the land in the ordinary way, or from destroying furze and underwood in the ordinary course (*Jeffryes* v. *Evans* (1865), 19 C. B. (N. S.) 246; see *Newton* v. *Wilmot* (1841), 8 M. & W. 711). Nor in the case of a lease of corporate property

Moreover, when the disturbance is not due to some act of direct interference with the premises, but to an act done off the premises, there is no breach of covenant unless it was either foreseen in fact, or ought by reasonable care to have been foreseen, that the interruption would follow as the consequence of the act (*h*).

Interference by acts off the premises.

1032. Disturbance of enjoyment which is merely temporary, and which does not interfere with the title or possession of the lessee, is not a breach of covenant (*i*).

Temporary disturbance.

1033. The act or omission which causes the disturbance of enjoyment must be subsequent to the granting of the lease; though if it is the act or omission of a person claiming under the lessor the title or authority under which he claims to do the act may have been created or given before the lease (*k*). Where the lessor acquires adjoining land after the lease, he is not restricted by the covenant (*l*) in the user of this land.

Acts prior to demise.

1034. Probably no action can be brought on the covenant for quiet enjoyment until the lessee has actually entered (*m*). The remedy of the lessee, if he cannot obtain possession, is on the implied covenant for title or the implied agreement by the lessor to put him in possession (*n*). But possession obtained under a prior valid lease is sufficient to support an action on the covenant for quiet enjoyment contained in a lease in reversion which is invalid (*o*).

Action for breach before entry.

1035. The damages in an action for breach of the covenant for quiet enjoyment are measured by the loss naturally resulting from the breach. If the lessee is evicted owing to the invalidity

Measure of damages.

does the covenant prevent the corporation from exercising a statutory right, such as the establishment of a market (*Spurling* v. *Bantoft*, [1891] 2 Q. B. 384).

(*h*) Thus where a mine is demised, and an adjoining mine is held under the same lessor, the fact that the working of the demised mine is disturbed by an unforeseen rush of water into the adjoining mine does not constitute a breach of the covenant (*Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, 689, C. A.).

(*i*) *Manchester, Sheffield, and Lincolnshire Railway* v. *Anderson*, [1898] 2 Ch. 394, 401, C. A.; and even if it does constitute a breach an injunction will not be granted, but the lessee will only have a remedy in damages (*Leader* v. *Moody* (1875), L. R. 20 Eq. 145).

(*k*) *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602, C. A.; *Markham* v. *Paget*, [1908] 1 Ch. 697; but see *Blatchford* v. *Plymouth Corporation* (1837), 3 Bing. (N. C.) 691.

(*l*) *Davis* v. *Town Properties Investment Corporation, Ltd.*, [1903] 1 Ch. 797, C. A.

(*m*) *Wallis* v. *Hands*, [1893] 2 Ch. 75, 85; but as regards the case where a third person is in possession under lawful title, there is earlier authority to the contrary; the lessee, it has been said, ought not to be forced to make a tortious entry, and so subject himself to an action (*Cloake* v. *Hooper* (1673), Freem. (K. B.) 122; *Ludwell* v. *Newman* (1795), 6 Term Rep. 458; see *Holder* v. *Taylor* (1613), Hob. 12; and compare *Hawkes* v. *Orton* (1836), 5 Ad. & El. 367); and in America this is treated as a constructive eviction, so as to entitle the lessee to sue on the covenant for quiet enjoyment; see Rawle on Covenants for Title, 5th ed., ss. 138, 139.

(*n*) See *Wallis* v. *Hands*, *supra*, and p. 527, *ante*.

(*o*) *Lock* v. *Furze* (1866), L. R. 1 C. P. 441, Ex. Ch.

SECT. 2. Breach of Covenant.

of the lease, he can recover the value of the term, and the pecuniary loss he has suffered by the action to evict him; that is, the costs of defending the action, and any sum recovered against him in the action as mesne profits (*p*). Similarly, if he has been compelled to leave the demised premises, he can recover the expense of removal, since this is loss which naturally flows from the breach of covenant (*q*).

Part XII.—Determination of Term.

SECT. 1.—*Forfeiture.*

SUB-SECT. 1.—*Right of Re-entry.*

Effect of proviso for re-entry.

1036. A lease may contain an express proviso for re-entry (*r*) by the lessor on specified events, such as non-payment of rent, non-performance or non-observance by the lessee of the covenants of the lease, the bankruptcy of the lessee (*s*), or the levy of execution on his goods (*t*). Such proviso leaves it optional with the lessor whether he will exercise his right of determining the lease, upon a cause of forfeiture arising, and the effect is the same when the proviso contains a declaration that in the events specified the term shall cease. This does not by itself enable the lessee to treat the term as at an end; the lease is not void but voidable (*a*), and only the lessor can avoid it (*b*). Hence, notwithstanding the cause of

(*p*) *Williams* v. *Burrell* (1845), 1 C. B. 402; *Rolph* v. *Crouch* (1867), L. R. 3 Exch. 44; see *Sutton* v. *Baillie* (1891), 65 L. T. 528. If the lessee takes a substituted lease from the lawful owner, the difference in value between the invalid lease and the substituted lease will be the measure of damages (*Lock* v. *Furze* (1866), L. R. 1 C. P. 441, Ex. Ch.); and these may be only nominal (see *Jones* v. *Hawkins* (1886), 3 T. L. R. 59).

(*q*) *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836, C. A. The damages here were given for the tort caused by nuisance, the express covenant for quiet enjoyment not applying; but the same measure seems to apply to breach of covenant.

(*r*) As to when such a proviso can be inserted in a lease made in pursuance of an agreement for a lease to certain "usual covenants and provisions," see p. 388, *ante*. Conduct on the part of the lessee of which the lessor, for political or other reasons, disapproves gives no right of re-entry (*Yelloly* v. *Morley* (1910), 27 T. L. R. 20). For form of proviso for re-entry, see Encyclopædia of Forms and Precedents, Vol. VII., p. 199.

(*s*) A proviso for re-entry on bankruptcy refers to the bankruptcy of the person in whom the term is vested for the time being (*Smith* v. *Gronow*, [1891] 2 Q. B. 394; see *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739, 749; *Horsey Estate Ltd.* v. *Steiger*, [1899] 2 Q. B. 79, C. A.); and as to the bankruptcy of a sole surviving devisee in trust, see *Doe* d. *Bridgman* v. *David* (1834), 1 Cr. M. & R. 405; S. C. *sub nom. Doe* d. *Williams* v. *Davies* (1834), 6 C. & P. 614. As to insolvency, see *Kilkenny Gas Co.* v. *Somerville* (1878), 2 L. R. Ir. 192; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 92, 149.

(*t*) *Davies* v. *Eyton* (1830), 7 Bing. 154; as to extent by the Crown, see *R.* v. *Topping* (1825), M'Cle. & Yo. 544, P. C.

(*a*) *Bowser* v. *Colby* (1841), 1 Hare, 109; see *Davenport* v. *R.* (1877), 3 App Cas. 115, 128, P. C.

(*b*) The lessee who has been guilty of a wrongful act cannot avail himself of that wrongful act to insist that the lease has thereby become void (*Doe* d.

forfeiture, the tenancy continues until the lessor does some act which shows his intention to determine it (*c*). Further, although the proviso declares that on re-entry the lessor shall have the premises again as if the deed had never been made, the lessor can sue for rent accrued due, or for breach of covenant committed, before the forfeiture (*d*).

Re-entry as against underlessees.

1037. The forfeiture of the lease destroys also the rights of underlessees (*e*); and a breach of covenant as to part of the premises, if followed by forfeiture, will destroy an underlease of another part (*f*).

Term created on condition.

1038. The lease will be determinable without an express proviso for re-entry, if the event specified in a condition, subject to which the term was created, happens (*g*). Such condition may be express or implied. The words "provided always" or "upon condition" are suitable for introducing an express condition, but no precise form of words is necessary; it is sufficient if the words used were intended to have the effect of creating a condition; and a clause may operate as a condition, although it includes also words of covenant (*h*).

But if the clause constitutes only an agreement on the part of the lessee to do or not to do a specific act, the lessor cannot re-enter for

Bryan v. *Bancks* (1821), 4 B. & Ald. 401, 406; see *Reid* v. *Parsons* (1817), 2 Chit. 247; *Rede* v. *Farr* (1817), 6 M. & S. 121; *Arnsby* v. *Woodward* (1827), 6 B. & C. 519; *Dakin* v. *Cope* (1827), 2 Russ. 170; *Doe* d. *Nash* v. *Birch* (1836), 1 M. & W. 402; *Jones* v. *Carter* (1846), 15 M. & W. 718, 725; *Toleman* v. *Portbury* (1871), L. R. 6 Q. B. 245, 250; *Re Tickle, Ex parte Leather Sellers' Co.* (1886), 3 Morr. 126); but formerly the proviso avoiding the lease was construed literally (*Pennant's Case* (1596), 3 Co. Rep. 64 a, 64 b). It can only operate during the term, and cannot be used after the term to deprive the lessee of a claim to emblements (*Johns* v. *Whitley* (1770), 3 Wils. 127, 140).

(*c*) *Roberts* v. *Davey* (1833), 4 B. & Ad. 664, 671. As to avoidance of a Crown lease under a colonial statute, see *Davenport* v. *R.* (1877), 3 App. Cas. 115, P. C.

(*d*) *Hartshorne* v. *Watson* (1838), 4 Bing. (N. C.) 178; and compare *Blore* v. *Giulini*, [1903] 1 K. B. 356.

(*e*) *Great Western Rail. Co.* v. *Smith* (1876), 2 Ch. D. 235, 253, C. A.

(*f*) *Darlington* v. *Hamilton* (1854), Kay, 550; *Creswell* v. *Davidson* (1887), 56 L. T. 811.

(*g*) See *Freeman* v. *Boyle* (1788), 2 Ridg. Parl. Rep. 69, 79; *Sexton* d. *Freeman* v. *Boyle* (1788), Vern. & Scr. 402, 414, Ex. Ch.; *Doe* d. *Lockwood* v. *Clarke* (1807), 8 East, 185.

(*h*) *Doe* d. *Henniker* v. *Watt* (1828), 8 B. & C. 308, 315, where it was "stipulated and conditioned" that the lessee should not assign the premises otherwise than to his wife or children. This was a condition for the breach of which the lessor was entitled to maintain ejectment; see Co. Litt. 203 b; *Pembroke* (*Earl*) v. *Berkley* (1595), Cro. Eliz. 384; *Harrington* v. *Wise* (1596), Cro. Eliz. 486. But a distinction was formerly made between conditions for breach of which a penalty is attached and conditions where there is no penalty. The former are sufficiently protected by the penalty, and may be construed as covenants only; the latter would be futile unless enforceable by re-entry (*Simpson* v. *Titterell* (1591), Cro. Eliz. 242). The condition must not be illegal or repugnant to the grant (Bac. Abr. "Leases and Terms for Years" (T. 2), 885). Compare title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 478.

SECT. 1. Forfeiture.

a breach of it except under an express proviso for re-entry (*i*). A lease containing a proviso for re-entry need not be by deed (*j*).

Impugning landlord's title is ground of forfeiture.

1039. There is implied in every lease a condition that the lessee shall not do anything that may prejudice the title of the lessor; and that if this is done the lessor may re-enter for breach of this implied condition (*k*). Thus it is a cause of forfeiture if the lessee denies the title of the lessor by alleging in writing—or, in the case of a tenancy from year to year, either in writing or verbally (*l*)—that the title to the land is in himself or another (*m*); or if he assists a stranger to set up an adverse title, as where he acknowledges the freehold title to be in him (*n*), or delivers the premises to him in order to enable him to set up a title (*o*). In the case of a tenancy from year to year, the effect of such denial of title is that the tenancy may be forthwith determined by the landlord without notice to quit (*p*). But it is not sufficient that the lessee pays rent to a stranger (*q*), or does not at once acknowledge the title of the landlord, or refuses to give up possession at a time when the landlord has no right to claim it (*r*).

Construction of forfeiture clauses.

1040. The ordinary rules of construction apply to conditions and covenants the breach of which may lead to a forfeiture (*s*), and the intention of the parties has to be found from the language they

(*i*) *Doe* d. *Willson* v. *Phillips* (1824), 2 Bing. 13 (agreement to give up part of the premises on lessor's requisition); *Shaw* v. *Coffin* (1863) 14 C. B. (N. S.) 372 (agreement not to underlet without consent); see *Crawley* v. *Price* (1875), L. R. 10 Q. B. 302.

(*j*) See *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.) 421.

(*k*) Bac. Abr., "Leases and Terms for Years" (T. 2), 884. On a similar principle, concealment by a lessee for lives of the death of a *cestui que vie* is a forfeiture of a right of renewal (see *Pendred* v. *Griffith* (1744), 1 Bro. Parl. Cas. 314).

(*l*) *Doe* d. *Graves* v. *Wells* (1839), 10 Ad. &. El. 427. It is a question of fact whether a particular expression amounts to a disclaimer of the landlord's title; see *Doe* d. *Bennett* v. *Long* (1841), 9 C. & P. 773.

(*m*) *Doe* d. *Williams and Jeffery* v. *Cooper* (1840), 1 Man. & G. 135, 139; see *Doe* d. *Whitehead* v. *Pittman* (1833), 2 Nev. & M. (K. B.) 673; *Doe* d. *Phillips* v. *Rollings* (1847), 4 C. B. 188, 200 (disclaimer proved); *Doe* d. *Lewis* v. *Cawdor* (1834), 1 Cr. M. & R. 398; *Hunt* v. *Allgood* (1861), 10 C. B. (N. S.) 253; *Jones* v. *Mills* (1861), 10 C. B. (N. S.) 788 (disclaimer not proved); see also cases cited in note (*p*), *infra*. Similarly where, in proceedings between himself and the lessor, the lessee, either as plaintiff or defendant, sets up an adverse title in himself, a cause of forfeiture arises (Bac. Abr., "Leases and Terms for Years" (T. 2), 884).

(*n*) Bac. Abr., "Leases and Terms for Years" (T. 2) 884.

(*o*) *Doe* d. *Ellerbrock* v. *Flynn* (1834), 1 Cr. M. & R. 137; see *Ackland* v. *Lutley* (1839), 9 Ad. & El. 879, 884.

(*p*) *Throgmorton* v. *Whelpdale* (1769), Buller, Law of Nisi Prius, 7th ed., 96; *Doe* d. *Williams* v. *Pasquali* (1794), Peake, 196 [259]; *Doe* d. *Jefferies* v. *Whittick* (1820), Gow, 195; *Doe* d. *Calvert* v. *Frowd* (1828), 4 Bing. 557; *Doe* d. *Grubb* v. *Grubb* (1830), 10 B. & C. 816; *Doe* d. *Davies* v. *Evans* (1841), 9 M. & W. 48; *Doe* d. *Landsell* v. *Gower* (1851), 17 Q. B. 589, 592; *Vivian* v. *Moat* (1881), 16 Ch. D. 730. Similarly, denial of the landlord's title determines a tenancy at will (*Doe* d. *Price* v. *Price* (1832), 9 Bing. 356, 358).

(*q*) *Doe* d. *Dillon* v. *Parker* (1820), Gow, 180.

(*r*) *Doe* d. *Gray* v. *Stanion* (1836), 1 M. & W. 695, 703.

(*s*) See *Croft* v. *Lumley* (1858), 6 H. L. Cas. 672, 693.

have used (*t*). Conditions of this nature are entitled neither to favour nor disfavour, but a fair construction is to be put upon them according to the apparent intent of the contracting parties (*a*).

Thus in the case of a covenant with a proviso for re-entry, the court has to ascertain the meaning of the covenant without regard to the forfeiture, and then see, upon that ascertained meaning, whether a forfeiture has been incurred (*b*). But, subject to this principle, the court leans towards a literal (*c*) or strict (*d*) construction of a clause of forfeiture; and, since the clause destroys or defeats the estate, it is subject to the subsidiary rule of construction that it is to be taken most strongly against the person at whose instance it is introduced, that is, the lessor (*e*). Hence, before the forfeiture is established, it must be clearly shown, in the case of a condition, that the event specified in the condition has happened, and, in the case of a proviso for re-entry on breach of covenant, that the proviso extends to the covenant (*f*), and that there has been a breach thereof (*g*). A condition against assignment is not

(*t*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*

(*a*) *Goodtitle* d. *Luxmore* v. *Saville* (1812), 16 East, 87, *per* Lord ELLENBOROUGH, C.J., at p. 95; *Doe* d. *Davis* v. *Elsam* (1828), Mood. & M. 189; *Doe* d. *Muston* v. *Gladwin* (1845), 6 Q. B. 953, 961.

(*b*) *Bristol Corporation* v. *Westcott* (1879), 12 Ch. D. 461, 465, C. A.

(*c*) *Doe* d. *Spencer* v. *Godwin* (1815), 4 M. & S. 265, 269 (proviso for re-entry for breach of covenants "hereinafter contained"; no forfeiture for breach of covenant occurring before the proviso, though there were no covenants after); see *Rees* d. *Powell* v. *King and Morris* (1800), For. 19 (proviso for re-entry if no sufficient distress is found; every part of the premises must be searched); *Doe* d. *Abdy* (*Sir W.*) v. *Stevens* (1832), 3 B. & Ad. 299 (proviso for re-entry if the lessee did an "act" contrary to the covenants did not apply to an omission to repair); *Doe* d. *Lloyd* v. *Ingleby* (1846), 15 M. & W. 465 (proviso for re-entry if lessee duly found bankrupt did not apply where there was an error in the process). If the condition is grammatically unintellegible the court will not find a meaning for it (*Doe* d. *Wyndham* v. *Carew* (1841), 2 Q. B. 317). Where the breach is by act of law a forfeiture is not incurred, see *Doe* d. *Grantley* (*Lord*) v. *Butcher* (1840), 6 Q. B. 115, n. (b); *Doe* d. *Anglesea* (*Marquis*) v. *Rugeley* (*Churchwardens*) (1844), 6 Q. B. 107; and as to re-entry under a statutory power, see *Doe* d. *Bywater* v. *Brandling* (1828), 7 B. & C. 643.

(*d*) *Doe* d. *Lloyd* v. *Powell* (1826), 5 B. & C. 308, 313; see *Northcote* v. *Duke* (1765), Amb. 511.

(*e*) *Doe* d. *Abdy* (*Sir W.*) v. *Stevens*, *supra*, at p. 303. And the lessor may disqualify himself to enforce a forfeiture, where, for instance, after the cause of forfeiture, he advises a purchaser to purchase the lease (*Doe* d. *Sore* v. *Eykins* (1824), 1 C. & P. 154).

(*f*) *Croft* v. *Lumley* (1858), 6 H. L. Cas. 672, 693. Where the proviso is for re-entry on breach of covenants or stipulations, it applies to a provision against assignment though not in the form of a covenant (*Brookes* v. *Drysdale* (1877), 3 C. P. D. 52).

(*g*) *West* v. *Dobb* (1870), L. R. 5 Q. B. 460, Ex. Ch.; *Bristol Corporation* v. *Westcott* (1879), 12 Ch. D. 461, 467, C. A. It is for the plaintiff to prove the forfeiture; thus, on an alleged breach of a covenant to insure, the plaintiff must prove the non-insurance; it is not sufficient that the lessee fails to produce the policy, unless he is expressly bound to do so by the covenant (*Doe* d. *Bridger* v. *Whitehead* (1838), 8 Ad. & El. 571; see *Doe* d. *Chandless* v. *Robson* (1826), 2 C. & P. 245; *Chaplin* v. *Reid* (1858), 1 F. & F. 315). The plaintiff cannot have discovery to prove a forfeiture (*Mexborough* (*Earl*) v. *Whitwood Urban District Council*, [1897] 2 Q. B. 111, C. A.); compare *Uxbridge* (*Lord*) v. *Staveland* (1747), 1 Ves. Sen. 56. As to forfeiture for acts done by the permission of the lessee and without the consent of the lessor, see *Toleman* v. *Portbury* (1870), L. R. 5 Q. B. 288, Ex. Ch.; *Toleman* v. *Portbury* (1872), L. R. 7 Q. B. 344, Ex. Ch.

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broken by the creation of an equitable charge (*h*), or by an assignment which is in fact void (*i*). But where there is a proviso for re-entry on the "liquidation" of a company, being the lessee, this word, in the absence of express restriction, includes voluntary liquidation, though only for the purpose of reconstruction (*k*).

Positive and negative covenants.

1041. Inasmuch as some of the lessee's covenants—such as the covenant to repair—are positive, and others—such as the covenant not to assign—are negative, it is usual to make the proviso for re-entry take effect on the "non-performance or non-observance" of the lessee's covenants; but while these words are appropriate to the positive and negative covenants respectively, yet words referring to "non-performance" only are sufficient (*l*).

To whom right may be reserved.

1042. At common law a right of re-entry can only be reserved in favour of the person in whom the legal estate is vested, either actually or by estoppel (*m*); and it can only be taken advantage of by such person and his heirs (*n*), or, in the case of leaseholds, his personal representatives (*o*). Where the lease is granted by a limited owner under a power, the word "heir" includes the

(*h*) *Bowser* v. *Colby* (1841), 1 Hare, 109, 138; and see p. 576, *post*.

(*i*) *Doe* d. *Lloyd* v. *Powell* (1826), 5 B. & C. 308, 313; see *Denn* d. *Dolman v. Dolman* (1794), 5 Term Rep. 641.

(*k*) *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. 79, C. A.; *Fryer* v. *Ewart*, [1902] A. C. 187. In a compulsory liquidation the right of re-entry accrues on the making of the winding-up order (*General Share and Trust Co.* v. *Wetley Brick and Pottery Co.* (1882), 20 Ch. D. 260, C. A.); and see title COMPANIES, Vol. V., p. 537.

(*l*) *Harman* v. *Ainslie*, [1904] 1 K. B. 698, C. A., *per* COLLINS, M.R., at p. 709: "In a proviso for re-entry for non-performance of covenants, it seems to me that the word 'perform' is used as meaning the fulfilment of the obligation or duty undertaken, and not as referring to the thing to be done or left undone in pursuance of the covenant." Previously to this decision it was considered that where there was a reference to non-performance only of covenants, the proviso for re-entry would not apply to breach of a negative covenant; see *Hyde* v. *Warden* (1877), 3 Ex. D. 72, 82, C. A.; *Evans* v. *Davis* (1878), 10 Ch. D. 747, 761; though a reference also to non-observance extended the proviso to such covenants; see *Croft* v. *Lumley* (1858), 6 H. L. Cas. 672; *Evans* v. *Davis*, *supra*; *Timms* v. *Baker* (1883), 49 L. T. 106 ("perform and keep"); and the word "performance" will still be restricted to positive covenants where there is a condition attached to the proviso for re-entry which indicates that this is the intention; where, for instance, the proviso is to take effect on default by the lessee in the performance of his covenants after a specified length of notice from the lessor (*Doe* d. *Palk* v. *Marchetti* (1831), 1 B. & Ad. 715; see *Harman* v. *Ainslie*, *supra*).

(*m*) Thus a right of entry could not be reserved in favour of a *cestui que trust*, whose title as such appeared by the lease (*Doe* d. *Barney* v. *Adams* (1832), 2 Cr. & J. 232; *Doe* d. *Barker* v. *Goldsmith* (1832), 2 Cr. & J. 674; *Saunders* v. *Merryweather* (1865), 3 H. & C. 902; see *Doe* d. *Barber* v. *Lawrence* (1811), 4 Taunt. 23). But if the lease does not show that the lessor's title is equitable, his want of the actual legal estate is immaterial, since, as against the lessee, he has a legal estate by estoppel (*Doe* d. *Barker* v. *Goldsmith*, *supra*; see *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135, Ex. Ch.); and as to estate by estoppel, see title ESTOPPEL, Vol. XIII., pp. 402 *et seq.*; and see pp. 436, 437, *ante*.

(*n*) Littleton's Tenures, s. 347. But where the condition itself determined the lease, the grantee of the reversion could take advantage of it (Co. Litt 214 b).

(*o*) Co. Litt. 214 b.

remainderman (*p*). But by statute (*q*), the benefit of a proviso for re-entry passes to the grantee of the reversion, though he cannot take advantage of a forfeiture incurred before the assignment (*r*), nor can he forfeit for non-payment of rent unless he has given notice of the assignment to the lessee (*s*); and, as regards leases made after 31st December, 1881, it is provided generally that conditions of re-entry are annexed to the reversionary estate in the land expectant on the term, and further, that they are capable of being taken advantage of by the person for the time being entitled, subject to the term, to the income of the land leased (*t*). Hence, where a beneficiary is in the position of landlord under a lease, the fact that his title is equitable does not prevent his exercising a right of re-entry (*a*). But to support a condition of re-entry it is not essential that there should be a reversion. A lessee who sub-lets for the whole residue of his term can reserve a right of re-entry on breach of covenant notwithstanding that the sub-lease operates as an assignment (*b*).

32 Hen. 8, c. 34.

1043. The terms of the proviso require that, if the lessor elects to determine the lease for a forfeiture, he shall do so by re-entry (*c*); and in the case of forfeiture for non-payment of rent he must first make formal demand of payment (*d*), unless this requirement is

What amounts to re-entry.

(*p*) *Greenaway* v. *Hart* (1854), 14 C. B. 340, 356.

(*q*) Stat. (1540) 32 Hen. 8, c. 34; see p. 586, *post*.

(*r*) Stat. (1705) 4 & 5 Ann. c. 3, s. 9; see *Cohen* v. *Tannar*, [1900] 2 Q. B. 609, C. A. Thus neither the lessor nor the grantee of the reversion can take advantage of a forfeiture incurred before the grant (*Fenn* d. *Matthews and Lewis* v. *Smart* (1810), 12 East, 444). Rights of entry are assignable under the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6; but it has been held that the statute only applies where an owner has a right of entry to recover his lost possession—that is, where he has been disseised; not where his right is to re-enter for condition broken (*Hunt* v. *Bishop* (1853), 8 Exch. 675; *Hunt* v. *Remnant* (1854), 9 Exch. 635; see *Jenkins* v. *Jones* (1882), 9 Q. B. D. 128, 131, C. A.); compare Challis, Law of Real Property, 3rd ed., 77, n.

(*s*) Stat. (1705) 4 & 5 Ann. c. 3, s. 10; see p. 595, *ante*.

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10.

(*a*) *E.g.*, where a lease has been granted by an equitable tenant for life under the statutory power, the remainderman, on his estate falling into possession, can exercise the right of re-entry. But where the legal reversion is in a mortgagee it seems that the mortgagor, although in possession, cannot re-enter for forfeiture (see *Molyneux* v. *Richard*, [1906] 1 Ch. 34; see title MORTGAGE). In *Matthews* v. *Usher*, [1900] 2 Q. B. 535, C. A., where the lease was before the 1st January, 1882, it was held that, so long as the mortgagee, as legal owner, had not taken steps to forfeit the lease, the mortgagor was not entitled to possession under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5).

(*b*) *Doe* d. *Freeman* v. *Bateman* (1818), 2 B. & Ald. 168.

(*c*) Where the premises are in the possession of an underlessee, a re-letting of the premises to him by the lessor is a sufficient re-entry to avoid the lease (*Baylis* v. *Le Gros* (1858), 4 C. B. (N. S.) 537); but it has been held to be otherwise when he relets to a stranger to whose entry the underlessee objects (*Parker* v. *Jones*, [1910] 2 K. B. 32).

(*d*) *Doe* d. *Chandless* v. *Robson* (1826), 2 C. & P. 245; *Hill* v. *Kempshall* (1849), 7 C. B. 975; *Jackson & Co.* v. *Northampton Street Tramways Co.* (1886), 55 L. T. 91. The demand must be made upon the land, and, if there is a house on the premises, at the front door (Co. Litt. 201 b, 202 a); it may, in the absence of the lessee, be made upon the occupier (*Doe* d. *Brook* v. *Brydges* (1822), 2 Dow. & Ry. (K. B.) 29); but it is good though no one is on the premises (Co. Litt. 201 b); it must be only of the sum due for rent for the last period for payment (*Scot* v. *Scot* (1587), Cro. Eliz. 73; *Fabian* v. *Winston* (1590), Cro. Eliz. 209

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Formal demand of rent.

dispensed with by suitable words in the proviso (*e*), or by statute. Usually the formal demand is expressly dispensed with by inserting the words "whether formally demanded or not" (*f*), and it is dispensed with by statute in cases where half-a-year's rent is in arrear and no sufficient distress can be found upon the premises (*g*). But actual entry is not necessary in order to take advantage of the forfeiture. When the cause of forfeiture is complete, the lessor can bring an action to recover possession, and the bringing of the action is equivalent to actual entry (*h*). Provided that the lessor definitely claims possession (*i*), the issue of the writ operates as a final election to determine the term, whether judgment is obtained or not (*k*).

Doe d. *Wheeldon* v. *Paul* (1829), 3 C. & P. 613); and must be made before sunset on the last day of payment, and continued till sunset (Co. Litt. 202 a; *Wood and Chivers' Case* (1573), 4 Leon. 179; *Doe* d. *Wheeldon* v. *Paul, supra; Acocks* v. *Phillips* (1860), 5 H. & N. 183; and see 1 Wms. Saund. (ed. 1871), 434; *Doe* d. *Darke* v. *Bowditch* (1846), 8 Q. B. 973). The condition is saved by tender of the rent to him who is to receive it on any part of the land at any time of the last day of payment (Co. Litt. 202 a).

(*e*) *Doe* d. *Harris* v. *Masters* (1824), 2 B. & C. 490.

(*f*) It seems that the words "being demanded" are sufficient, but the full period of grace must be allowed to elapse before demand (*Phillips* v. *Bridge* (1873), L. R. 9 C. P. 48), and the amount demanded must be correct (*Jackson & Co.* v. *Northampton Street Tramways Co.* (1886), 55 L. T. 91). "Being lawfully demanded" was held not to dispense with formal demand in *Doe* d. *Scholefield* v. *Alexander* (1814), 2 M. & S. 525, though in that case demand was dispensed with by the statute; but Lord ELLENBOROUGH, C.J., dissented, and in *Manser* v. *Dix* (1857), 8 De G. M. & G. 703, C. A., these words were treated as sufficient. As to a power of distress upon a mining rent being "legally demanded," see *Thorp* v. *Hurt*, [1886] W. N. 96.

(*g*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210 (re-enacting the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 2). The statute dispenses with both formal demand and re-entry, and enables the lessor to sue for recovery of the premises. It must be proved that half a year's rent was due before the writ was served, that there was no sufficient distress (*Doe* d. *Forster* v. *Wandlass* (1797), 7 Term Rep. 117), and that the lessor had power to re-enter (*Doe* d. *Darke* v. *Bowditch* (1846), 8 Q. B. 973). Formerly, if judgment was entered for non-appearance, these matters were proved by affidavit (*Cross* v. *Jordan* (1852), 8 Exch. 149); but now the affidavit is seldom if ever used, since the plaintiff proceeds under R. S. C., Ord. 13, r. 8. A distress which reduces the arrears below half a year's rent takes the case out of the statute (*Cotesworth* v. *Spokes* (1861), 10 C. B. (N. S.) 103). The goods must be so visibly on the premises as to be distrainable by a broker using due diligence (*Doe* d *Haverson* v. *Franks* (1847), 2 Car. & Kir. 678); but it is not necessary that the goods should be actually distrained (see *Rickett* v. *Green*, [1910] 1 K. B. 253, on the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 139). If the premises are locked up, no distress can be found and the statute is satisfied (*Hammond* v. *Mather* (1862), 3 F. & F. 151; see *Doe* d. *Chippendale* v. *Dyson* (1827), Mood. & M. 77; *Doe* d. *Cox* v. *Roe* (1847), 5 Dow. & L. 272). The statute does not prevent the parties from dispensing with formal demand by the lease (*Goodright* d. *Hare* v. *Cator* (1780), 2 Doug. (K. B.) 477, 486).

(*h*) Under the old practice in ejectment the defendant admitted the lessor's entry, and no actual entry was necessary (*Goodright* d. *Hare* v. *Cator* (1780), 2 Doug. (K. B.) 477; *Doe* d. *Phillips* v. *Rollings* (1827), 4 C. B. 188, 197); and the alteration in procedure has not affected the right of the lessor, so that he can still bring his action without previous entry (*Grimwood* v. *Moss* (1872), L. R. 7 C. P. 360, 364; *Ware* v. *Booth* (1894), 10 T. L. R. 446; see *Re Morrish, Ex parte Hart Dyke* (*Sir W.*) (1882), 22 Ch. D. 410, C. A.

(*i*) *Moore* v. *Ullcoats Mining Co., Ltd.*, [1908] 1 Ch. 575, where an inconsistent claim was added; see *ibid.*, at p. 589, as to the proceedings on appeal.

(*k*) *Jones* v. *Carter* (1846), 15 M. & W. 718; *Serjeant* v. *Nash, Field & Co.*,

Waiver of forfeiture.

1044. It is at the option of the lessor whether he will take advantage of a forfeiture or not (*l*), and if he elects not to do so the forfeiture is waived. Such election may be either express or implied, and it is implied when the lessor, after the cause of forfeiture has come to his knowledge (*m*), does any act whereby he recognises the relation of landlord and tenant as still continuing (*n*). The onus of proof that the lessor knew of the cause of forfeiture is on the lessee (*o*). By such act of recognition he is precluded from saying that he did not do the act with the intention of waiving the forfeiture (*p*). But a lessor does not waive the forfeiture by merely standing by and seeing it incurred, where, for instance, the lessee makes alterations in breach of covenant and the lessor does not interfere: there must be some positive act of waiver (*q*).

What acts amount to waiver.

1045. A subsisting tenancy is recognised, and, provided that the lessor has notice of the cause of forfeiture, the forfeiture is waived, by his bringing an action for (*r*), or by the mere receipt of, rent which has accrued due since the cause of forfeiture (*s*), whether the

[1903] 2 K. B. 304, C. A.; see *Kilkenny Gas Co.* v. *Somerville* (1878), 2 L. R. Ir. 192.

(*l*) See p. 530, *ante*.

(*m*) Waiver implies knowledge; see *Pennant's Case* (1596), 3 Co. Rep. 64 a; *Harvey* v. *Oswald* (1597), Cro. Eliz. 553, 572; *Roe* d. *Gregson* v. *Harrison* (1788), 2 Term Rep. 425.

(*n*) *Ward* v. *Day* (1864), 5 B. & S. 359, 362, Ex. Ch.; *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522, 533, C. A.; see *Green's Case* (1582), Cro. Eliz. 3.

(*o*) *Matthews* v. *Smallwood*, [1910] 1 Ch. 777.

(*p*) *Toleman* v. *Portbury* (1871), L. R. 6 Q. B. 245, 248.

(*q*) *Doe* d. *Sheppard* v. *Allen* (1810), 3 Taunt. 78, 81; *Perry* v. *Davis* (1858), 3 C. B. (N. S.) 769; compare *Griffin* v. *Tomkins* (1880), 42 L. T. 359, 362. But it will be a waiver if the lessor encourages the lessee to spend money (*North Staffordshire Steel etc. Co.* v. *Camoys* (1865), 11 Jur. (N. S.) 555, C. A.; see *Hume* v. *Kent* (1811), 1 Ball & B. 554); and as to acquiescence, see *Whitehead* v. *Bennett* (1861), 9 W. R. 626.

(*r*) *Roe* d. *Crompton* v. *Minshall* (1760), Buller, Law of Nisi Prius, 7th ed., 96; *Dendy* v. *Nicholl* (1858), 4 C. B. (N. S.) 376; *Penton* v. *Barnett*, [1898] 1 Q. B. 276, C. A. The lessor, if he takes advantage of the forfeiture, will recover the equivalent of the rent as mesne profits. The taking of other proceedings which imply the continuance of the tenancy will also operate as a waiver of the forfeiture; see *Pellatt* v. *Boosey* (1862), 31 L. J. (C. P.) 281; *Evans* v. *Davis* (1878), 10 Ch. D. 747.

(*s*) *Pennant's Case* (1596), 3 Co. Rep. 64 a, 64 b, note (B); *Whitchcot* v. *Fox* (1616), Cro. Jac. 398; *Goodright* d. *Walter* v. *Davids* (1778), 2 Cowp. 803; *Arnsby* v. *Woodward* (1827), 6 B. & C. 519; *Doe* d. *Griffith* v. *Pritchard* (1833), 5 B. & Ad. 765; *Doe* d. *Gatehouse* v. *Rees* (1838), 4 Bing. (N. C.) 384; *Pellatt* v. *Boosey, supra*; *Miles* v. *Tobin* (1867), 17 L. T. 432; *Clifford* v. *Reilly* (1869), 4 I. R. C. L. 218; especially if the lessor has also required repairs to be done (*Griffin* v. *Tomkins* (1880), 42 L. T. 359). Payment into the lessor's banking account, if usual, may operate as a waiver, although the lessor has instructed the bank not to receive it (*Pierson* v. *Harvey* (1885), 1 T. L. R. 430). It is sufficient if payment is accepted from an under-tenant (*Price* v. *Worwood* (1859), 4 H. & N. 512) or other person in satisfaction of the rent (*Pellatt* v. *Boosey, supra*). The rule applies to a Crown lease (*Bridges* v. *Longman* (1857), 24 Beav. 27). The forfeiture is not waived by acceptance of rent accrued due before the cause of forfeiture (*Green's Case* (1582), Cro. Eliz. 3; *Price* v. *Worwood, supra*), unless at the same time the lessor recognises the tenancy as subsisting, where, for instance, he describes the lessee as such in the receipt; see *Green's Case, supra*.

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forfeiture is for condition broken or under an express proviso for re-entry (*t*), by distraining for rent, whether accrued due before or after the cause of forfeiture (*a*), unless the object of the distress is such that the distress does not imply a recognition of the tenancy, as where it is levied for the purpose of escaping the requirement of formal demand of the rent (*b*), and by agreeing to grant a new lease to commence from the regular determination of the existing lease (*c*). Probably also an absolute and unqualified demand of rent due after the cause of forfeiture, made by the lessor or his duly authorised agent, operates as a waiver (*d*). But if the lessor has already shown a final determination to take advantage of the forfeiture, for instance, by commencing an action to recover possession, no subsequent act, whether receipt of rent (*e*), or distress (*f*), or otherwise, will operate as a waiver.

Continuing breach of covenant.

1046. Where the breach of covenant which gives the right of re-entry is a continuing breach (*g*), there is a continually recurring

Where notice has been given to repair under a covenant requiring notice of a specified length, there is no forfeiture till the expiration of the notice, and receipt, after such expiration, of rent which accrued due before is no waiver (*Cronin* v. *Rogers* (1884), Cab. & El. 348): but this assumes that the breach of the general covenant to repair has been waived; see p. 510, *ante*.

(*t*) *Marsh* v. *Curteys* (1596), Cro. Eliz. 528. The waiver cannot be prevented by the rent being accepted without prejudice to the forfeiture (*Davenport* v. *R.* (1877), 3 App. Cas. 115, P. C.; see *Croft* v. *Lumley* (1855), 5 E. & B. 648, (1856), 682, Ex. Ch.; (1858), 6 H. L. Cas. 672, 744; *Strong* v. *Stringer* (1889), 61 L. T. 470, 472).

(*a*) *Green's Case* (1582), Cro. Eliz. 3; *Pennant's Case* (1596), 3 Co. Rep. 64 a; *Doe* d. *Flower* v. *Peck* (1830), 1 B. & Ad. 428; *Doe* d. *David* v. *Williams* (1835), 7 C. & P. 322. Since, apart from statute, the landlord can only distrain during the continuance of the tenancy, it makes no difference whether the arrears accrued due before or after the forfeiture. In ordinary cases of determination of tenancy, distress can be made within six months after the determination under the Landlord and Tenant Act, 1709 (8 Ann. c. 18); but this does not apply where the tenancy is determined for forfeiture (*Grimwood* v. *Moss* (1872), L. R. 7 C. P. 360, 365; *Kirkland* v. *Briancourt* (1890), 6 T. L. R. 441; compare *Ward* v. *Day* (1864), 5 B. & S. 359, Ex. Ch.; and see title DISTRESS, Vol. X., p. 150. But the continuing in possession of a distress levied before the forfeiture is not a waiver (*Doe* d. *Taylor* v. *Johnson* (1816), 1 Stark. 411).

(*b*) See Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210; p. 536, *ante*; *Brewer* d. *Onslow* (*Lord*) v. *Eaton* (1783), 3 Doug. (K. B.) 230; *Thomas* v. *Lulham*, [1895] 2 Q. B. 400, C. A.

(*c*) *Doe* d. *Weatherhead* v. *Curwood* (1835), 1 Har. & W. 140; *Ward* v. *Day*, *supra*.

(*d*) See *Doe* d. *Nash* v. *Birch* (1836), 1 M. & W. 402, 408; and compare *Toleman* v. *Portbury* (1872), L. R. 7 Q. B. 344, Ex. Ch.

(*e*) *Doe* d. *Morecraft* v. *Meux* (1824), 1 C. & P. 346; see *Toleman* v. *Portbury*, *supra*, at p. 351. But receipt of rent may be evidence of a new tenancy from year to year on such of the former terms as are applicable (*Evans* v. *Wyatt* (1880), 43 L. T. 176).

(*f*) *Grimwood* v. *Moss*, *supra*; see *Kilkenny Gas Co.* v. *Somerville* (1878), 2 L. R. Ir. 192.

(*g*) *E.g.*, a covenant to repair (*Coward* v. *Gregory* (1866), L. R. 2 C. P. 153; *Penton* v. *Barnett*, [1898] 1 Q. B. 276, C. A.; see *Fryett* d. *Harris* v. *Jeffreys* (1795), 1 Esp. 393; and a covenant to insure (*Doe* d. *Flower* v. *Peck* (1830), 1 B. & Ad. 428; *Doe* d. *Muston* v. *Gladwin* (1845), 6 Q. B. 953). In the case of a covenant against assigning or underletting or permitting a third person to occupy the premises, it is not a continuing breach to allow an underlessee to remain in possession (*Walrond* v. *Hawkins* (1875), L. R. 10 C. P. 342); though

cause of forfeiture, and receipt of rent or the levying of distress is only a waiver of the forfeiture incurred up to the date when the rent was due (*h*), or the distress was levied (*i*), and the lessor is not precluded from taking advantage of the breach continuing since such date (*k*).

Waiver extends only to particular breach.

1047. A waiver of the benefit of a covenant or condition in a lease only extends to the particular breach of covenant or condition to which it relates, and is not a general waiver of the benefit of the covenant or condition unless an intention to that effect appears (*l*).

SUB-SECT. 3.—*Relief against Forfeiture.*

(i.) *Under the Conveyancing Acts*, 1881—1892.

Statutory conditions of re-entry. Conveyancing Act, 1881, s. 14.

1048. Before a right of re-entry or forfeiture (*m*) for breach of a covenant or condition in a lease can be enforced by action or otherwise (*n*), the lessor must, save in certain cases (*o*), serve on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring him to remedy it; and in any case requiring him to make compensation in money for the breach. If the lessee fails within a reasonable time after service

user of premises by the underlessee contrary to a covenant in the head lease may be a continuing breach of that covenant on the part of the lessee (*Lawrie* v. *Lees* (1880), 14 Ch. D. 249, 262, C. A.; affirmed (1881), 7 App. Cas. 19, 30; *contra*, *Griffin* v. *Tomkins* (1880), 42 L. T. 359).

(*h*) *Doe* d. *Ambler* v. *Woodbridge* (1829), 9 B. & C. 376; *Doe* d. *Baker* v. *Jones* (1850), 5 Exch. 498.

(*i*) *Doe* d. *Hemmings* v. *Durnford* (1832), 2 Cr. & J. 667.

(*k*) *Penton* v. *Barnett*, [1898] 1 Q. B. 276, C. A. (where a three months' notice to repair was served under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, on 22nd September, 1896, and on 14th January, 1897, no repairs having been done, an action was brought claiming the rent due on 25th December, and possession. It was held, overruling *Bevan* v. *Barnett* (1897), 13 T. L. R. 310, that the claim to rent was not a waiver of the breach of the covenant to repair continuing after 25th December. But if the lessee does some repairs, and the lessor continues for several quarters to receive the rent while negotiations as to a new lease are going on, he will be held to have waived the breach notwithstanding that it is continuing (*Guillemard* v. *Silverthorne* (1908), 99 L. T. 584).

(*l*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 6. The statute speaks of "actual waiver," but this does not mean express waiver by formal written document (*Mills* v. *Griffiths* (1876), 45 L. J. (Q. B.) 771). At common law a condition against assignment was not apportionable, and a waiver of a particular breach destroyed the condition altogether (*Dumpor's Case* (1603), 4 Co. Rep. 119 b); but this did not apply to a condition against underletting (*Doe* d. *Griffith* v. *Pritchard* (1833), 5 B. & Ad. 765, 781; see *Doe* d. *Boscawen* v. *Bliss* (1813), 4 Taunt. 735); and apparently the principle of *Dumpor's Case*, *supra*, does not apply to conditions which are capable of continuing breach (*Maunsell* v. *Hort* (1877), 1 L. R. Ir. 88, 95, C. A.).

(*m*) As to the jurisdiction in equity to relieve against forfeiture, see title EQUITY, Vol. XIII., p. 153. Relief will be given where the landlord has dealt with the tenant so as to lead him to suppose that the forfeiture would not be insisted on (*Flattery* v. *Anderdon* (1848), 12 I. Eq. R. 218.

(*n*) *I.e.*, by action or peaceable entry (*Re Riggs*, *Ex parte Lovell*, [1901] 2 K. B. 16, 20; and see *Howard* v. *Fanshawe*, [1895] 2 Ch. 581. As to restraining the action where the lessor has himself committed a breach of covenant, see *Pearson* v. *Hoghton* (1829), 3 Y. & J. 413.

(*o*) See p. 542, *post*.

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of the notice to remedy the breach, if capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor, then the latter can either re-enter or commence an action to recover possession (*p*).

What notice required.

1049. The notice must be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains in order that the tenant may have an opportunity of remedying them before an action to enforce the forfeiture is commenced (*q*); but it will not be bad because, in attempting to enumerate the specific breaches, it includes some breaches which have not been committed (*r*). It is not necessary that it should require payment of compensation in money (*s*). The notice may state a time within which the breach is to be remedied; but the lessor will not be able to enter at the end of the stated period unless the time is in fact reasonable (*t*).

(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (1), which does not destroy the lessor's right of re-entry, but merely gives, the lessee a *locus pœnitentiæ* (*Creswell* v. *Davidson* (1887), 56 L. T. 811). In the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, "lease" includes an original or derivative underlease, and "lessee" and "lessor" have corresponding meanings (*ibid.*, s. 14 (3)); moreover, it includes an agreement for a lease where the lessee has become entitled to have his lease granted (Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 5; see *Swain* v. *Ayres* (1888), 21 Q. B. D. 289, C. A.; *Strong* v. *Stringer* (1889), 61 L. T. 470), and a lease by estoppel (*Keith* v. *Gancia* (*R.*) & *Co., Ltd.*, [1904] 1 Ch. 774, 783, 791, C. A.); and, as to tenancy agreements, see *Charrington & Co., Ltd.* v. *Camp*, [1902] 1 Ch. 386; but if the lessee has already committed breaches of the intended covenants he is not entitled to have his lease granted and cannot obtain the statutory relief (*Coatsworth* v. *Johnson* (1886), 55 L. J. (Q. B.) 220, C. A.). The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, applies to leases made either before or after the commencement of the Act (1st January, 1882), and has effect notwithstanding any stipulation to the contrary (*ibid.*, s. 14 (9)). Where the lessor has waived a breach of a covenant to repair by receipt of rent accruing due during the currency of the notice, but no repairs have been done at the expiration of the notice, he can sue for possession without serving a fresh notice (*Penton* v. *Barnett*, [1898] 1 Q. B. 276, C. A.); *contra*, if some repairs have been done and negotiations have taken place (*Guillemard* v. *Silverthorne* (1908), 99 L. T. 584). For form of notice, see Encyclopædia of Forms and Precedents, Vol. VII., p. 691.

(*q*) *Fletcher* v. *Nokes*, [1897] 1 Ch. 271, where a notice that the lessee had broken the covenants to repair, without giving any details of the want of repair, was held to be insufficient; see *Re Serle, Gregory* v. *Serle*, [1898] 1 Ch. 652; but the notice need not specify the particular acts which the lessee must do (*Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134, 147).

(*r*) *Matthews* v. *Usher*, [1900] 2 Q. B. 535, C. A.; *Pannell* v. *City of London Brewery Co.*, [1900] 1 Ch. 496. But it will be bad if it claims in respect of special covenants to repair which are not in fact contained in the lease (*Guillemard* v. *Silverthorne*, *supra*), or refers to the wrong covenant (*Jacob* v. *Down*, [1900] 2 Ch. 156).

(*s*) *Lock* v. *Pearce*, [1893] 2 Ch. 271, C. A., overruling *North London Freehold Land and House Co.* v. *Jacques* (1883), 49 L. T. 659, and *Greenfield* v. *Hanson* (1886), 2 T. L. R. 876.

(*t*) See *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. 79, 92, C. A. A three months' notice will usually be reasonable; see *Penton* v. *Barnett*, *supra*; but where the notice applies to all the premises and a longer period is necessary in respect of part, it must be allowed in respect of the whole (*Hopley* v. *Tarvin Parish Council* (1910), 74 J. P. 209). The defence that the time allowed was not reasonable need not be specially pleaded under R. S. C., Ord. 19, r. 14 (*Hopley* v. *Tarvin Parish Council*, *supra*). As to pleading generally, see title PLEADING.

Service of notice.

1050. The notice may be addressed to the "lessee" by that designation without his name (*a*); and where the lease has been assigned, it is sufficient if it is addressed to the lessee and other persons interested and is served on the occupier (*b*).

Lessee's right to relief.

1051. The service of the statutory notice, and default under it, are essential preliminaries to the enforcement of a forfeiture (*c*); but after the lessor has thus become qualified to take advantage of the forfeiture, the lessee may still apply to the court for relief at any time before the lessor has actually re-entered (*d*). If the lessor is proceeding by action, the lessee can apply in the lessor's action; otherwise the lessee may himself bring an action and apply for relief (*e*); and the court may grant or refuse relief as it thinks fit, having regard to the proceedings and conduct of the parties in regard to the notice, and to all the other circumstances. Relief, if granted, may be on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including an injunction against a further like breach, as the court, in the circumstances of each case, thinks fit (*f*). The lessee must, as a condition of relief, remedy past breaches (*g*), and relief will be refused if he avows an intention to commit breaches in the future (*h*).

Compensation.

1052. The court may grant relief although there has been a serious breach of covenant; where, for instance, premises are very much out of repair (*i*); but if the lessee has remedied the breach, he will only be required to make compensation when the lessor has in fact suffered loss (*k*); and where compensation is given it will, in general, be measured by the same rule as damages in an action for breach of the covenant (*k*).

(*a*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 67 (2). As to service of the notice, see *ibid.*, s. 67 (3).

(*b*) *Cronin* v. *Rogers* (1884), Cab. & El. 348; but a notice served on a mere equitable assignee is insufficient (*Gentle* v. *Faulkner*, [1900] 2 Q. B. 267, C. A.).

(*c*) If the notice has not been served the lessor's action to enforce the forfeiture will necessarily fail (*Greenfield* v. *Hanson* (1886), 2 T. L. R. 876; see *Jacques* v. *Harrison* (1884), 12 Q. B. D. 165, C. A.; *contra*, *Scott* v. *Brown* (*Matthew*) *& Co., Ltd.* (1884), 51 L. T. 746). Nor can the lessor obtain a mere declaration of forfeiture not to be followed by re-entry (*Wilson* v. *Rosenthal* (1906), 22 T. L. R. 233). But a notice is not a necessary preliminary of an action for a receiver (*Charrington* (*R.*) *& Co., Ltd.* v. *Camp*, [1902] 1 Ch. 386; and see *Leney & Sons, Ltd.* v. *Callingham and Thompson*, [1908] 1 K. B. 79, C. A.).

(*d*) *Rogers* v. *Rice*, [1892] 2 Ch. 170, C. A.; *Lock* v. *Pearce*, [1893] 2 Ch. 271, 274, C. A.; *Scott* v. *Brown* (*Matthew*) *& Co., Ltd.*, *supra*.

(*e*) The lessee cannot apply by originating summons (*Lock* v. *Pearce*, *supra*); but if the application is made in an action it is not essential that the relief shall have been claimed by the pleadings (*Mitchison* v. *Thomson* (1883), Cab. & El. 72).

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (2). The right to relief is a chose in action, and devolves, in the event of the lessee's bankruptcy, on his trustee, who can assign it to a purchaser (*Howard* v. *Fanshawe*, [1895] 2 Ch. 581, 589). As to the conditions of relief, see *Quilter* v. *Mapleson* (1882), 9 Q. B. D. 672, C. A.; *North London Freehold Land and House Co.* v. *Jacques* (1883), 49 L. T. 659; *Bond* v. *Freke*, [1884] W. N. 47.

(*g*) *Rose* v. *Spicer*, *Rose* v. *Hyman*, [1911] 2 K. B. 234, C. A.; see *Batson* v. *London School Board* (1904), 69 J. P. 9.

(*h*) *Rose* v. *Spicer*, *Rose* v. *Hyman*, *supra*.

(*i*) *Mitchison* v. *Thomson*, *supra*.

(*k*) *Skinners' Co.* v. *Knight*, [1891] 2 Q. B. 542, C. A.; see p. 512, *ante*.

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Costs of solicitor and surveyor.

In addition to such damages, the lessor is entitled to recover the reasonable costs incurred by him in the employment of a solicitor, and surveyor or valuer, or otherwise, in reference to the breach (*l*).

New lease unnecessary.

Where relief is granted it is not necessary that a new lease shall be executed; the lessee continues to hold the premises under the old lease (*m*).

Abandonment of order.

The lessee cannot be compelled to perform the conditions of relief, and if he declines to do so, the order for relief will be treated as abandoned (*n*).

Covenant against assigning.

1053. The statutory provision above referred to (*o*) does not apply to a covenant or condition against assigning, underletting, or parting with the possession of the land demised (*p*); hence, in the case of breach of such a covenant or condition, no notice is required before enforcing the forfeiture, nor can the court grant relief under the

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statute (*q*). As regards a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest, the statutory provision above referred to (*o*) is also excluded (*r*); but the exclusion operates only after the expiration of one year from the bankruptcy or execution, and provided the lessee's interest is not sold within the year (*s*). Hence, within the year, and afterwards

(*l*) Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 2 (1). Solicitor and client costs are generally given. Previously to this statute such costs could not be included in damages, though their payment might be made a condition of relief (*Bond* v. *Freke*, [1884] W. N. 47; *Bridge* v. *Quick* (1892), 61 L. J. (Q. B.) 375). But they are recoverable only where the lessor waives the breach by writing under his hand, or when the lessee is relieved under the statute; not where the lessee complies with the notice, and so avoids the forfeiture (*Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q. B. 226, C. A.). As to solicitors' remuneration, see title SOLICITORS.

(*m*) *Dendy* v. *Evans*, [1910] 1 K. B. 263, C. A.

(*n*) *Talbot* v. *Blindell*, [1908] 2 K. B. 114.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14; see p. 539, *ante*, and the text, *supra*.

(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (6) (i.); or disposing of the land leased (*ibid.*); but this does not include a condition against assignment for the benefit of creditors (*Gentle* v. *Faulkner*, [1900] 2 Q. B. 267, C. A.).

(*q*) See *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417, C. A.; and there is no relief in such a case in equity (*ibid.*; see *Wafer* v. *Mocato* (1724), 9 Mod. Rep. 112; *Hill* v. *Barclay* (1811), 18 Ves. 56, 63). As to such a covenant, see p. 576, *post*.

(*r*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (6) (i.); *Re Walker, Ex parte Gould* (1884), 13 Q. B. D. 454. As to exclusion of Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, in the case of mining leases, see title MINES, MINERALS, AND QUARRIES. "Bankruptcy" includes the liquidation of a company (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (xv.)); *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. 79, C. A.); even if only for the purposes of reconstruction (*Fryer* v. *Ewart*, [1902] A. C. 187); and see *Re Walker, Ex parte Gould, supra*; titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 149; COMPANIES, Vol. V., p. 578.

(*s*) Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 2 (2). But this partial saving for bankruptcy and execution does not apply to leases of agricultural or pastoral land; of mines or minerals; of a public-house or beershop; of a furnished house; or of any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the property, or on the ground of neighbourhood to the lessor or any person holding under him (*ibid.*, s. 2 (3)).

if there has been a sale within the year, notice must be given before forfeiture, and relief may be granted (*t*). The statutory provision (*u*) above referred to does not apply to forfeiture for non-payment of rent (*v*).

Under-lessor's right to relief.

1054. The statutory provision above referred to (*u*) did not confer on an underlessee, whether of the whole or of part of the property comprised in the head lease, a right to relief against forfeiture for breach of a covenant or condition in the head lease (*w*); but by another enactment (*a*), where the lessor is proceeding by action or otherwise to enforce the forfeiture, the court may, on the application of the underlessee of the whole or part of the demised property, either in the lessor's action (if any), or in an action brought by him for that purpose (*b*), make an order vesting in the underlessee, for the whole term of the lease or any less term, the property comprised in the lease upon such conditions as to execution of any deed or other document, payment of rent, costs, compensation, giving security, or otherwise, as the court in the circumstances of each case thinks fit (*c*). This is an independent enactment, and not simply a provision amending, and to be read subject to the qualifications of the earlier statutory provision above referred to (*d*). Consequently it empowers the court to grant relief against conditions of forfeiture on bankruptcy (*e*), and against forfeiture for non-payment of rent (*f*), and for breach of covenants of any description, including covenants against assigning, although, as to matters for which the lessee cannot get relief, this will only be given to an underlessee in exceptional cases, and where he has not

Conveyancing Act, 1892, s. 4.

(*t*) *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. 79, C. A. To obtain the benefit of this provision the sale must either be completed by conveyance, or the contract for sale must be absolute; a conditional contract entered into for the purpose of the statute is not sufficient (*Re Castle (Henry) & Sons, Mitchell* v. *Castle (Henry) & Sons* (1906), 94 L. T. 396).

(*u*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14; see p. 539, *ante*.

(*v*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (8). As to relief in this case, see p. 544, *post*.

(*w*) *Burt* v. *Gray*, [1891] 2 Q. B. 98; see *Creswell* v. *Davidson* (1887), 56 L. T. 811.

(*a*) Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 4.

(*b*) As to the mode of application, see note (*e*), p. 541, *ante*.

(*c*) In the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), "underlease" includes an agreement for an underlease where the underlessee has become entitled to have his lease granted, and "underlessee" includes any person deriving title under or from an underlessee (*ibid.*, s. 5). The underlessee must pay the costs of obtaining relief (*London Bridge Buildings Co.* v. *Thomson* (1903), 89 L. T. 50), including the costs of an inquiry necessary to determine the new rent (*Ewart* v. *Fryer* (1902), 86 L. T. 676). The estate so vested is a new estate (*Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304, 313, C. A.). The rent may be increased (*Ewart* v. *Fryer*, [1901] 1 Ch. 499, 507, C. A.; *Cholmeley School, Highgate* (*Wardens etc.*) v. *Sewell*, [1894] 2 Q. B. 906, 913); and may be restricted to part of the land originally leased (*London Bridge Buildings Co.* v. *Thomson, supra*); see also *Gray* v. *Bonsall*, [1904] 1 K. B. 601, C. A.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14; see p. 539, *ante*; see *Gray* v. *Bonsall, supra*.

(*e*) *Cholmeley School, Highgate* (*Wardens etc.*) v. *Sewell, supra*.

(*f*) See p. 546, *post*.

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been guilty of negligence (*g*). The lessor cannot recover as against an underlessee the costs of his solicitor and valuer in reference to the breach which gives the right of re-entry (*h*).

(ii.) *Relief from Forfeiture for Non-payment of Rent.*

Relief from forfeiture for non-payment of rent.

1055. The proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent, and accordingly, provided that the lessor and other persons interested can be put in the same position as before (*i*), the lessee is entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the lessor has been put (*k*). This right to relief has been recognised, and restricted as to time, by statute. If the lessor has brought an action to recover possession, the lessee or his assigns may, at any time before trial, pay or tender to the lessor, or pay into court, all the rent in arrear, together with costs; thereupon all further proceedings are stayed, and the lessee or his assigns hold the demised lands under the lease, without any new lease (*l*). After trial and judgment for recovery of possession the lessee is still entitled to relief, but he must apply within six months from the date when the judgment was executed; after that time he is barred from relief (*m*). If, however, he applies in time and obtains relief he holds the demised lands, as in the former case, according to the original lease, without any new lease (*n*). The jurisdiction is exercised by the High Court of Justice (*o*).

Common Law Procedure Acts, 1852, 1860.

(*g*) *Imray* v. *Oakshette*, [1897] 2 Q. B. 218, C. A.; *Matthews* v. *Smallwood* [1910] 1 Ch. 777.

(*h*) *Nind* v. *Nineteenth Century Buildiny Society*, [1894] 2 Q. B. 226, C. A. As to recovery of costs by the lessee against a sub-lessee, see *Clare* v. *Dobson*, [1911] 1 K. B. 35.

(*i*) See *Stanhope* v. *Haworth* (1886), 3 T. L. R. 34, C. A.

(*k*) *Wadman* v. *Calcraft* (1804), 10 Ves. 67; *Howard* v. *Fanshawe*, [1895] 2 Ch. 581, 588; *Dendy* v. *Evans*, [1910] 1 K. B. 263, 270, C. A. It is the same whether there is a proviso for re-entry or whether the lease is conditioned to be void on non-payment of rent (*Bowser* v. *Colby* (1841), 1 Hare, 109, 128). In Ireland an underlessee or incumbrancer who pays rent to avoid a forfeiture is entitled to a first lien on the ground of salvage (*Kehoe* v. *Hales* (1843), 5 I. Eq. R. 597; *Locke* v. *Evans* (1823), 11 I. Eq. R. 52; see *Fetherstone* v. *Mitchell* (1848), 11 I. Eq. R. 35).

(*l*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 212. In order to stay proceedings it is essential that the rent should be brought in; see, on the earlier Irish Statutes, *O'Mahony* v. *Dickson* (1805), 2 Sch. & Lef. 400; *Clancy* v. *Roberts* (1838), 1 I. Eq. R. 21; as to an open account between landlord and tenant, see *Beasley* v. *Darcy* (1800), 2 Sch. & Lef. 403, n.; *O'Connor* v. *Spaight* (1804), 1 Sch. & Lef. 305. A mortgagee is entered to relief on the same terms as the lessee (*Doe* d. *Whitfield* v. *Roe* (1811), 3 Taunt. 402). The relief protects under tenants (*Shine* v. *Gough* (1811), 1 Ball & B. 436).

(*m*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210; see *Vesey* v. *Bodkin* (1830), 4 Bli. (N. S.) 64, H. L. As to rent accruing due after judgment in ejectment where the tenant is restored to possession, see *Wilson* v. *Burne* (1889), 24 L. R. Ir. 14, C. A.

(*n*) Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1. Formerly, when relief was granted after the determination of the lease, a new lease had to be executed (see *Hare* v. *Elms*, [1893] 1 Q. B. 604, 608; *Dendy* v. *Evans*, *supra*, at p. 266).

(*o*) The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), left the lessee

Where the lessor has re-entered without the assistance of the court, the lessee is similarly entitled to relief, and this will be given upon the statutory terms, namely, that, on payment of rent and costs, he shall hold under the original lease without any new lease. But apparently this relief will be given only within six months of the re-entry (*p*).

Underlessee's right to relief under:

(i.) Common Law Procedure Act, 1852;

1056. An underlessee is entitled to obtain the statutory relief referred to in the preceding paragraph (*q*) against forfeiture of the head lease for non-payment of rent; and it is not necessary that he should prove his title under the original lessee; it is sufficient that he is in possession and claims as underlessee (*r*). But if he does not apply until after the lease has been actually determined by the lessor (*s*), he must, since the granting of the relief means the revival of the lease, bring the original lessee, and, where the lease has been assigned, the last assignee, before the court (*t*), or must satisfactorily account for their absence (*a*). On the other hand, if the underlessee applies before actual determination of the lease, the presence of the lessee and assignee is not necessary (*b*).

to apply in equity for relief; the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), empowered the courts of common law to give relief, and this jurisdiction has passed to the High Court (see *Wilson* v. *Bolton* (1893), 10 T. L. R. 17). Breach of covenant by the lessee is no bar to the relief (*Swanton* v. *Biggs* (1828), Beat. 170). As to forfeiture of a right of renewal for non-payment of rent, see *Mulloy* v. *Goff* (1850), 1 I. Ch. R. 27; *M'Donnell* v. *Burnett*, *Burnett* v. *Going* (1841), 4 I. Eq. R. 216; *Fitzgerald* v. *O'Connell* (1844), 6 I. Eq. R. 455; and for non-payment of fines, see *Butler* v. *Mulvihill* (1819), 1 Bli. 137, H. L.; *Trant* v. *Dwyer* (1828), 2 Bli. (N. S.) 11, H. L.

(*p*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581, 589—592.

(*q*) *I.e.*, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76); see p. 544, *ante*. In the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, the words used are "the lessee or his assignee or other person claiming or deriving under the said lease," which are clearly wide enough to include underlessees. In *ibid.*, s. 212, the words are "the tenant or his assignee"; but "tenant" here includes an underlessee; see *Doe* d. *Wyatt* v. *Byron* (1845), 1 C. B. 623, on the provisions of the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 4, replaced by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 210, 212. The relief is available for mortgagees by sub-demise (*Hare* v. *Elms*, [1893] 1 Q. B. 604; *Newbolt* v. *Bingham* (1895), 72 L. T. 852, C. A.). As to contribution between underlessees, see *Webber* v. *Smith* (1689), 2 Vern. 103; and compare note (*c*), p. 408, *ante*.

(*r*) *Moore* v. *Smee and Cornish*, [1907] 2 K. B. 8, C. A.

(*s*) It seems that the judgment determines the lease; the lease does not continue till possession is delivered under the judgment; see *Dendy* v. *Evans*, [1910] 1 K. B. 263, 266, C. A.

(*t*) *Hare* v. *Elms*, *supra*, at p. 609; compare *Adams* v. *St. Leger* (1809), 1 Ball & B. 181.

(*a*) *Humphreys* v. *Morten*, [1905] 1 Ch. 739, where the presence of the lessee was dispensed with on the ground of his bankruptcy and assignment by his trustee in bankruptcy, and of the assignee on the ground of his disappearance for twenty-six years.

(*b*) *Doe* d. *Wyatt* v. *Byron*, *supra*; *Hare* v. *Elms*, *supra*, at p. 609. In *Gray* v. *Bonsall*, [1904] 1 K. B. 601, 606, C. A., it appears to have been considered that, in proceedings for relief under the Common Law Procedure Acts, the presence of the lessee and assignee was necessary although the lessor had not actually obtained possession, and this was regarded as a reason for proceeding under the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). In fact, however, proceedings under that Act can only be taken before re-entry, and until re-entry the presence of the lessee is not required under the Common Law

SECT. 1. Forfeiture.

(ii.) Conveyancing Act, 1892.

The underlessee can also apply for relief against forfeiture of the head lease for non-payment of rent under the Conveyancing and Law of Property Act, 1892, s. 4 (*c*); but he must apply before the lessor has regained possession (*d*), and the court can impose terms as a condition of the relief. The proper course is to order that the premises shall vest in the underlessee for the residue of the term of the underlease upon his executing a deed of covenant to pay the rent and perform the covenants of the head lease during such residue. He must also pay the arrears of rent and costs, and make good any subsisting breaches of covenant (*e*).

Liability for costs.

1057. Where relief is given against forfeiture for non-payment of rent the applicant must pay all the lessor's costs properly incurred in the proceedings for relief. But he does not pay the costs of the lessor so far as they have been increased by resisting his claim (*f*); and if the lessor has recovered judgment in ejectment without costs, the lessee will, on obtaining relief, only pay the costs of the summons for that purpose (*g*).

SECT. 2.—*Surrender.*

Express surrender.

Necessity for a deed.

1058. A surrender of a term may be either express or implied Under the Statute of Frauds (*h*), an express surrender must be by deed or note in writing, signed by the surrenderor or his agent thereunto lawfully authorised by writing. Under the Real Property Act, 1845 (*i*), a surrender in writing is void at law, unless made by deed, except where the interest surrendered might have been created without writing (*k*). The effect of these enactments is that terms not exceeding three years, whereon not less than two-thirds of a rack-rent is reserved, can be surrendered by writing not under seal; other terms must be surrendered by deed. Surrenders

Procedure Acts. Hence, this is not a reason for preferring the procedure under the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13) (see *Humphreys* v. *Morten*, [1905] 1 Ch. 739, 741 (*arguendo*); and compare *Rogers* v. *Rice*, [1892] 2 Ch. 170, C. A.).

(*c*) 55 & 56 Vict. c. 13, s. 4; see p. 543, *ante*.

(*d*) See *Rogers* v. *Rice*, *supra*; compare p. 541, *ante*.

(*e*) *Gray* v. *Bonsall*, [1904] 1 K. B. 601, 608, C. A.

(*f*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581, 592; *Humphreys* v. *Morten*, *supra*, at p. 743; see *Newbolt* v. *Bingham* (1895), 72 L. T. 852, C. A.

(*g*) *Croft* v. *London and County Banking Co.* (1885), 14 Q. B. D. 347, C. A.

(*h*) 29 Car. 2, c. 3, s. 3. Previously to this statute a term could be surrendered verbally (see *Sleigh* v. *Bateman* (1596), Cro. Eliz. 487; *Farmer* d. *Earl* v. *Rogers* (1755), 2 Wils. 26, 27); under the statute a verbal surrender is void (*Matthews* v. *Sawell* (1818), 8 Taunt. 270), even though the tenancy was created verbally (*Taylor* v. *Chapman* (1795), Peake, Add. Cas. 19). And so also is a verbal agreement for the determination of the tenancy, which is equivalent to a surrender (*Thomson* v. *Wilson* (1818), 2 Stark. 379; compare *Doe* d. *Read* v. *Ridout* (1814), 5 Taunt. 519); even though the tenancy was created verbally (*Mollett* v. *Brayne* (1809), 2 Camp. 103). For forms of surrender, see Encyclopædia of Forms and Precedents, Vol. VII., p. 668; Vol. XII., pp. 850 *et seq.*

(*i*) 8 & 9 Vict. c. 106, s. 3. A deed was not rendered necessary by the Statute of Frauds (29 Car. 2, c. 3) (*Farmer* d. *Earl* v. *Rogers*, *supra*).

(*k*) This refers to the original creation of the interest, not to the residue which is surrendered (see *Wallis* v. *Hands*, [1893] 2 Ch. 75).

by act or operation of law are excluded from the above-mentioned enactments (*l*).

Form and effect of surrender.

1059. The surrender consists in the yielding up of the term to him who has the immediate estate in reversion in order that the term may, by mutual agreement, merge in the reversion (*m*). Hence the parties to the surrender must be the owner of the term (*n*) and the owner of the immediate reversion expectant on the term (*o*); and apparently the surrender must take effect at once; there cannot be a surrender *in futuro* (*p*). But the use of the word "surrender" is not necessary. Any form of words which shows the intention of the parties to effect a surrender will be sufficient, and the words will be construed so as to give effect to that intention (*q*). The surrender

(*l*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 368.

(*m*) Co. Litt. 337 b; Bac. Abr., tit. "Leases and Terms for Years" (S.) 1, p. 873. A part only of the premises may be surrendered; see *Baynton* v. *Morgan* (1888), 22 Q. B. D. 74, C. A. A lessee cannot surrender before he has entered, but if the lessee has entered, an assignee can surrender without entry (Bac. Abr., tit. "Leases and Terms for Years" (S.) 2 (2), p. 880). A term may be surrendered to a leasehold reversioner who holds for a shorter term (*Hughes* v. *Robotham* (1593), Cro. Eliz. 302; Bac. Abr., tit. "Leases and Terms for Years" (S.) 1, p. 875). Previously it was held that a term could not be "drowned" in a term (*Porry* v. *Allen* (1590), Cro. Eliz. 173).

(*n*) See *Seaward* v. *Drew* (1898), 67 L. J. (Q. B.) 322, 323. The surrender must be of the entire term in the premises comprised in it (*Burton* v. *Barclay* (1831), 7 Bing. 745, 757). A sub-lessee cannot surrender to the head lessor, but a surrender by the sub-lessee and lessee to the lessor will operate as a surrender by the sub-lessee to the lessee, followed by a surrender by the latter to the lessor (*Paramour* v. *Yardley* (1579), Plowd. 539, 541).

(*o*) Hence a surrender to a sequestrator (*Cornish* v. *Searell* (1828), 8 B. & C. 471, 476), or to a mortgagor, notwithstanding that the lease was granted by him (see p. 356, *ante*) under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (*Robbins* v. *Whyte*, [1906] 1 K. B. 125), is ineffectual; see *Cadle* v. *Moody* (1861), 30 L. J. (EX.) 385; *Edwards* v. *Wickwar* (1866), L. R. 1 Eq. 403. The assignee of the reversion can accept a surrender and put an end to the rent, notwithstanding an agreement on the assignment that the rent shall continue to be received by the assignor (*Southwell* v. *Scotter* (1880), 49 L. J. (Q. B.) 356, C. A.; but see *Wood* v. *Londonderry* (*Marquis*) (1847), 10 Beav. 465). A tenant for life can accept a surrender under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 13, 31; see *Easton* v. *Penny* (1892), 67 L. T. 290; and title SETTLEMENTS. As to surrender where the reversioner is an infant, see p. 351, *ante*; and title INFANTS AND CHILDREN, Vol. XVII., p. 98; or a lunatic, see title LUNATICS AND PERSONS OF UNSOUND MIND. Where a concurrent lease is granted so as to pass the reversion on the prior lease (see p. 404, *ante*), the later lessee can accept a surrender of the earlier lease.

(*p*) *Weddall* v. *Capes* (1836), 1 M. & W. 50, 52; *Doe* d. *Murrell* v. *Milward* (1838), 3 M. & W. 328, *per* PARKE, B., at p. 332; compare *Badeley* v. *Vigurs* (1854), 4 E. & B. 71, 79. But see 37 Sol. Jo. 452, where it is stated that in *Parker* v. *Briggs* (1893), unreported, C. A., this opinion was not followed; and an agreement for a surrender entered into for valuable consideration is enforceable; compare *Wallace* v. *Patton* (1846), 12 Cl. & Fin. 491, H. L. As to such an agreement where the lease has been mortgaged, see *Phelps* v. *Prothero* (1849), 2 De G. & Sm. 274; *Phelps* v. *Prothero*, *Prothero* v. *Phelps* (1855), 7 De G. M. & G. 722, C. A. A future lease cannot be surrendered expressly, though it can be surrendered by operation of law (Bac. Abr., tit. "Leases and Terms for Years" (S.) (2) 2, p. 880). The acceptance by the tenant of an invalid notice to quit does not effect a surrender (*Bessell* v. *Landsberg* (1845), 7 Q. B. 638).

(*q*) Bac. Abr., tit. "Leases and Terms for Years" (S.) 1, p. 873; see *Smith* v. *Mapleback* (1786), 1 Term Rep. 441; *Doe* d. *Wyatt* v. *Stagg* (1839), 5 Bing.

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vests the estate immediately in the surrenderee without express acceptance, but is made void by his dissent (*r*). Where an express surrender is accompanied by the grant of a new lease, the old lease does not revive upon the new lease being or becoming void (*s*), unless the surrender is so expressed as to show that the parties intended to make the surrender only in consideration of the new grant, and then the surrender is construed as though it were conditioned to be void in case the grant should be void (*t*).

Surrender by operation of law.

1060. Delivery of possession by the tenant to the landlord and his acceptance of possession effect a surrender by operation of law (*a*). The surrender in this case depends upon the agreement by the landlord and tenant that the term shall be put an end to, and upon the change of possession in pursuance of the agreement (*b*). The change of possession is essential (*c*). A parol licence to quit will not of itself operate as a surrender; but where the tenant gives up possession in pursuance of the licence, and the landlord accepts it, the surrender by operation of law is complete (*d*). The surrender is effectual although the landlord accepts possession under a mistake induced by the tenant, provided that the tenant's conduct is not fraudulent (*e*). An implied surrender may be effectual under the Settled Land Act, 1882 (*f*).

By delivery of possession.

(N. C.) 564. An agreement between the landlord and tenant that the landlord shall have immediate possession operates as a surrender, if otherwise suitable for this purpose (*Williams* v. *Sawyer* (1821), 3 Brod. & Bing. 70).

(*r*) *Re Thompson* v. *Leach* (1698), 2 Salk. 618; and as to the previous litigation in this matter, see *ibid.*, 6th ed., n. (b).

(*s*) *Doe* d. *Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847.

(*t*) *Doe* d. *Egremont* (*Earl*) v. *Courtenay* (1848), 11 Q. B. 702, 712. See *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1807. As to the effect of an implied surrender, see p. 550, *post*.

(*a*) In this case the law gives effect to the intention of the parties as appearing from their acts, and cures the informality of the surrender; see *Cannan* v. *Hartley* (1850), 9 C. B. 634, n. (a). But the mere cancelling of the lease does not effect a surrender by operation of law, so as to get rid of the necessity of a formal surrender (*Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86; *Wootley* v. *Gregory* (1828), 2 Y. & J. 536, 542; *Ward* (*Lord*) v. *Lumley* (1860), 5 H. & N. 870; title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 410); nor is the cancelling *primâ facie* evidence of a formal surrender (*Doe* d. *Cortail* v. *Thomas* (1829), 9 B. & C. 288). Directing the occupier to attorn to the landlord is sufficient delivery of possession (*Gray* v. *Balls*, *Field* v. *Morrison* (1861), 5 L. T. 395).

(*b*) *Phené* v. *Popplewell* (1862), 12 C. B. (N. S.) 334, 342; *Easton* v. *Penny* (1892), 67 L. T. 290, 292. A delivery up of part of the premises will be a surrender as to that part; see *Holme* v. *Brunskill* (1877), 3 Q. B. D. 495, C. A.

(*c*) See *Whitehead* v. *Clifford* (1814), 5 Taunt. 518. Thus there cannot be a surrender by a conditional agreement which is not followed by the tenant giving up possession (*Coupland* v. *Maynard* (1810), 12 East, 134, 140); or by an agreement to give up and accept possession in the future (see *Brown* v. *Burtinshaw* (1826), 7 Dow. & Ry. (K. B.) 603; *Weddall* v. *Capes* (1836), 1 M. & W. 50; see note (*p*), p. 547, *ante*); or by an insufficient notice to quit although accepted by the landlord, if the tenant retains possession after the notice (*Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922; *Doe* d. *Murrell* v. *Milward* (1838), 3 M. & W. 328).

(*d*) *Grimman* v. *Legge* (1828), 8 B. & C. 324, 325.

(*e*) *Gray* v. *Owen*, [1910] 1 K. B. 622; see title ESTOPPEL, Vol. XIII., pp. 375, 376, note (*k*).

(*f*) 45 & 46 Vict. c. 38; see *Easton* v. *Penny*, *supra*. The court cannot set up again a lease thus *bonâ fide* surrendered (*Nixon* v. *Robinson* (1844), 2 Jo. & Lat. 4).

There is a delivery of possession sufficient to effect a surrender when the tenant returns the keys of the premises, and the landlord accepts them with the intention of changing the possession (*g*). But the consent of the landlord to the delivery of the keys is essential, and it is not sufficient that they are delivered to his servant who does not return them (*h*). If there is no consent at the time, the surrender is not complete until the landlord takes possession in such a manner as to estop him from denying that the tenancy is at an end (*i*). He does not thus take possession by attempting to relet the premises (*k*), nor by entering to do necessary repairs (*l*), nor by making occasional use of a part of the premises (*m*). But if, after the tenant has quitted the premises, the landlord relets them to another tenant who goes into occupation, this will effect a surrender from the time of reletting, unless the landlord gives notice to the tenant that the reletting is on his account (*n*).

Delivery of possession.

Acts of landlord not amounting to taking possession.

1061. A surrender by operation of law takes place when the lessee takes a new lease from the lessor to commence during the term of the old lease, even though the new lease is for a shorter term than the residue of the old term (*o*). This surrender is founded upon estoppel, and takes place without regard to the intention of the parties. The lessor has no power to grant the new lease except upon the footing that the old lease is surrendered, and the lessee, being a party to the grant of the new lease, is estopped (*p*) from denying the surrender. Consequently the acceptance of the new lease operates as a surrender of the old one (*q*); and the result is the same although the new lease is a future lease (*r*), or although the new lease is by parol and the old lease was by deed (*s*). But it is essential to such a surrender that the new lease should be valid and should take effect at once as a lease; hence, there is no implied

By grant of new lease to tenant.

(*g*) *Dodd* v. *Acklom* (1843), 6 Man. & G. 672; see *Natchbolt* v. *Porter* (1689), 2 Vern. 112; compare *Mines Royal Societies* v. *Magnay* (1854), 10 Exch. 489, 493.

(*h*) *Cannan* v. *Hartley* (1850), 9 C. B. 634, 648; see *Furnivall* v. *Grove* (1860), 8 C. B. (N. S.) 496.

(*i*) *Oastler* v. *Henderson* (1877), 2 Q. B. D. 575, C. A.

(*k*) *Oastler* v. *Henderson*, *supra*; *Smith* v. *Blackmore* (1885), 1 T. L. R. 267; see *Redpath* v. *Roberts* (1800), 3 Esp. 225; but if the landlord puts up a notice to let and paints out the tenant's name, this will be a resumption of possession (*Phené* v. *Popplewell* (1862), 12 C. B. (N. S.) 334, 342).

(*l*) *Smith* v. *Blackmore*, *supra*; but the mode of doing the repairs may imply that the landlord regards the house as in his own occupation, so as to complete the surrender (*Smith* v. *Roberts* (1892), 9 T. L. R. 77, C. A.).

(*m*) *Oastler* v. *Henderson*, *supra*.

(*n*) *Walls* v. *Atcheson* (1826), 3 Bing. 462.

(*o*) *Dodd* v. *Acklom*, *supra*, at p. 679. An acceptance of a new lease of part of the demised premises is a surrender only of that part (*Carnarvon* (*Earl*) v. *Villebois* (1844), 13 M. & W. 313, 342).

(*p*) See title ESTOPPEL, Vol. XIII., p. 375. There can, of course, be no implied surrender by an agreement to which the lessee is not a party (*Porry* v. *Allen* (1590), Cro. Eliz. 173; compare *Easton* v. *Penny* (1892), 67 L. T. 290, 292).

(*q*) *Lyon* v. *Reed* (1844), 13 M. & W. 285, 306; *Fenner* v. *Blake*, [1900] 1 Q. B. 426; and see the observations on these cases in title ESTOPPEL, Vol. XIII., p. 375, note (*k*).

(*r*) *Ive's Case* (1597), 5 Co. Rep. 11 a.

(*s*) *Dodd* v. *Acklom*, *supra*; compare *Foquet* v. *Moor* (1852), 7 Exch. 870.

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surrender by the acceptance by the lessee of a new lease which is void (*t*), or which is voidable and is in fact avoided (*a*); or by a mere agreement for a new lease (*b*), unless, perhaps, it is one which is capable of being specifically enforced (*c*).

Change in the rent or provisions of lease.

Any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy; and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder (*d*), provided a substantial difference is thereby made in the conditions of the tenancy (*e*). But a surrender does not follow from a mere agreement made during the tenancy for the reduction (*f*) or increase (*g*) of rent, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end (*h*).

By change in position of tenant.

1062. A surrender is also implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being tenant, where, for instance, he becomes servant or caretaker of the landlord (*i*). But an agreement by the tenant to purchase the reversion does not of itself effect a surrender, since the purchase is conditional on a good title being made by the landlord (*k*).

(*t*) *Doe* d. *Egremont* (*Earl*) v. *Courtenay* (1848), 11 Q. B. 702; *Doe* d. *Biddulph* v. *Poole* (1848), 11 Q. B. 713; see *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1807; *Wilson* v. *Sewell* (1766), 4 Burr. 1975, 1980; *Davison* d. *Bromley* v. *Stanley* (1768), 4 Burr. 2210, 2213.

(*a*) The implied surrender is subject to an implied condition that the surrender is to be void if the new lease is made void (*Doe* d. *Egremont* (*Earl*) v. *Courtenay*, *supra*, at p. 712; *Easton* v. *Penny* (1892), 67 L. T. 290; *Zick* v. *London United Tramways, Ltd.*, [1908] 2 K. B. 126, 132, C. A.; *Canterbury Corporation* v. *Cooper* (1908), 99 L. T. 612; affirmed (1909), 100 L. T. 597, C. A.); that is, if it is void *in toto* (*Brinkley* v. *M'Munn* (1893), 32 L. R. Ir. 532). The effect is the same where the new lease is expressed to be made in consideration of the surrender of the old lease (*Knight* v. *Williams*, [1901] 1 Ch. 256). As to a voidable lease, compare *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86, 102; and as to the operation of an express surrender, see p. 548, *ante*.

(*b*) *Foquet* v. *Moor* (1852), 7 Exch. 870; see *Hamerton* v. *Stead* (1824), 3 B. & C. 478, 482. The creation of a new tenancy in favour of the lessee and a third person, who enters and occupies jointly with the lessee, will effect a surrender (*ibid.*).

(*c*) See *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A., and p. 367, *ante*; and an agreement for a new lease which is acted on is a surrender of the old lease (*Re Young, Ex parte Vitale* (1882), 47 L. T. 480).

(*d*) *Jones* v. *Bridgman* (1878), 39 L. T. 500.

(*e*) *Holme* v *Brunskill* (1877), 3 Q. B. D. 495, C. A.

(*f*) *Crowley* v. *Vitty* (1852), 7 Exch. 319; see *Clarke* v. *Moore* (1844), 1 Jo. & Lat. 723, 729; and compare *Foquet* v. *Moor*, *supra*, at p. 877.

(*g*) *Inchiquin* (*Lord*) v. *Lyons* (1887), 20 L. R. Ir. 474, 479, C. A.; see *Geeckie* v. *Monk*, *Doe* d. *Monk* v. *Geeckie* (1844), 1 Car. & Kir. 307; *Doe* d. *Monck* v. *Geeckie* (1844), 5 Q. B. 841; especially where the additional sum to be paid is a percentage on improvements made by the landlord, and is not strictly payable as rent (*Donellan* v. *Read* (1832), 3 B. & Ad. 899, 905).

(*h*) *Hodges* v. *Lawrance* (1854), 18 J. P. 347.

(*i*) *Peter* v. *Kendal* (1827), 6 B. & C. 703, 710; *Lambert* v. *M'Donnell* (1864), 15 I. C. L. R. 136. This involves delivery of possession to the landlord, since a servant's possession is the possession of the master; see p. 340, *ante*, and title MASTER AND SERVANT.

(*k*) *Doé* d. *Gray* v. *Stanion* (1836), 1 M. & W. 695, 701; *Tarte* v. *Darby* (1846), 15 M. & W. 601; *Ellis* v. *Wright* (1897), 76 L. T. 522, C. A.

By lease to third person with tenant's consent.

1063. The grant by the lessor of a new lease to a third person, with the assent of the lessee, operates as a surrender of the old lease, provided that the old lessee gives up possession to the new lessee at or about the time of the grant of the new lease (*l*); and the like effect is produced when the landlord, with the assent of the tenant, accepts another person as tenant (*m*), and such other person takes possession (*n*), unless the landlord reserves his rights against the original tenant (*o*). Receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant, whether he is a stranger (*p*), or whether he was already in possession as undertenant (*q*).

Effect of surrender on underleases.

1064. The surrender of the term does not destroy the rights of underlessees. As regards them, and also as regards third parties generally, the surrender operates only as a grant subject to their rights, and the term is treated as continuing so far as is required for the preservation of such rights (*r*). This principle makes it necessary to provide for the substitution of a new reversion for the leasehold reversion which has been surrendered, and also, in the case of a surrender and renewal, for the validity of the renewed lease as against the underlessees. Under the Real Property Act, 1845 (*s*), the estate of the head lessor (*t*) is deemed to be the

(*l*) *Wallis* v. *Hands*, [1893] 2 Ch. 75. The change of possession gives the notoriety which is necessary to raise the estoppel upon which the surrender depends (*Lyon* v. *Reed* (1844), 13 M. & W. 285, 309; *Creagh* v. *Blood* (1845), 3 Jo. & Lat. 133, 160); and this change is essential to the implied surrender (*Davison* v. *Gent* (1857), 1 H. & N. 744); see title ESTOPPEL, Vol. XIII., p. 375, note (*k*). It follows that mere negotiations for a lease to a third person do not cause a surrender (*Dawson* v. *Lamb* (1852), 3 Car. & Kir. 269).

(*m*) See *Woodcock* v. *Nuth* (1832), 8 Bing. 170; *Doe* d. *Hull* v. *Wood* (1845), 14 M. & W. 682; *Doran* v. *Kenny* (1869), 3 I. R. Eq. 148; and compare *Mathews* v. *Sawell* (1818), 2 Moore (C. P.), 262. But there will be no surrender if it is the intention of the parties that the lease shall continue to exist (*Clifford* v. *Reilly* (1870), 4 I. R. C. L. 218). Where the landlords are executors, acceptance of the new tenant by one only will not suffice (*Turner* v. *Hardey* (1842), 9 M. & W. 770).

(*n*) *Thomas* v. *Cook* (1818), 2 B. & Ald. 119; *Reeve* v. *Bird* (1834), 1 Cr. M. & R. 31; see *Taylor* v. *Chapman* (1795), Peake, Add. Cas. 19; *Doe* d. *Hull* v. *Wood*, *supra*. An exchange between two tenants who hold under different landlords, made with the consent of the landlords, operates as a surrender of the old tenancies and the creation of a new tenancy as to each holding (*Bees* v. *Williams* (1835), 2 Cr. M. & R. 581).

(*o*) *Dawson* v. *Lamb*, *supra*; and, as to vitiation of surrender by fraud, see title ESTOPPEL, Vol. XIII., pp. 375, 376, note (*k*).

(*p*) *Laurance* v. *Faux* (1861), 2 F. & F. 435; compare *Copeland* v. *Watts* (1815), 1 Stark. 95; and see note (*s*), p. 473, *ante*.

(*q*) *Harding* v. *Crethorn* (1793), 1 Esp. 57.

(*r*) *Pleasant* d. *Hayton* v. *Benson* (1811), 14 East, 234, 238; *Doe* d. *Beadon* v. *Pyke* (1816), 5 M. & S. 146, 154; *Pike* v. *Eyre* (1829), 9 B. & C. 909, 914; *Mellor* v. *Watkins* (1874), L. R. 9 Q. B. 400; see Co. Litt. 338 b; *Phipos* v. *Callegari* (*G. and B.*) (1910), 54 Sol. Jo. 635; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473, 479, 487, C. A.; and though a forfeiture destroys the rights of underlessees (see p. 531, *ante*), yet if the lessor accepts a surrender after a cause of forfeiture has accrued, the above rule prevails and the rights of underlessees are preserved (*Great Western Rail. Co.* v. *Smith* (1876), 2 Ch. D. 235, C. A.; (1877) 3 App. Cas. 165). Apparently it is the same although the lessor has no notice of the forfeiture at the date of the surrender (*Parker* v. *Jones*, [1910] 2 K. B. 32).

(*s*) 8 & 9 Vict. c. 106, s. 9.

(*t*) *Ibid.*, s. 9, refers to "the estate which shall for the time being confer, as

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reversion on the underlease to the extent and for the purpose of preserving such incidents to and obligations on the surrendered leasehold reversion as, but for the surrender thereof, would have subsisted. Further, under the Landlord and Tenant Act, 1730 (*a*), where a lease is duly surrendered (*b*) in order to be renewed, and a new lease is granted, the new lease is as valid as if all the underleases had been likewise surrendered; and the respective rights and liabilities of the lessee and the underlessees are regulated as though the original lease still continued. The new lease passes an immediate estate, and not an *interesse termini* only (*c*); and the effect is to place all parties, as to every matter, in the same position as if no surrender had taken place (*d*), but subject, as between the head lessor and the lessee, to the terms of the new lease.

Effect of surrender on liability for rent.

1065. The surrender of the lease stops the accrual of rent (*e*). Where the lease is by deed with a covenant for payment of rent, rent accrued before the surrender can be recovered on the covenant (*f*); otherwise it is recoverable on the agreement or in an action for use and occupation (*g*).

SECT. 3.—*Merger.*

Merger of term at law.

1066. Where a term of years becomes vested in the owner for the time being of the reversion immediately expectant on the term, the term is at law merged in the reversion (*h*). Thus a man cannot at law be reversioner to himself (*i*). For this purpose the reversion is deemed to be the greater estate, notwithstanding that it is in fact shorter than the term; hence a term of 1,000 years can be merged

against the tenant under the [underlease], the next vested right" to the premises; this is the reversion in which the surrendered lease has merged.

(*a*) 4 Geo. 2, c. 28, s. 6. The court could not compel a surrender of the underlease for the purpose of renewal (*Colchester* v. *Arnott* (1700), 2 Vern. 383).

(*b*) These words apply to both an express and an implied surrender.

(*c*) *Ecclesiastical Commissioners for England* v. *Treemer*, [1893] 1 Ch. 166.

(*d*) *Doe* d. *Palk* v. *Marchetti* (1831), 1 B. & Ad. 715, 721; *Cousins* v. *Phillips* (1865), 3 H. & C. 892, 901.

(*e*) *Southwell* v. *Scotter* (1880), 49 L. J. (Q. B.) 356. Upon accepting a surrender from an assignee of the lease, the lessor cannot reserve his rights against the lessee (*Clements* v. *Richardson* (1888), 22 L. R. Ir. 535).

(*f*) *A.-G.* v. *Cox*, *Pearce* v. *A.-G.* (1850), 3 H. L. Cas. 240.

(*g*) *Shaw* v. *Lomas* (1888), 59 L. T. 477; see p. 486, *ante*.

(*h*) See *Burton* v. *Barclay* (1831), 7 Bing. 745, 746. An assignment of the residue of the term by the lessee to the lessor, though only by way of mortgage, is equivalent to a surrender (*Cottee* v. *Richardson* (1851), 7 Exch. 143); and so is a redemise by the lessee to the lessor for the whole term (*Loyd* v. *Langford* (1777), 2 Mod. Rep. 174; *Smith* v. *Mapleback* (1786), 1 Term Rep. 441); and if rent is reserved, this is only recoverable as a sum in gross (*Smith* v. *Mapleback*, *supra*).

(*i*) See *Doe* d. *Rawlings* v. *Walker* (1826), 5 B. & C. 111, 121. The term and the reversion are concurrent estates and cannot exist together. It is different where the same man has successive estates, the one following immediately on the other; as an estate *pur autre vie* and a term to commence from the death of the *cestui que vie;* and as to these there is no merger (*ibid.*). Hence, if the lessee grants to his sub-lessee the residue of the term from the determination of the sub-lease, the sub-term is not merged in the residue of the head term (*Hyde* v. *Warden* (1877), 3 Ex. D. 72, 84, C. A.).

in a reversionary term of 500 years (*k*). Where the term merges the covenants attached to it are extinguished (*l*).

Merger in equity.

But in equity there is no merger where the reversion and the term are held by the same person in different rights, where, for instance, the reversion is vested in him as administrator, and the term beneficially (*m*). Even when they are held by the same person in the same right, the question of merger is governed in equity by the intention of the parties, and there is no merger if it is intended that the term should be kept alive (*n*): the intention need not be express, but may be implied from a consideration of what would be for the advantage of the parties (*o*).

Equitable rule.

The equitable rule prevails in all cases (*p*). Moreover, the merger of a term does not in equity destroy restrictive covenants which are attached to it (*q*).

Effect of merger on underlease.

1067. The merger of a term in the reversion formerly destroyed the covenants in a sub-lease (*r*); but now the head lessor becomes the immediate reversioner on the sub-lease, and is entitled to the benefit of the covenants (*s*). The assignment of the residue of a term which has in fact merged may operate to create a new term for the same length as such residue (*t*).

SECT. 4.—*Disclaimer.*

Disclaimer in bankruptcy.

1068. Where leaseholds are vested in a bankrupt, his trustee in bankruptcy may disclaim the property by writing signed by him at any time within twelve months after the first appointment of a trustee, but the period may be extended by the court; and if the

(*k*) Bac. Abr., tit. "Leases and Terms for Years" (S.) 1 (2), p. 876; *Stephens* v. *Bridges* (1821), Madd. & G. 66.

(*l*) See *Dynevor* (*Lord*) v. *Tennant* (1888), 13 App. Cas. 279.

(*m*) *Chambers* v. *Kingham* (1878), 10 Ch. D. 743. There was no merger at law if the interests were held by one person in different rights, at any rate if the union was not due to his own act (*Platt* (*Lady*) v. *Sleap* (1611), Cro. Jac. 275; *Jones* v. *Davies* (1860), 5 H. & N. 766; affirmed (1861), 7 H. & N. 597, Ex. Ch.).

(*n*) This principle is more usually operative in respect of charges, but it applies also to estates (*Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A.).

(*o*) *Forbes* v. *Moffatt* (1811), 18 Ves. 384, 390; *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368; and compare *Thellusson* v. *Liddard*, [1900] 2 Ch. 635. Merger is sometimes avoided by taking a conveyance of the term to a trustee (*Belaney* v. *Belaney* (1867), 2 Ch. App. 138). But the insertion in the conveyance to the lessor of a declaration against merger is equally effectual; and see, generally, title EQUITY, Vol. XIII., p. 146.

(*p*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (4); and title EQUITY, Vol. XIII., p. 146.

(*q*) *Birmingham Joint Stock Co.* v. *Lea* (1877), 36 L. T. 843; see *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33; *Jay* v. *Richardson* (1862), 30 Beav. 563; *Craig* v. *Greer*, [1899] 1 I. R. 258, C. A.; though possibly the surrender extinguishes provisions inserted in the lease for the benefit of the lessor (*Dynevor* (*Lord*) v. *Tennant*, *supra*, at p. 292); and compare p. 519, *ante*.

(*r*) *Webb* v. *Russell* (1789), 3 Term Rep. 393.

(*s*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 9, which applies equally to surrender (see p. 551, *ante*) and to merger; and compare Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10.

(*t*) *Cottee* v. *Richardson* (1851), 7 Exch. 143; and compare note (*h*), p. 552, *ante*.

SECT. 4. Disclaimer.

property has not come to the knowledge of the trustee within one month after the first appointment, the period of twelve months runs from the time when he first became aware of its existence (*a*).

SECT. 5.—*Action for Double Rent or Double Value.*

SUB-SECT. 1.—*Double Rent.*

Action for double rent.

Distress for Rent Act, 1737.

1069. If a tenant (*b*) gives notice to quit (*c*) at a time mentioned in the notice, and does not deliver up possession at the time so mentioned, he is liable (*d*) thenceforward, during all the time that he continues in possession (*e*), to pay to the landlord double the rent payable under the tenancy. The landlord has the same remedies for the double rent as he had, prior to the notice, for the single rent (*f*). But the tenant may leave at any time and stop the double rent without giving a fresh notice to quit (*g*).

SUB-SECT. 2.—*Double Value.*

Action for double value.

1070. If a tenant for any term for life or years (*h*), or any person who gets possession of the premises under or by collusion with such

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 155, 191; and as to the effect of the disclaimer, as to leave of the court to disclaim, as to orders vesting the disclaimed property in other persons interested, and as to the rights of persons injured by disclaimer, see *ibid.*, pp. 192—196; and as to the proof for rent, see *ibid.*, pp. 209, 221. Where the right to remove fixtures depends on the terms of the lease, the trustee cannot remove them after disclaimer, since this puts an end to all the provisions of the lease (*Re Latham, Ex parte Glegg* (1881), 19 Ch. D. 7, C. A.); see *Re Lavies, Ex parte Stephens* (1877), 7 Ch. D. 127, C. A. (decided under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23). Where an assignment is an act of bankruptcy and the trustee disclaims, the assignee is liable for rent accrued due before the adjudication in bankruptcy (*Stein* v. *Pope*, [1902] 1 K. B. 595, C. A.). An order vesting the disclaimed property in a mortgagee by sub-demise may include a part of the demised premises which is not included in the mortgage (*Re Holmes, Ex parte Ashworth*, [1908] 2 K. B. 812). For form of disclaimer, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 707 *et seq.*

(*b*) The statute (see note (*d*), *infra*) applies to all tenants, including weekly tenants, who have power to determine the tenancy by notice; *Sullivan* v. *Bishop* (1826), 2 C. & P. 359, *contra*, was decided on the erroneous assumption that the statute was similar to the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 1; see p. 555, *post*. There are material distinctions between the two statutes, and the latter statute must be construed by itself (*Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922, 931; compare *Cutting* v. *Derby* (1776), 2 Wm. Bl. 1075, 1077; *Timmins* v. *Rowlison* (1764), 1 Wm. Bl. 533).

(*c*) The notice may be verbal or in writing (*Timmins* v. *Rowlison, supra*): but it must be certain; a notice to quit upon a contingency will not do, although the contingency happens (*Farrance* v. *Elkington* (1811), 2 Camp. 591, 592); and see title DISTRESS, Vol. XI., p. 159, note (*h*). In proceedings founded on the statute the terms of the tenancy and of the notice to quit must be so shown that the tenant's power to determine the tenancy by notice, and the sufficiency of the notice, may appear (*Humberstone* v. *Dubois* (1842), 10 M. & W. 765).

(*d*) By the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 18; see title DISTRESS, Vol. XI., p. 159.

(*e*) See *Anon.* (1773), Lofft, 275; *Booth* v. *Macfarlane* (1831), 1 B. & Ad. 904.

(*f*) See *Timmins* v. *Rowlison, supra; Soulsby* v. *Neving* (1808), 9 East, 310, 314; *Humberstone* v. *Dubois, supra*.

(*g*) *Booth* v. *Macfarlane, supra*.

(*h*) A tenant from year to year holds for a "term" (see *Doe* d. *Hull* v. *Wood*

SECT. 5. Action for Double Rent or Double Value.

tenant, wilfully (*i*) holds over the premises after the determination of the term, and after demand made and notice in writing given for delivery of possession (*k*) by the reversioner or his lawfully authorised agent (*l*), the person so holding over is liable to pay to the reversioner at the rate of double the yearly value of the premises (*m*); and against this penalty there is no relief in equity. The notice may be given either before (*n*) or after (*o*) the determination of the term, and it is not necessary that the demand and notice should be distinct (*p*). Moreover, a notice to quit involves in itself a demand for possession, and is a sufficient notice under the statute (*q*).

Landlord and Tenant Act, 1730.

What is sufficient notice.

1071. The action for double value can be brought only by the landlord or reversioner (*r*), and he can bring it notwithstanding that

Nature of remedy.

(1845), 14 M. & W. 682, 686) and the statute applies to such a tenant (see *Ryall* v. *Rich* (1808), 10 East, 48) but not to a weekly tenant (*Lloyd* v. *Rosbee* (1810), 2 Camp. 453) or other tenant for less than a year (*Wilkinson* v. *Hall* (1837), 3 Bing. (N. C.) 508).

(*i*) The statute does not apply where the holding over is under a *bonâ fide* mistake or under a fair claim of right; it must be contumacious in the sense that the tenant knows that he has no right to keep possession (*Wright* v. *Smith* (1805), 5 Esp. 203; *Soulsby* v. *Neving* (1808), 9 East, 310, 313; *Hirst* v. *Horn* (1840), 6 M. & W. 393; *Swinfen* v. *Bacon* (1861) 6 H. & N. 846, Ex. Ch.; *Rawlinson* v. *Marriott* (1867), 16 L. T. 207). Hence it does not apply where a sub-tenant holds over without the consent of the tenant (*Rands* v. *Clark* (1870), 19 W. R. 48).

(*k*) The tenant is not bound to give up possession till the end of the last day of the term, see p. 446, *ante;* hence a notice under the statute to give up possession at noon on the last day is bad (*Page* v. *More* (1850), 15 Q. B. 684). For a form of notice demanding possession and claiming double value, see Encyclopædia of Forms and Precedents, Vol. VII., p. 688.

(*l*) A receiver under a mortgage deed, with power to give notice to quit (*Poole* v. *Warren* (1838), 8 Ad. & El. 582), and a receiver appointed by the court (*Wilkinson* v. *Colley* (1771), 5 Burr, 2694) are agents lawfully authorised to give a notice under the statute. As to receivers, generally, see title RECEIVERS.

(*m*) By the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 1.

(*n*) *Cutting* v. *Derby* (1776), 2 Wm. Bl. 1075; *Messenger* v. *Armstrong* (1785), 1 Term Rep. 53.

(*o*) *Cobb* v. *Stokes* (1807), 8 East, 358; but the landlord must not in the meantime have done any act recognising the continuance of the tenancy (*ibid.*, at p. 361).

(*p*) *Wilkinson* v. *Colley, supra.*

(*q*) See *Messenger* v. *Armstrong, supra;* and for this purpose a notice given in the usual alternative form (see p. 450, *ante*) will suffice, though if there is doubt as to the actual time for quitting, this may prevent the holding over from being wilful (*Hirst* v. *Horn, supra*, at p. 395). But a notice to quit which requires possession to be given before the determination of the term will not suffice (*Page* v. *More, supra*).

(*r*) See *Harcourt* v. *Wyman* (1849), 3 Exch. 817. It cannot be brought by a lessee under a future lease to commence after the determination of the first lease, since such future lease does not pass the reversion (*Blatchford* v. *Cole* (1858), 5 C. B. (N. S.) 514). One tenant in common can bring an action for the double value of his moiety (*Cutting* v. *Derby, supra*); but tenants in common cannot sue jointly unless there has been a joint demise (*Wilkinson* v. *Hall* (1835), 1 Bing. (N. C.) 713; see p. 343, *ante*). An action for double value cannot be brought by the administrator of the landlord's executor until he has taken out administration *de bonis non* to the landlord, notwithstanding that the tenant has attorned to him (*Tingrey* v. *Brown* (1798), 1 Bos. & P. 310).

SECT. 5. Action for Double Rent or Double Value.

he has obtained judgment for recovery of possession (*s*). If the amount claimed does not exceed £100 it can be brought in the county court (*t*), otherwise in the High Court, but double value cannot be distrained for (*a*). The double value is reckoned from the determination of the tenancy, if the notice was given before the determination (*b*); and from the giving of the notice, if given afterwards (*c*); and is calculated on the yearly value of the premises, and not also on the value of incidental advantages (*d*). If the landlord accepts a single rent for the period covered by his claim to double value, it is a question of fact whether he has waived the claim, or whether he takes the amount of the single rent in part satisfaction of it (*e*).

Part XIII.—Delivery and Recovery of Possession.

SECT. 1.—*Entry.*

Liability to restore possession.

1072. A lease usually contains a covenant on the part of the lessee to deliver up the premises on the determination of the term. In the absence of such covenant or of any express stipulation, the tenant is under an implied contract to restore possession to the landlord (*f*). The damages for breach of this express or implied obligation are not the value of the land but the real damage sustained by the landlord (*g*). This will include the rent of the

(*s*) Since the action is for double value, not double rent, it does not recognise a tenancy in the lessee (*Soulsby* v. *Neving* (1808), 9 East, 310). The head-note to *Wright* v. *Smith* (1805), 5 Esp. 203, *contra*, appears to be erroneous. As to proceedings for recovery of possession, see p. 558, *post*.

(*t*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3; *Wickham* v. *Lee* (1848), 12 Q. B. 521; and see title COUNTY COURTS, Vol. VIII., p. 428.

(*a*) *Timmins* v. *Rowlison* (1764), 1 Wm. Bl. 533, 535.

(*b*) *Soulsby* v. *Neving*, *supra*.

(*c*) *Cobb* v. *Stokes* (1807), 8 East, 358, where it was also held that single rent could not be recovered for the interval between the expiration of the term and the notice.

(*d*) *E.g.*, the value of the supply of steam power incident to a tenancy of a room in a factory (*Robinson* v. *Learoyd* (1840), 7 M. & W. 48).

(*e*) *Ryall* v. *Rich* (1808), 10 East, 48, 52; see *Doe* d. *Cheny* v. *Batten* (1775), 1 Cowp. 243, 246; and compare *Rawlinson* v. *Marriott* (1867), 16 L. T. 207.

(*f*) *Henderson* v. *Squire* (1869), L. R. 4 Q. B. 170, 173; see *Harding* v. *Crethorn* (1793), 1 Esp. 57. The rule applies where the lease is determined by surrender (*D'Arcy* v. *Castlemaine* (*Lord*), [1909] 2 I. R. 474, C. A.). The tenant cannot by the use and enjoyment of the demised land acquire against the landlord an easement in it distinct from such use and enjoyment (*Outram* v. *Maude* (1881), 17 Ch. D. 391, 404); see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 263.

(*g*) *Watson* v. *Lane* (1856), 11 Exch. 769, 774. Where one of two joint tenants holds over, both will be liable if the other assents to the holding over, but otherwise only the one who holds over (*Christy* v. *Tancred* (1843), 12 M. & W. 316, Ex. Ch.; *Draper* v. *Crofts* (1846), 15 M. & W. 166).

premises during the time the landlord is kept out of possession (*h*); the reasonable damages and costs incurred by the landlord in respect of claims against him naturally arising out of the tenant's failure to deliver possession (*i*); and also, where an undertenant is in possession, the costs of an action brought against him to recover possession (*k*). The landlord can sue for the recovery of chattels which form part of the demised premises, and which have been wrongfully removed during the tenancy (*l*).

Measure of damages.

1073. Where the tenant fails to deliver up possession, the landlord is entitled to re-enter and take possession, subject only to certain statutory restrictions (*m*). Thus he can re-enter where the tenant has abandoned possession (*n*), or where he can effect the entry peaceably (*o*); and even if he enters forcibly, and

Landlord's right of re-entry.

Statutes of Forcible Entry.

(*h*) *Henderson* v. *Squire* (1869), L. R. 4 Q. B. 170, 173.

(*i*) Where, for instance, he has contracted to let the premises, but cannot place the new tenant in possession (*Bramley* v. *Chesterton* (1857), 2 C. B. (N. S.) 592).

(*k*) *Henderson* v. *Squire*, *supra*. While an underlessee wrongfully remains in occupation, the lessor can treat the lessee as still in possession (*Harding* v. *Crethorn* (1793), 1 Esp. 57; compare *Roe* v. *Wiggs* (1806), 2 Bos. & P. (N. R.) 330), and can recover rent from him for the period of the underlessee's occupation (*Ibbs* v. *Richardson* (1839), 9 Ad. & El. 849). If the lessee arranges to continue his tenancy, the underlessee, if he remains in possession, will usually be presumed to continue the undertenancy so as to be liable to the lessee for rent (*Levy* v. *Lewis* (1861), 9 C. B. (N. S.) 872).

(*l*) *Petre* v. *Ferrers* (1891), 61 L. J. (CH.) 426.

(*m*) *I.e.*, those imposed by the Statutes of Forcible Entry:—stat. (1381) 5 Ric. 2, st. 1, c. 7 (which provides that entry shall not be made with a strong hand, or with a multitude of people, but only in peaceable and easy manner); stat. (1391) 15 Ric. 2, c. 2 (which empowers the justices (see title MAGISTRATES) to punish forcible entry); stat. (1429) 8 Hen. 6, c. 9 (which applied the earlier statutes to both forcible entry and forcible detainer, and empowered the justices to cause the party forcibly turned out to be put back in possession); and see stat. (1588-9) 31 Eliz. c. 11; stat. (1623-4) 21 Jac. 1, c. 15 (restitution in the case of lessees for years); see *R.* v. *Wannop* (1754), Say. 142. Forcible entry is "entry with a strong hand, with unusual weapons, or with menace of life or limb" (3 Bac. Abr., tit. "Forcible Entry and Detainer," 7th ed., 716; *Harvey* v. *Brydges* (1845), 14 M. & W. 437). Violence to a building, as well as to persons, may constitute a forcible entry (3 Bac. Abr., tit. "Forcible Entry and Detainer," 7th ed., 717; 1 Hawk. P. C., 8th ed., 501); but not the mere removal of locks or bars, provided there is no breach of the peace (*Williams* v. *Taperell* (1892), 8 T. L. R. 241). The use of force after the entry, but before complete possession has been obtained, turns a peaceable into a forcible entry (13 Vin. Abr., 2nd ed., 380; 3 Bac. Abr., tit. "Forcible Entry and Detainer," 7th ed., 716; *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199). It has been held that there cannot be a forcible entry on a tenant at will or at sufferance (*R.* v. *Westly and Walker* (1669), 2 Keb. 495; *R.* v. *Dorny* (1700), 1 Salk. 260), but this is doubtful; compare 1 Hawk. P. C., 8th ed., 503. After a peaceable and complete entry by a person with right, a forcible maintenance of possession is not a forcible detainer; it is only a forcible detainer where a person who has entered, whether forcibly or not, without right, or who, having right, has entered forcibly, withholds possession from the former possessor (*R.* v. *Oakley* (1832), 4 B. & Ad. 307). There is no forcible detainer after three years from entry (stat. (1429) 8 Hen. 6, c. 9; stat. (1588-9) 31 Eliz. c. 11).

(*n*) See *Lacey* v. *Lear* (1802), Peake, Add. Cas. 210; *Wildbor* v. *Rainforth* (1828), 8 B. & C. 4, 6.

(*o*) *Williams* v. *Taperell* (1892), 8 T. L. R. 241. A mere trespasser, who has not been in occupation long enough to establish his own possession, can be

SECT. 1. Entry.

is thus liable to criminal proceedings under the statutes, yet the tenant has no civil remedy against him in respect of the entry (*p*), though the tenant can recover damages for injury to himself, or his family, or his property in the course of the entry (*q*). If, however, the entry is peaceable, the landlord is not liable for damage to goods which are unlawfully on the premises (*r*).

SECT. 2.—*Action.*

SUB-SECT. 1.—*In the High Court.*

Action to recover possession. Summary procedure.

1074. Possession is recovered in the High Court by means of an action for recovery of land (*s*), with which may be joined a claim for mesne profits (*t*). Where the term has expired by lapse of time, or has been duly determined by notice to quit, or, in the case of a tenancy at will, by determination of the will (*u*), or has become liable to forfeiture for non-payment of rent, the writ may be specially indorsed (*a*), and then judgment can be obtained summarily (*b*), unless the defendant obtains leave to defend. Judgment may include mesne profits up to the date on which the landlord obtains possession (*c*). But this procedure is not available where the tenancy has been determined by surrender (*d*), or by forfeiture otherwise than for non-payment of rent (*e*). Nor is it available

ejected by force, provided no personal injury is done to him (*Scott* v. *Brown (Matthew) & Co.* (1884), 51 L. T. 746); and see title TRESPASS.

(*p*) *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; *Beattie* v. *Mair* (1882), 10 L. R. Ir. 208, 211; see *Taunton* v. *Costar* (1797), 7 Term Rep. 431; *Turner* v. *Meymott* (1823), 1 Bing. 158; *Kavanagh* v. *Gudge* (1844), 7 Man. & G. 316; *Davison* v. *Wilson* (1848), 11 Q. B. 890; *Burling* v. *Read* (1850), 11 Q. B. 904; *Pollen* v. *Brewer* (1859), 7 C. B. (N. S.) 371; *Blades* v. *Higgs* (1861), 10 C. B. (N. S.) 713; and as to the nature of the possession given by a forcible entry, see *Lows* v. *Telford* (1876), 1 App. Cas. 414.

(*q*) *Hillary* v. *Gay* (1833), 6 C. & P. 284; *Newton* v. *Harland* (1840), 1 Man. & G. 644; *Beddall* v. *Maitland, supra; Edwick* v. *Hawkes* (1881), 18 Ch. D. 199, 211; but see the judgments of ALDERSON and PARKE, BB., in *Harvey* v. *Brydges* (1845), 14 M. & W. 437.

(*r*) *Jones* v. *Foley*, [1891] 1 Q. B. 730.

(*s*) This replaces the action of ejectment (see *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492); see title ACTION, Vol. I., pp. 34 *et seq.*, 44 *et seq.*

(*t*) R. S. C., Ord. 18, r. 2.

(*u*) Including a tenancy at will created for mortgage purposes (*Daubuz* v. *Lavington* (1884), 13 Q. B. D. 347; *Hall* v. *Comfort* (1886), 18 Q. B. D. 11; *Jerred* v. *Edwards* (1891), 92 L. T. Jo. 8; *Kemp* v. *Lester*, [1896] 2 Q. B. 162, C. A.).

(*a*) R. S. C., Ord. 3, r. 6. As to the indorsement, see *Hanmer* v. *Clifton*, [1894] 1 Q. B. 238. This in practice replaces the summary procedure under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 213, 214, founded on stat. (1820) 1 Geo. 4, c. 87.

(*b*) R. S. C., Ord. 14.

(*c*) *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66, C. A. It is immaterial that the plaintiff has claimed too much by his writ, or has in fact claimed on a wrong basis, where, *e.g.*, the figure is based on double value, provided the writ does not show this (*ibid.*).

(*d*) *Doe* d. *Tindal* v. *Roe* (1831), 2 B. & Ad. 922; decided on stat. (1820) 1 Geo. 4, c. 87, ss. 1, 4.

(*e*) See *Doe* d. *Cundey* v. *Sharpley* (1846), 15 M. & W. 558; *Mansergh* v. *Rimell*, [1884] W. N. 34; *Arden* v. *Boyce*, [1894] 1 Q. B. 796, C. A. The

where the claim involves proof of devolution of the title to the reversion. The plaintiff must either be the original lessor, or his title must depend on estoppel, by payment of rent or otherwise (*f*); and the facts out of which the estoppel arises must not be in dispute (*g*).

Ordinary procedure.

Where the writ is not specially indorsed, or where the defendant gets leave to defend, the action will proceed as an ordinary action to recover possession of land (*h*). A mortgagor entitled to possession can sue in his own name, if the mortgagee has not given notice of his intention to take possession (*i*); but usually the plaintiff must have the legal title in himself (*k*). Judgment for recovery of possession will be enforced by writ of possession (*l*).

Notice to landlord.

1075. If the tenant is sued for possession by a person claiming adversely to the landlord, he must give notice to the landlord (*m*), and the landlord can then obtain leave to appear and defend (*n*).

SUB-SECT. 2.—*In the County Court.*

In county court.

1076. The landlord may, in some cases, recover possession in the county court either by an action of ejectment or by an action for recovery of possession (*o*).

SECT. 3.—*Procedure before Magistrates.*

Recovery of possession before magistrates.

1077. Where a house, land, or other corporeal hereditament has been held on a tenancy at will or for a term not exceeding seven

procedure was extended to forfeiture for non-payment of rent by the R. S. C., January, 1902.

(*f*) *Casey* v. *Hellyer* (1886), 17 Q. B. D. 97, C. A.; see *Guinness* v. *Caraher*, [1900] 2 I. R. 505, C. A.

(*g*) *Jones* v. *Stone*, [1894] A. C. 122, P. C.

(*h*) As to service of the writ where the premises are vacant, see R. S. C., Ord. 9, r. 9; as to service out of the jurisdiction, see R. S. C., Ord. 11, r. 1 (a); *Agnew* v. *Usher* (1884), 14 Q. B. D. 78.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c, 66), s. 25 (5). But if the legal estate is in the mortgagee, the mortgagor cannot exercise the right of forfeiture for breach of covenant and then sue for possession in his own name (*Matthews* v. *Usher*, [1900] 2 Q. B. 535, C. A.; compare *Turner* v. *Walsh*, [1909] 2 K. B. 484, C. A., and see p. 596, *post*).

(*k*) In ejectment the legal title must as a rule be before the court, if the equitable title has not been clearly established (see *Allen* v. *Woods* (1893), 68 L. T. 143, C. A.) though if the equitable title is clear this may not be necessary (*Antrim Land, Building, and Investment Co.* v. *Stewart*, [1904] 2 I. R. 357, C. A.); but a landlord usually has a legal title by estoppel.

(*l*) R. S. C., Ord. 42, r. 5; Ord. 47, rr. 1, 2; and see title EXECUTION, Vol. XIV., p. 76. The writ may be issued notwithstanding that the landlord's estate has terminated, unless this would be unjust and futile (*Knight* v. *Clarke* (1885), 15 Q. B. D. 294, C. A.).

(*m*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 209; see *Crocker* v. *Fothergill* (1819), 2 B. & Ald. 652.

(*n*) R. S. C., Ord. 12, rr. 25—27. The landlord must rely only on his own title, and cannot set up any defect in the plaintiff's title as against the tenant (*Doe* d. *Davies* v. *Creed* (1829), 5 Bing. 327; *Doe* d. *Mee* v. *Litherland* (1836), 4 Ad. & El. 784).

(*o*) See title COUNTY COURTS, Vol. VIII., pp. 435, 436. As to joinder of causes of action, see *ibid.*, p. 458; as to service, *ibid.*, p. 469; and as to appeals, *ibid.*, p. 602.

SECT. 3. Procedure before Magistrates.

Small Tenements Recovery Act, 1838.

years, either rent free or at a rent not exceeding £20 a year, and upon which no fine has been made payable, and the term has ended or has been duly determined by a legal notice to quit or otherwise, and the tenant or occupier neglects or refuses to give up possession, the landlord can recover possession summarily before the justices, by statutory proceedings (*p*). For this purpose he must serve (*q*) on the tenant or occupier a written notice in the statutory form (*r*), signed by himself or his agent (*s*), of his intention to proceed under the statute; and if at the hearing the tenant or occupier does not show cause to the contrary, and the landlord gives evidence of his title to relief (*t*), the justices in petty sessions, or any two of them, or a stipendiary magistrate (*a*), may issue a warrant to the police (*b*) commanding them, within a period therein named, not less than twenty-one nor more than thirty clear days from the date of the warrant (*c*), to enter (by force if needful) and give possession of the premises to the landlord or his agent. The procedure does not affect the tenant's rights as outgoing tenant under the custom of the country or otherwise (*d*); nor during the twenty-one days is the lessor precluded from exercising his common law right of entry (*e*). If the landlord is not in fact entitled to enter, the warrant does not protect him from an action of trespass; the obtaining of a warrant may be treated as a trespass, and, on the tenant giving security for costs, the execution of the warrant can

(*p*) Under the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 1. For the statute to apply there must be the relation of landlord and tenant between the parties (*Webb* v. *Fordred* (1868), 32 J. P. 804; *Brown* v. *Newmarch* (1875), 40 J. P. 212). The premises are within the statute if the rent is less than £20, although the tenant has agreed to pay collateral sums, such as rates and taxes, which bring the annual payment to more than £20 (*Re Richmond Justices* (1893), 10 T. L. R. 68). As to the general procedure before justices, see title MAGISTRATES.

(*q*) As to service of the notice, see Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 2; the notice must be read to the person on whom it is served, and its purport and intent explained.

(*r*) Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), Schedule. The statutory form should be strictly followed, and should state the place where the application is to be made (*Delaney* v. *Fox* (1856), 1 C. B. (N. S.) 166). For form of notice, see Encyclopædia of Forms and Precedents, Vol. VII., p. 689.

(*s*) If the justices find as a fact that the person who signs the notice and applies for a warrant is the duly authorised agent of the landlord, this finding will not be interfered with (*R.* v. *Hopkins* (1900), 64 J. P. 454).

(*t*) *I.e.*, evidence of (1) the holding and of the expiration or other determination of the tenancy; (2) where the title of the landlord has accrued since the letting, the right by which he claims possession; (3) service of the notice; and (4) the neglect or refusal of the tenant or occupier. If these matters are proved, the jurisdiction of the justices is not ousted by the tenant alleging title in a third person (*Rees* v. *Davies* (1858), 4 C. B. (N. S.) 56).

(*a*) See Stipendiary Magistrates Act, 1858 (21 & 22 Vict. c. 73), s. 1; and see title MAGISTRATES.

(*b*) The warrant can only be issued to the police (*Jones* v. *Chapman* (1845), 14 M. & W. 124); as to the defence to an action against persons acting in aid of the police, see *Edmunds* v. *Pinniger* (1845), 7 Q. B. 558.

(*c*) These periods must be strictly observed, and the magistrates cannot suspend the issue of the order for a stated period (*R.* v. *Hopkins* (1900), 64 J. P. 454).

(*d*) Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 1 (proviso).

(*e*) *Jones* v. *Foley*, [1891] 1 Q. B. 730.

SECT. 3. Procedure before Magistrates.

be stayed until judgment in the action of trespass (*f*). If the landlord has lawful right to the possession of the premises, he is not to be deemed a trespasser by reason of any irregularity in the proceedings under the statute, but the party aggrieved can bring an action to recover the special damage which he has suffered (*g*).

Recovery of deserted premises. Distress for Rent Act, 1737.

1078. Where premises are deserted, possession can be recovered under statute (*h*), where (1) there is a tenancy of lands, tenements, or hereditaments at a rack-rent, or at a rent of full three-fourths of the yearly value of the premises; (2) there is a half-year's rent in arrear (*i*); (3) the tenant has deserted the premises and left them uncultivated or unoccupied (*k*); and (4) there is no sufficient distress to meet the arrears of rent.

Two or more justices, at the request (*l*) of the landlord or his bailiff, view the premises (*m*), and affix a notice of a second view to take place not sooner than fourteen days (*n*). If on the second view the tenant does not appear and pay the rent in arrear, or if there is not sufficient distress on the premises, the justices may put the landlord into possession (*o*), and the lease, as to any demise therein contained only, is thenceforth void. An appeal lies to the judges of assize (*a*). A successful appeal gives no action for trespass against the justices provided the statutory procedure has been followed (*b*); though the landlord is liable if he has improperly procured the interference of the magistrates (*c*).

SECT. 4.—*Encroachments.*

Benefit of encroachments.

1079. Where a tenant encroaches upon waste—that is, uninclosed—land adjoining his holding, there is, in the absence of evidence of

(*f*) Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), ss. 3, 4; *Darlington* v. *Pritchard* (1842), 4 Man. & G. 783; see *Flitters* v. *Allfrey* (1874), L. R. 10 C. P. 29.

(*g*) Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 6; *Delaney* v. *Fox* (1857), 1 C. B. (N. S.) 166.

(*h*) *I.e.*, the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 16.

(*i*) The Deserted Tenements Act, 1817 (57 Geo. 3, c. 52), altered the period of arrears from one year to half a year. It is not necessary that the landlord should have an express power of re-entry (*ibid.*; see *Edwards* v. *Hodges* (1855), 15 C. B. 477, 490; compare *Ex parte Pilton* (1818), 1 B. & Ald. 369).

(*k*) *Ex parte Pilton, supra.*

(*l*) The request need not be on oath (*Basten* v. *Carew* (1825), 3 B. & C. 649).

(*m*) A metropolitan police magistrate may send a constable to view the premises (Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 13); but this power cannot be exercised by the Lord Mayor or Aldermen at the Mansion House or Guildhall (*Edwards* v. *Hodges, supra*).

(*n*) There must be fourteen clear days (*Creak* v. *Brighton Justices* (1858), 1 F. & F. 110).

(*o*) If the magistrates are not satisfied that the case is within the statute a mandamus will not be issued to compel them to give possession (*Ex parte Fulder* (1840), 8 Dowl. 535). As to mandamus, see titles CROWN PRACTICE, Vol. X., pp. 89 *et seq.*; MAGISTRATES.

(*a*) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 17. The appeal is to them as individuals, and not as Commissioners of Assize, and their order should be verified by their own signatures (*R.* v. *Sewell* (1845), 8 Q. B. 161). Although the appeal is successful, the justices are not bound to restore possession unless so directed by the order (*R.* v. *Traill* (1840), 12 Ad. & El. 761).

(*b*) *Basten* v. *Carew, supra*; *Ashcroft* v. *Bourne* (1832), 3 B. & Ad. 684.

(*c*) See *Basten* v. *Carew, supra*, at p. 655.

SECT. 4. Encroachments.

a contrary intention on his part, a presumption that the encroachment is annexed to the holding, and on the determination of his tenancy he must give it up to the landlord together with the demised premises (*d*).

Waste land.

1080. The rule that a tenant is presumed to make an encroachment for the benefit of his landlord is restricted to cases where the encroachment is upon waste land (*e*), but the presumption arises whether the land belongs to a third person or to the landlord himself. As against a third person, the tenant is only entitled to hold the encroachment when the title of such third person is extinguished under the Statutes of Limitation (*f*); and it is the same as against the landlord, if he has not assented to the encroachment. After twelve years the tenant is entitled to hold the encroachment against the owner, whether a third person or the landlord, until the determination of his tenancy, when it must then be given up to the landlord. But, though the landlord is the owner, and has assented to the encroachment, this does not create a tenancy at will, so as to enable the tenant to get an absolute title against the landlord under the statutory provision relating to such tenancies (*g*). The tenant's title lasts only during his tenancy of the original premises.

Land not waste.

1081. If the encroachment is not on waste land, so that the presumption does not arise, it may still appear from the circumstances of the case that the tenant intended it to be part of his holding, and though after twelve years he may retain it during the remainder of his tenancy, he must give it up to the landlord when his tenancy comes to an end (*h*).

(*d*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 533, 534, and cases cited *ibid.*, p. 534, note (*m*); see *Doe* d. *Gonville and Caius College, Cambridge, and Dickinson* v. *Stopford* (1831), 9 L. J. (O. S.) (K. B.) 171. This rule is sometimes based on the presumption that the tenant incloses "for the benefit" of the landlord (*Doe* d. *Challinor* v. *Davies* (1795), 1 Esp. 461; *Doe* d. *Dunraven (Earl)* v. *Williams* (1836), 7 C. & P. 332); but this has been objected to on the ground that it makes him steal for the landlord (see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 533; and compare *Lisburne (Earl)* v. *Davies* (1866), L. R. 1 C. P. 259, 267). The rule applies to an inclosure made by a lessee for lives (*Doe* d. *Lloyd* v. *Jones* (1846), 15 M. & W. 580). As to the application of the rule to premises not actually adjoining the holding, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 534. As to the subsequent severance of the encroachment from the holding, see *ibid.*, p. 535; as to the rebuttal of the presumption, and as to the encroachment operating for the benefit of the tenant, see *ibid.*, pp. 533, 535.

(*e*) *Hastings (Lord)* v. *Saddler* (1898), 79 L. T. 355.

(*f*) See title LIMITATION OF ACTIONS.

(*g*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7; *Whitmore* v. *Humphries* (1871), L. R. 7 C. P. 6.

(*h*) See *Tabor* v. *Godfrey* (1895), 64 L. J. (Q. B.) 245. If, where no presumption arises, the landlord knows of the encroachment and declines to recognise it, the encroachment will not be treated as part of the demised premises (*Doe* d. *Baddeley* v. *Massey* (1851), 17 Q. B. 373).

Part XIV.—Leases of Special Property.

SECT. 1.—*Agricultural Leases.*

SECT. 1. Agricultural Leases.

Custom of the country.

1082. The practice of agriculture is largely regulated by custom (*i*), and where there is a written agreement for the tenancy of a farm, there is a presumption that the whole of the contract is not contained in the agreement, but that the parties have contracted with reference to the customs of agriculture prevailing in the district. Hence all such customs are deemed to be incorporated in the agreement unless they are expressly or impliedly excluded (*k*).

Statutory provisions incorporated in agricultural leases.

1083. Agricultural tenancies are subject to certain statutory provisions (*l*) in addition to the provisions as to the management of the holding referred to subsequently (*m*).

Rules as to husbandlike management.

1084. The management of the holding during the tenancy depends, in the absence of agreement, upon the rule that the tenant is bound to treat the farm in a husbandlike manner according to the "custom of the country" (*n*), which includes not only special customs

(*i*) See title AGRICULTURE, Vol. I., p. 243; and as to the sources for ascertaining customs, see *ibid.*, note (*t*).

(*k*) *Hutton* v. *Warren* (1836), 1 M. & W. 466; see *Wigglesworth* v. *Dallison* (1779), 1 Doug. (K. B.) 201; 1 Smith, L. C., 11th ed., 545; *Senior* v. *Armytage* (1816), Holt (N. P.), 197; *Webb* v. *Plummer* (1819), 2 B. & Ald. 746. The rule applies to all tenancies, whether verbal or in writing (*Wilkins* v. *Wood* (1848), 17 L. J. (Q. B.) 319); and see title CUSTOM AND USAGES, Vol. X., p. 257. As to the nature, proof, and applicability of such customs, see title AGRICULTURE, Vol. I., p. 244. For forms of lease, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 507 *et seq.*, and, for forms for special counties, see *ibid.*, pp. 547 *et seq.*

(*l*) See title AGRICULTURE, Vol. I., p. 278 (compensation for damage by game); *ibid.*, p. 270 (compensation for unreasonable deprivation of holding); *ibid.*, p. 241 (length of notice to quit); *ibid.*, p. 242 (notice to quit part, and tenant's right to treat same as notice to quit whole, of holding); *ibid.*, p. 243 (landlord's right to enter and view); *ibid.*, p. 250 (limitation on penal rents); *ibid.*, p. 240 (record of condition of holding); *ibid.*, pp. 253, 255 (limitations on common law right of distress); all of which must be read in the light of the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 10, 11, 22, 23, 24, 25, 27, 28, 29. The Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), consolidates and repeals the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61); Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50); Agricultural Holdings Act, 1906 (6 Edw. 7, c. 56); Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27); and part of the Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57). As to the definition of agricultural holding, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 48; and title AGRICULTURE, Vol. I., p. 239. As to compensation in relation to tenancies of market gardens current on 1st January, 1896, see *ibid.*, p. 270; *Re Kedwell and Flint & Co.*, [1911] 1 K. B. 797, C. A.

(*m*) See the text, *infra*, and pp. 564 *et seq.*, *post*.

(*n*) *Brown* v. *Crump* (1815), 1 Marsh. 567; *Powley* v. *Walker* (1793), 5 Term Rep. 373; *Onslow* v. —— (1809), 16 Ves. 173; *Hallifax* v. *Chambers* (1839), 4 M. & W. 662; *Westropp* v. *Elligott* (1884), 9 App. Cas. 815, *per* Lord BLACKBURN, at pp. 823, 824. This is the usual form of the rule, though the words "according to the custom of the country" are perhaps surplusage, since to farm "according to the custom of the country" is to farm in a husbandlike manner (*Legh* v. *Hewitt* (1803), 4 East, 154, 159); see title AGRICULTURE, Vol. I., p. 243. The erection of needless dwelling-houses is a breach of an implied covenant to use the land as an agricultural holding, and may also be waste (*Brooke* v. *Mernagh* (1888), 23 L. R. Ir. 86; *Brooke* v. *Kavanagh* (1888), 23 L. R. Ir. 97, C. A.).

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regulating particular matters, but also the prevalent course of good management in the district (*o*); and the rule will be broken if the tenant does not follow this course of management (*p*). The tenant may sell hay or straw off the premises, provided this is not contrary to special custom or to the terms of the lease (*q*); but he is bound to consume on the farm such produce as would be consumed thereon if the farm were treated in a husbandlike manner (*r*), and not to remove manure (*s*); and he must not commit waste (*t*).

Express covenants as to management.

The management of the farm is usually regulated by express covenants (*a*). These may prescribe a particular system of tillage (*b*), or there may be a general covenant to cultivate in a husbandlike manner (*c*) according to the best rules of husbandry practised in the district (*d*). A covenant to cultivate on a particular system according to the custom of the country binds the tenant to adopt the system only so far as the custom makes it universally obligatory (*e*). An agreement to manage and leave the farm as it has been managed and left by former tenants does not impose on the tenant without notice the terms on which former tenants have held. He must be guided by the condition and mode of management when he took possession (*f*).

Removal of produce.

The removal of produce which is usually consumed on the farm, such as straw, hay, and roots, may be prohibited by express covenant; but the prohibition is usually modified (*g*), for example, where it is restricted to the last year of the term (*h*); or where

(*o*) *Legh* v. *Hewitt* (1803), 4 East, 154, 159, 161; and see title AGRICULTURE, Vol. I., p. 246. For forms of leases suitable for particular districts, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 547 *et seq.*

(*p*) *E.g.*, if he has half his farm under tillage at the same time, while no other farmer in the neighbourhood tills more than a third (*Legh* v. *Hewitt*, *supra*). But a tenant is not necessarily bound to have a certain portion of the land every year in a certain tillage or to leave a certain quantity fallow (*Brown* v. *Crump* (1815), 1 Marsh. 567).

(*q*) *Gough* v. *Howard* (1801), Peake, Add. Cas. 197.

(*r*) *Onslow* v. —— (1809), 16 Ves. 173; *Brown* v. *Crump*, *supra*, at p. 569.

(*s*) *Powley* v. *Walker* (1793), 5 Term Rep. 373; *Gough* v. *Howard*, *supra*.

(*t*) *E.g.*, by turning pasture land into arable (Co. Litt. 53 b; *Simmons* v. *Norton* (1831), 7 Bing. 640, 647. But the land must be in pasture at the beginning of the tenancy (*Goring* v. *Goring* (1676), 3 Swan. 661; *Rush* v. *Lucas*, [1910] 1 Ch. 437).

(*a*) As to the construction of such covenants, see title AGRICULTURE, Vol. I., pp. 247—249.

(*b*) See, as to the four-course system, *Rankin* v. *Lay* (1860), 2 De G. F. & J. 65.

(*c*) This forbids the conversion of pasture into arable land (*Drury* v. *Molins* (1801), 6 Ves. 328). As to such a covenant in respect of land not for the time built on, see *Hills* v. *Rowland* (1853), 4 De G. M. & G. 430.

(*d*) It is permissible to convert part of the farm into a market garden, if other farms in the neighbourhood have been so converted (*Meux* v. *Cobley*, [1892] 2 Ch. 253).

(*e*) *Newson* v. *Smythies* (1859), 1 F. & F. 477, 479.

(*f*) *Liebenrood* v. *Vines* (1815), 1 Mer. 15, 18; *Hood* (*Lord*) v. *Kendall* (1855), 17 C. B. 260. As to a covenant to leave "the turnip or fallow breaks once ploughed for the incoming tenant," see *Hunter* v. *Miller* (1863), 9 L. T. 159.

(*g*) See Encyclopædia of Forms and Precedents, Vol. VII., pp. 517, 531.

(*h*) *Gale* v. *Bates* (1864), 3 H. & C. 84.

the removal is permitted on condition of bringing back an equivalent in manure (*i*).

Statutory power to disregard customs.

1085. The object of customs and covenants as to tillage and disposal of produce is to protect the farm from deterioration, and the tenant is now empowered to disregard such customs and covenants, so far as they relate to arable land, if he makes provision, as required by statute, to protect the holding from injury or deterioration (*k*).

Agricultural fixtures.

1086. An agricultural tenant has, in certain circumstances and subject to statutory requirements, the right to remove engines, machinery, fencing, and other fixtures, and buildings before or within a reasonable time after the determination of the tenancy (*l*).

Emblements.

Common law right.

1087. Where a tenant holds for an uncertain interest—this includes a tenancy from year to year (*m*)—and his interest is determined otherwise than by or in consequence of his own act (*n*), he has at common law the right, under the name of emblements (*o*), to the benefit of growing crops of such species as ordinarily repay the labour by which they are produced within the year in which

(*i*) See *Westropp* v. *Elligott* (1884), 9 App. Cas. 815, 825. A covenant not to mow meadow land more than once a year without an exception of cases where an equivalent in manure is returned to the land is not so unusual a covenant as to form an objection to the lessee's title on assignment (*Hyde* v. *Warden* (1877), 3 Ex. D. 72, 82, C. A. The farm is not prejudiced if the tenant returns the "full equivalent manurial value" of the produce sold off (see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 26); but this is not a fixed value, and a stipulation for the return of one-third the market value avoids the uncertainty. If the "value" of the produce is to be returned in manure, this probably means the manurial value (*Lowndes* v. *Fountain* (1857), 11 Exch. 487, *per* POLLOCK, C.B., and PARKE, B. (ALDERSON and PLATT, BB., dissenting); and as to such covenants, see title AGRICULTURE, Vol. I., p. 248. As to extension of the term where the tenant is bound to consume the last year's produce on the premises, see *St. Germains (Earl)* v. *Willan* (1823), 2 B. & C. 216; but more usually the tenant is entitled to be paid for hay and straw, and for manure left on quitting. If he is entitled to be paid for hay and straw, but not for manure, he is entitled to be paid for the former at a fodder or consuming price, *i.e.*, one-half the market price (*Clarke* v. *Westrope* (1856), 18 C. B. 765; see Encyclopædia of Forms and Precedents, Vol. VII., p. 519). As to increased rent payable on removal of produce, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 25; title AGRICULTURE, Vol. I., pp. 248—250.

(*k*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 26. See title AGRICULTURE, Vol. I., p. 250.

(*l*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 21; see title AGRICULTURE, Vol. I., pp. 271, 272; and see *ibid.* for the earlier provisions of the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 3, which, though not repealed, are probably obsolete. As to removal of fixtures and buildings, and fruit trees and fruit bushes from market gardens, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 42, reproducing the provisions stated in title AGRICULTURE, Vol. I., p. 273. As to the right to remove fixtures in the case of other tenancies, compare pp. 421, 422, *ante*.

(*m*) *Kingsbury* v. *Collins* (1827), 4 Bing. 202, 207; *Graves* v. *Weld* (1833), 5 B. & Ad. 105, 114.

(*n*) The tenant is not entitled to emblements where his own act determines or leads to the determination of the estate. In the case of determination of a term by forfeiture, there is the further reason that the tenancy was not originally for an uncertain interest (*Davis* v. *Eyton* (1830), 7 Bing. 154).

(*o*) See title AGRICULTURE, Vol. I., p. 282.

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that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period (*p*). Such crops are grain crops, roots, clover, and potatoes (*q*), and hops (*r*). On the death of the lessee the right to emblements passes to his personal representatives (*a*).

Statutory right.

Where the tenancy determines by reason of the death or cesser of the estate of a landlord entitled for life or for other uncertain interest, a statutory right for the tenant to hold until the expiration of the current year of the tenancy is now substituted for the common law right to emblements (*b*).

Compensation for crops and tillages.

1088. The tenant may have, either by custom or agreement, the right to the benefit of the work which has been done, but has not become productive, during the last year of the term. Thus he may be entitled to take the away-going crops himself (*c*), or to receive their value from the landlord or the incoming tenant (*d*); and he may be entitled to compensation for tillage, that is, for expenses and acts of husbandry in general, such as seeds and labour, fallows, and unapplied manure (*e*); and if the landlord accepts tillage and manure, an agreement by him to pay for it will be implied (*f*). But, apart from such custom or agreement, the tenant must, at the end of the term, give up possession of the farm with all growing crops (*g*). A custom as to any of these matters is excluded by an express agreement which is inconsistent with it (*h*). The tenant forfeits his

(*p*) *Graves* v. *Weld* (1833), 5 B. & Ad. 105, 118.

(*q*) 1 Roll. Abr. 728, pl. 22; Co. Litt. 55 b; *Evans* v. *Roberts* (1826), 5 B. & C. 829, 832; *Graves* v. *Weld*, *supra*; *Haines* v. *Welch* (1868), L. R. 4 C. P. 91.

(*r*) *Latham* v. *Atwood* (1638), Cro. Car. 515; *Graves* v. *Weld*, *supra*, at p. 119.

(*a*) Co. Litt. 55 b.

(*b*) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 1; *Haines* v. *Welch*, *supra*; see title AGRICULTURE, Vol. I., p. 283.

(*c*) *Wigglesworth* v. *Dallison* (1779), 1 Doug. (K. B.) 201; 1 Smith, L. C., 11th ed., 545.

(*d*) A right to take an away-going crop may operate as a prolongation of the tenancy as to the land on which the crop is growing (*Boraston* v. *Green* (1812), 16 East, 71, 81); or may entitle the tenant to possession until the crop is cut and carried (*Griffiths* v. *Puleston* (1844), 13 M. & W. 358, 360). This does not prevent recovery of possession of the land (*Doe* d. *Waters* v. *Houghton* (1827), 1 Man. & Ry. (K. B.) 208. But where the crop is to be left at a valuation, the tenant has only a right to go on the land to improve the crop (*Strickland* v. *Maxwell* (1834), 2 Cr. & M. 539; compare *Re Powers, Manisty* v. *Archdale* (1890), 39 W. R. 185). According to modern practice, leaving the crop at a valuation is preferable to the outgoing tenant re-entering to take the crops; see title AGRICULTURE, Vol. I., p. 247.

(*e*) *Dalby* v. *Hirst* (1819), 1 Brod. & Bing. 224; *Hutton* v. *Warren* (1836), 1 M. & W. 466; and see title AGRICULTURE, Vol. I., p. 246. Where a tenant becomes a yearly tenant on such of the terms of a written agreement as are applicable to a yearly tenancy, these terms will include a stipulation for payment for tillages (*Brocklington* v. *Saunders* (1864), 13 W. R. 46; compare p. 442, *ante*). An alternative method is for the incoming tenant to enter to plough and sow during the last year of the expiring tenancy (see *Milner* v. *Jordan* (1846), 8 Q. B. 615).

(*f*) *Martin* v. *Coulman* (1834), 4 L. J. (K. B.) 37.

(*g*) *Caldecott* v. *Smythies* (1837), 7 C. & P. 808.

(*h*) Thus a custom for the tenant to have away-going crops is excluded by an agreement as to such crops (*Boraston* v. *Green*, *supra*); see title AGRICULTURE, Vol. I., p. 245; and see *Clarke* v. *Roystone* (1845), 13 M. & W. 752, as to custom to pay for manure.

tenant right if he quits before the determination of the tenancy (*i*), or if he takes a new lease giving a fresh tenant right; but not if he takes a new lease which is silent about compensation (*k*).

Compensation for permanent improvements.

1089. At common law the tenant is not entitled on quitting to any compensation for permanent improvements which he has made during his tenancy; but he may be entitled to such compensation by custom or agreement, and a statutory right to compensation is conferred (*l*), in respect of certain specified improvements (*m*).

SECT. 2.—*Building Leases.*

Interest of builder under building agreement.

1090. An agreement for a building lease usually gives the builder the right to enter upon the land for the purpose of executing specified works, but no interest except a tenancy at will is immediately vested in him (*n*). A nominal rent is reserved during the period required for building, but otherwise the builder becomes liable for the rent and subject to the covenants (so far as applicable) which are to be reserved by or contained in the lease when granted. The builder becomes entitled to have a lease granted to himself or his nominee on the completion of the works, or some specified part thereof (*o*), in accordance with the agreement,

(*i*) See title AGRICULTURE, Vol. I., p. 247.

(*k*) *Lane* v. *Moeder* (1885), Cab. & El. 548; as to assignment of tenant right, see title AGRICULTURE, Vol. I., p. 294. Where the tenant agrees to pay interest on the amount of the incoming valuation, and on quitting to leave an equal value of tenant rights, this enures for the benefit of a subsequent landlord (*Wagstaff* v. *Clinton* (1883), Cab. & El. 45). As to the liability to pay for tenant right, see title AGRICULTURE, Vol. I., p. 246. Where there is no incoming tenant the landlord must pay any sums which are due by custom to the outgoing tenant (*Faviell* v. *Gaskoin* (1852), 7 Exch. 273); and in all cases the primary liability to make the payment is on the landlord (*Bradburn* v. *Foley* (1878), 3 C. P. D. 129; compare *Mansel* v. *Norton* (1883), 22 Ch. D. 769, C. A.). Valuation is not a condition precedent to the tenant's right to sue unless made so by the lease (*Sucksmith* v. *Wilson* (1866), 4 F. & F. 1083); *a fortiori* where the valuation has become impossible (*Clarke* v. *Westrope* (1856), 18 C. B. 765).

(*l*) See Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28); and title AGRICULTURE, Vol. I., pp. 258 *et seq.*, where the procedure for obtaining compensation is fully stated. The statutory provisions there referred to are now consolidated in the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 1—9, 13—20; and see *Cathcart* v. *Chalmers*, [1911] A. C. 246 (proviso in a lease that no claim for compensation should be made by the tenant later than one month prior to the determination of the tenancy, held void, as being an agreement depriving the tenant of his statutory rights). As to compensation against a mortgagee who takes possession where the contract of tenancy is not binding on him, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 12; and title AGRICULTURE, Vol. I., p. 263.

(*m*) See Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), Sched. I., Parts 1—3; see also *ibid.*, ss. 1—5; and title AGRICULTURE, Vol. I., pp. 258—262. As to market gardens, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), Sched. III.

(*n*) *Camden* (*Marquis*) v. *Batterbury* (1859), 5 C. B. (N. S.) 808, 816; affirmed (1860), 7 C. B. (N. S.) 864, Ex. Ch.; *Holland* (*Lady*) v. *Kensington Vestry* (1867), L. R. 2 C. P. 565. In *Quicke* v. *Chapman*, [1903] 1 Ch. 659, 668, COLLINS, M.R., spoke of the builder as having "at the most a kind of licence, coupled with an interest in the land, which could not ripen into ownership until he had actually completed the building upon the land"; but in effect he obtains exclusive possession during the building, so as to become tenant at will, and the agreement usually purports to create such a tenancy; see Encyclopædia of Forms and Precedents, Vol. VII., p. 288. As to the power of the builder to bind the land, see *Abbey* v. *Gutteres* (1911), 55 Sol. Jo. 364.

(*o*) *E.g.*, when the houses are roofed in (see *Lowther* v. *Heaver* (1889), 41

SECT. 2. Building Leases.

and the form of the lease is frequently scheduled to the agreement (*p*).

Liability for rent.

Since the rent is made payable under the agreement, and the agreement excludes the creation of a tenancy from year to year, such a tenancy is not implied from payment of the rent. Hence the assignment of the agreement does not transfer a tenancy to the assignee so as to render him liable for the rent. The liability for the rent is imposed only on the builder (*q*), and since it is imposed by virtue of the agreement it does not depend upon his actually entering into possession of the land (*r*).

Rights and liabilities under lease.

1091. Upon the completion of such part of the works as entitles the builder to call for a lease, his rights and liabilities become the same as if a lease had been granted; consequently he ceases to hold on the terms of the building agreement, and holds on the terms of the lease to which he is entitled (*s*). If he is entitled to have separate leases granted of different plots as the houses on them are built, the same rule applies to each plot, and on the completion or part completion of the house, in accordance with the agreement, he holds that house as though the lease had been granted (*t*). Thus he is not subject to a stipulation in the agreement—for example, a power of re-entry on discontinuance of the works for a specified time—which is not to be introduced into the lease (*u*). Since the grant of the lease might operate as an implied grant of light over adjoining land retained by the lessor, this implication requires to be excluded by the agreement (*v*). But the builder himself has no estate in adjoining land comprised in the agreement, but not yet leased, which would enable him to grant an easement of light over it expressly, and as against him no such grant will be implied (*w*).

Forfeiture of materials and damages.

1092. The agreement may provide that if the lessor re-enters on the default of the lessee to complete the buildings, he shall take the material and plant brought upon the land for the purpose of

Ch. D. 248, C. A.). As to extension of time for completion, and as to delay caused by the landlord, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 243, 246; as to certificates of completion, see *ibid.*, p. 208.

(*p*) A building lease granted under the Settled Land Acts, 1882, can contain an option of purchase (Settled Land Act, 1889 (52 & 53 Vict. c. 36). As to the terms of the option, see *ibid.*, s. 2. A covenant to make an open space round houses imposes a continuing obligation to keep it open (*Herbert* v. *Maclean* (1860), 12 I. Ch. R. 84). As to the obligations of the lessor under a covenant to make roads and sewers, see *Mason* v. *Cole* (1849), 4 Exch. 375.

(*q*) *Camden* (*Marquis*) v. *Batterbury* (1859), 5 C. B. (N. S.) 808, 816.

(*r*) *Adams* v. *Hagger* (1879), 4 Q. B. D. 480, C. A.

(*s*) *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, C. A.; see *Strong* v. *Stringer* (1889), 61 L. T. 470; compare *Banister* v. *Usborne* (1796), Peake, Add. Cas. 76.

(*t*) *Lowther* v. *Heaver*, *supra*. An assignee of a particular house is entitled to have a lease of it granted without assuming the builder's liabilities under the agreement generally (*Wilkinson* v. *Clements* (1872), 8 Ch. App. 96). See *Rogers* v. *Tudor* (1860), 2 L. T. 303; and compare *contra*, *Anon.* (1822), 1 L. J. (O. S.) (CH.) 25.

(*u*) *Lowther* v. *Heaver*, *supra*.

(*v*) See Encyclopædia of Forms and Precedents, Vol. VII., p. 291.

(*w*) *Quicke* v. *Chapman*, [1903] 1 Ch. 569. As to rights of light, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI, pp. 297 *et seq.*

the works (*x*), as liquidated damages; but in the absence of such a provision he is not restricted to his remedy by forfeiture. He is also entitled to damages for breach of the agreement (*y*).

SECT. 3.—*Furnished Houses and Flats.*

SUB-SECT. 1.—*Furnished Houses.*

Furnished house.

1093. On the letting of a furnished house, there is an implied condition that it is in a fit state for habitation at the commencement of the tenancy, and if this condition is not fulfilled the tenant is entitled to repudiate the contract at once (*a*). He need not wait to give the landlord an opportunity for effecting repairs (*b*). It is a breach of the condition if there are substantial defects in the drainage (*c*); or if the house or any part of it is so infested with vermin as to be a source of serious inconvenience to the occupants (*d*); or if there has been recent infectious illness, and the house has not been properly disinfected (*e*); but not if there are merely ordinary defects of repair which can be easily remedied (*f*). To fulfil the condition it is not enough that the landlord believes the house to be in a fit state for habitation; it must in fact be reasonably

(*x*) As to the effect of an agreement that such plant and material shall become the property of the landlord, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 252 *et seq.*, 259—264; see also titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 152; BILLS OF SALE, Vol. III., p. 12. The court will not in general order specific performance of a building agreement as regards the works to be executed under it (see p. 379, *ante*; and title SPECIFIC PERFORMANCE), especially where no plans have been approved (*Brace* v. *Wehnert* (1858), 25 Beav. 348); and as to modifying plans to suit statutory requirements, see *Cubitt* v. *Smith* (1864), 11 L. T. 298.

(*y*) *Marshall* v. *Mackintosh* (1898), 46 W. R. 580; see *Oldershaw* v. *Holt* (1840), 12 Ad. & El. 590; *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522, 529, C. A. There is no relief in equity against forfeiture for non-completion of the buildings if not occasioned by default of the lessor (*Croft* v. *Goldsmid* (1857), 24 Beav. 312); and the lessor does not necessarily waive the forfeiture by allowing the lessee to proceed with the works (*Doe* d. *Kensington* (*Lord*) v. *Brindley* (1826), 12 Moore (C.P.), 37). But the lessee may be entitled to relief under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41); see p. 539, *ante*.

(*a*) *Smith* v. *Marrable* (1843), 11 M. & W. 5; *Wilson* v. *Finch Hatton* (1877), 2 Ex. D. 336. The case of letting a furnished house has been distinguished from letting real property on the ground that the bargain is not so much for the house as the furniture (*Sutton* v. *Temple* (1843), 12 M. & W. 52, 65). *Smith* v. *Marrable, supra*, was doubted in *Hart* v. *Windsor* (1843), 12 M. & W. 68, but the distinction is now well established, though rather on the ground of the intention of the parties to be inferred from the circumstances of the letting than on that just stated, which is obviously incorrect (*Wilson* v. *Finch Hatton, supra*, at pp. 342, 344). Possibly the rule does not apply to a furnished house and grounds taken for a substantial term, such as five years (*Chester* v. *Powell*, *Powell* v. *Chester* (1885), 52 L. T. 722). For form of agreement, see Encyclopædia of Forms and Precedents, Vol. XVII., pp. 215 *et seq.*

(*b*) *Wilson* v. *Finch Hatton, supra*.

(*c*) *Ibid.*; *Harrison* v. *Malet* (1886), 3 T. L. R. 58.

(*d*) *Campbell* v. *Wenlock* (*Lord*) (1866), 4 F. & F. 716 (where, however, the tenant failed, notwithstanding strong evidence of the presence of vermin); *Harrison* v. *Malet, supra*; *Smith* v. *Marrable, supra*.

(*e*) *Bird* v. *Greville* (*Lord*) (1884), Cab. & El. 317.

(*f*) *Maclean* v. *Currie* (1884), Cab. & El. 361 (plaster of ceilings cracked and partly fallen).

SECT. 3. Furnished Houses and Flats.

habitable (*g*). The implied condition may be treated also as a warranty, and the tenant can recover damages for the breach (*h*). But the condition and warranty relate only to the state of the premises at the commencement of the tenancy; there is no implied condition or warranty that they shall continue fit for habitation throughout the term (*i*).

Tenant's power to move furniture in furnished house.

1094. The lessee of a furnished house is not bound to keep the furniture and pictures in their original positions during the tenancy, and he is at liberty to store pictures or other articles in part of the house (*k*).

SUB-SECT. 2.—*Flats.*

Flats.

1095. The ordinary principles which regulate the relation of landlord and tenant apply to the letting of flats so far as concerns the premises actually demised (*l*), and in the absense of express stipulation the landlord is under no liability to repair (*m*); but as regards parts of the building which are necessary for the convenience of all the tenants, and which the landlord is assumed to retain in his own possession, he is bound to use reasonable care that they are in a fit condition; and for damage resulting from his failure to use such care, he is liable both to the tenants themselves and to persons on the premises by their express or implied permission. Thus he is liable for injuries to a visitor to a tenant caused by the defective state of the common staircase (*n*), though not for injuries through defect of lighting if the circumstances exclude the implication of an agreement by the landlord to light it (*o*). He is liable for injuries caused by omission to repair the roof after his attention has been called to the want of repair (*p*); but he is not liable for defects in a

(*g*) *Charsley* v. *Jones* (1889), 53 J. P. 280.

(*h*) *Harrison* v. *Malet* (1886), 3 T. L. R. 58; *Charsley* v. *Jones*, *supra*; see *Sarson* v. *Roberts*, [1895] 2 Q. B. 395, C. A.

(*i*) *Sarson* v. *Roberts*, *supra*; see *Maclean* v. *Currie* (1884), Cab. & El. 361; *Dawson* v. *Clementson* (1885), 1 T. L. R. 295.

(*k*) *Miller* v. *Stewart* (1899), 2 F. (Ct. of Sess.) 309.

(*l*) For legal purposes a flat is a separate house (*Grant* v. *Langston*, [1900] A. C. 383, 392; see *Yorkshire Insurance Co.* v. *Clayton* (1881), 8 Q. B. D. 421, 424, C. A.). Flats are assessed to poor rate as separate hereditaments (*R.* v. *St. George's Union* (1871), L. R. 7 Q. B. 90), so that the occupier is primarily liable for poor rates and borough rates (see title RATES AND RATING); but as a matter of convenience they are frequently paid by the landlord. For inhabited house duty, the entire building is treated as one dwelling-house (*A.-G.* v. *Mutual Tontine Westminster Chambers Association* (1876), 1 Ex. D. 469, C. A.; see title INHABITED HOUSE DUTY, Vol. XVII., pp. 182, 185, 195). For form of agreement for letting a flat, see Encyclopædia of Forms and Precedents, Vol. VII., p. 232.

(*m*) See *Colebeck* v. *Girdlers Co.* (1876), 1 Q. B. D. 234; and p. 501, *ante*.

(*n*) *Miller* v. *Hancock*, [1893] 2 Q. B. 177, C. A.; and as to the ground of holding the landlord liable to strangers, see *Huggett* v. *Miers*, [1908] 2 K. B. 278, 288, C. A. As to the liability of owners towards visitors generally, see p. 505, *ante*; title NEGLIGENCE; see also title TRESPASS.

(*o*) *Huggett* v. *Miers*, *supra*; *Lewis* v. *Ronald* (1909), 101 L. T. 534.

(*p*) *Hargroves, Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472. If the landlord does work to the premises in such a way as to cause damage to a tenant he is not excused because he has employed an independent contractor (*Odell* v. *Cleveland House, Ltd.* (1910), 102 L. T. 602).

part of the premises which is not necessary for the use of the tenants, but is merely an additional convenience to them (*q*): nor does he guarantee the soundness of cisterns and waterpipes; it is sufficient if he uses reasonable care to keep them in order (*r*). Where the landlord supplies a lift suitably constructed in the first instance, he is not liable for accidents due to the nature of the lift itself (*s*), nor for those due to its management unless he has retained the control of it (*t*).

Landlord's covenant for quiet enjoyment of flats.

1096. The landlord's covenant for quiet enjoyment is not broken by the fact that other tenants cause annoyance by the improper use of their own flats, unless this involves physical interference with the tenant's enjoyment (*a*); nor by the erection of a staircase which interferes with the privacy of the flat, but does not render it materially less fit for occupation (*b*). If at the time of demise gas is supplied to the premises the landlord cannot cut it off, notwithstanding that the tenant has not reimbursed him the cost of it. He should sue the tenant for the amount (*c*).

Door-porter.

Where the regulations for the flats provide for the employment by the landlord of a resident porter, the landlord undertakes that a competent porter shall be employed; but this undertaking is not the subject of specific performance; the remedy is in damages (*d*).

SECT. 4.—*Licensed Premises.*

SUB-SECT. 1.—*Maintenance of Licence.*

Leases of licensed premises.

1097. Leases of licensed premises usually contain covenants on the part of the lessee intended for the protection of the licence, and also, if the landlord is a brewer and the premises are to be "tied" to his business, intended to create the "tie" and insure that the benefit of it shall be assignable (*e*).

Maintenance of licence.

If the lessee covenants that he will not do nor suffer to be done anything whereby the licence may be forfeited or the renewal thereof withheld, this will render him and his assigns liable in respect of their own conduct of the premises; but it will not render them liable if the licence is forfeited, or if renewal is withheld, by reason of offences committed by an underlessee or his servant (*f*). To render them liable in this event the covenant must either extend

(*q*) *Ivay* v. *Hedges* (1882), 9 Q. B. D. 80 (defective fencing to roof which was used as a drying-ground).

(*r*) *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217; and see p. 501, *ante*.

(*s*) *Powell* v. *Thorndike* (1910), 102 L. T. 600.

(*t*) *Matthieson* v. *Pollock*, [1910] S. C. 11; see *Steer* v. *St. James's Prudential Chambers Co.* (1887), 3 T. L. R. 500.

(*a*) *Jaeger* v. *Mansions Consolidated, Ltd.* (1903), 87 L. T. 690, C. A.

(*b*) *Browne* v. *Flower*, [1911] 1 Ch. 219.

(*c*) *Hersey* v. *White* (1893), 9 T. L. R. 335.

(*d*) *Ryan* v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, C. A.

(*e*) As to "usual covenants" in a lease of a public-house, see p. 388, *ante*.

(*f*) *Wilson* v. *Twamley*, [1904] 2 K. B. 99, C. A.; see *Bryant* v. *Hancock & Co.*, [1899] A. C. 442; *Mumford* v. *Walker* (1901), 71 L. J. (K. B.) 19. As to offences which may result in a loss of licence, see title INTOXICATING LIQUORS, pp. 107 *et seq.*, *ante*.

SECT. 4. Licensed Premises.

specifically to the conduct of an underlessee or other occupier (*g*), or must be an absolute covenant that the premises shall be so conducted that the licence shall not be forfeited nor the renewal refused (*h*). If the covenant extends to conduct whereby the renewal may be imperilled, an entry of a conviction will probably be a breach (*i*). On the letting of a public-house by parol there is no implied agreement that the tenant shall do no act whereby the licence shall be forfeited (*k*).

Usual covenants as to licence.

1098. The lessee usually covenants to keep open the premises at all lawful hours (*l*), and to apply for and use his best endeavours to obtain a renewal of the licence (*m*), or to keep the house open as a public-house. He commits a breach of the last covenant if, on a renewal being refused, he makes no attempt to have the decision reversed (*n*).

(*g*) For a form, see Encyclopædia of Forms and Precedents, Vol. VII., p. 372.

(*h*) See *Bryant* v. *Hancock & Co.*, [1899] A. C. 442 (where the covenant was divided into three parts, of which the first, relating (so it was held) to forfeiture, was absolute; the second, relating to non-renewal, was not absolute. Renewal was refused owing to the conduct of the undertenant, and the assignee of the lease was not liable). A covenant that the lessee will at all times during the term conduct the demised premises in a proper manner is absolute, and is broken if the licence is lost through the conduct of an underlessee (*Palethorpe* v. *Home Brewery Co., Ltd.*, [1906] 2 K. B. 5, C. A.). But a covenant to transfer the licence at the end of the term is not broken if the licence has been lost through the conduct of an underlessee, and the lessee has used his best endeavours to save it (*Williamson* v. *Issott* (1909), 25 T. L. R. 514). A covenant to insure against the "loss" of the licence will extend to the risk of non-renewal in consequence of the licence not being required by the neighbourhood (*Williams* v. *Lassell and Sharman, Ltd.* (1906), 22 T. L. R. 443).

(*i*) Under the former practice the incurring of a conviction which was not indorsed did not endanger the licence, so as to be a breach of a covenant not to do anything that might "affect, lessen or make void" the licence (*Wooler* v. *Knott* (1876), 1 Ex. D. 265, C. A.); or that might afford a "ground of pretext" whereby the licence should be "suspended, discontinued, or forfeited" (*Fleetwood* v. *Hull* (1889), 23 Q. B. D. 35); but the indorsing of two convictions, though possibly not of one only, was a breach (*Harmann* v. *Powell* (1891), 60 L. J. (Q. B.) 628); see also *Moore* v. *Robinson* (1878), 48 L. J. (Q. B.) 156.

(*k*) *Maw* v. *Hindmarsh* (1873), 28 L. T. 644.

(*l*) See Encyclopædia of Forms and Precedents, Vol. VII., p. 372. As to "usual covenants," see p. 388, *ante*. A covenant against carrying on any trade other than that of a licensed victualler is usual; see *Bennett* v. *Womack* (1828), 7 B. & C. 627. Any attempt by the lessee to reduce the drinking will be restrained by injunction (*Dartford Brewery Co., Ltd.* v. *Till and Godfrey* (1906), 95 L. T. 636, C. A.); though the covenant in its entirety will not be thus enforced (*Hooper* v. *Brodrick* (1840), 11 Sim. 47). Where the renewal of the licence is refused on the ground that it is not necessary (see title INTOXICATING LIQUORS, p. 62, *ante*), this does not put an end to the lease, and the rent continues to be payable (*Grimsdick* v. *Sweetman*, [1909] 2 K. B. 740); and where a reversionary lease is granted and the licence is forfeited during the continuance of the prior lease, the rent under the reversionary lease is payable when it falls into possession (*Blum* v. *Ansley* (1900), 64 J. P. 184; compare *Hart* v. *Arrol* (1903), 6 F. (Ct. of Sess.) 36). The lease may be made determinable in the event of the licence being withdrawn; see *Williams* v. *Lassell and Sharman, Ltd.*, *supra*.

(*m*) See *Bryant* v. *Hancock & Co.*, *supra*. An executor, if he is willing to transfer the licence, and if he delivers up possession, which is accepted by the landlord, is not liable for loss of the licence due to his omission to obtain an interim transfer (*Brown* v. *Watson*, [1904] 2 I. R. 218, C. A.). As to interim transfers, see title INTOXICATING LIQUORS, pp. 26, 47, *ante*.

(*n*) *Linder* v. *Pryor* (1838), 8 C. & P. 518.

SECT. 4. Licensed Premises.

Covenants relating to the management of the premises run with the reversion, and hence the assignee of the reversion is entitled to take advantage of them (*o*).

SUB-SECT. 2.—*Tied House Covenants.*

Tied house covenants.

1099. A covenant by the lessee of licensed premises to obtain all liquor required for his business from the lessor can be effectively entered into (*p*); but it is subject to an implied condition that the lessor is ready to supply to the lessee liquor such as he reasonably requires in kind and quality, and at fair and reasonable prices (*q*), and if this condition is not fulfilled the lessee may obtain his supplies elsewhere (*r*). The covenant is sometimes enforced by reserving an additional rent while it is broken or by allowing a reduction of rent while it is observed. But this does not prevent the covenant from being imperative—at any rate, where there is a proviso for re-entry on non-performance—and the lessee has not the option of paying the additional or the unreduced rent and of dealing with another brewer (*s*).

Devolution of burden and benefit of covenants.

1100. A covenant binding the lessee to purchase liquor only from the lessor is capable of running with the land, so that the burden will devolve upon the assignee of the term and the benefit will pass to a grantee of the reversion (*t*), and this is so whether in either case "assigns" are mentioned or not (*a*).

So far as the covenant is in substance negative it will be enforced by injunction (*b*), and since the intention is to bind the premises into whosesoever hands they may come, the covenant will be so enforced against a sub-lessee with notice, notwithstanding that it purports to bind the lessee and his "assigns" (*c*). Moreover, apart from the question whether the covenant runs with the land, the assignee of the reversion can enforce it if he also takes an express assignment of the covenant (*d*).

Liability to assigns of business.

1101. If the covenant binds the lessee to take liquor from the lessor and his assigns, being successors in his business, then assigns of the reversion cannot take the benefit of the covenant

(*o*) *Fleetwood* v. *Hull* (1889), 23 Q. B. D. 35; p. 586, *post*.

(*p*) Such covenants were at first viewed with disfavour, as being prejudicial to the public welfare (*Cooper* v. *Twibill* (1812), 3 Camp. 286, n. (a); *Thornton* v. *Sherratt* (1818), 8 Taunt. 529); but their validity is well established. For form of covenant, see Encyclopædia of Forms and Precedents, Vol. VII., p. 385.

(*q*) *Noakes & Co., Ltd.* v. *Day* (1905), reported [1910] 1 Ch. 270, n., C. A.; *Courage & Co., Ltd.* v. *Carpenter*, [1910] 1 Ch. 262.

(*r*) *Holcombe* v. *Hewson* (1820), 2 Camp. 391; *Thornton* v. *Sherratt*, *supra*; *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199; see *Weaver* v. *Sessions* (1815), 6 Taunt. 154; *Stancliffe* v. *Clarke* (1852), 7 Exch. 439. Sometimes an express proviso to the same effect is inserted (see *Doe* d. *Calvert* v. *Reid* (1830), 10 B. & C. 849, 851; *Clegg* v. *Hands* (1890), 44 Ch. D. 503, 516, C. A.).

(*s*) *Hanbury* v. *Cundy* (1887), 58 L. T. 155.

(*t*) *Clegg* v. *Hands*, *supra*; see p. 585, *post*.

(*a*) *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767, C. A.

(*b*) *Clegg* v. *Hands*, *supra*, at p. 519; and see title INJUNCTION, Vol. XVII., p. 239.

(*c*) *John Brothers Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 188.

(*d*) *Clegg* v. *Hands*, *supra*, at p. 518.

SECT. 4. Licensed Premises.

unless they are also assigns of the business (*e*). The covenant may be further restricted by requiring them to carry on the business at the particular brewery to which the premises were originally tied (*f*). But in the absence of special restriction it is sufficient if they are assigns of the business generally; and if the reversion and the business are assigned together, the assignee is entitled to the benefit of the covenant, notwithstanding that he carries on business at a different place and that the lessor's brewery is closed (*g*). If the reversion is assigned, and the business retained by the lessor, the lessee comes under no liability to the assignee of the reversion, but he remains liable to the lessor (*h*); and if the business is assigned and the reversion retained by the lessor, the lessee is still liable to the lessor, who alone can sue on the covenant, though the lessee satisfies his liability if he takes liquor from the assignee of the business (*i*).

Liability to assigns of reversion on covenant not incident to busiuess.

1102. If the covenant binds the lessee to take liquor from the lessor simply, without reference to his business, the benefit of the covenant is not necessarily incident to the business. It will pass upon an assignment of the reversion together with the business (*k*); but it will pass also with the reversion although the reversion and the business are severed, and whether the business is retained by the lessor or is assigned by him in a different direction (*l*). For the benefit of the covenant to pass, it is not necessary that the lessor's business should be given up. Even though it continues, the lessee's obligation is to the new reversioner, and no longer to the lessor (*m*). Nor is it necessary that the reversioner should himself carry on a brewery business. He can qualify himself to take the benefit of the covenant by purchasing beer and reselling it (*n*).

(*e*) *Birmingham Breweries, Ltd.* v. *Jameson* (1898), 67 L. J. (CH.) 403, C. A., where the phrase "successors in business" was held to qualify the word "assigns" introduced into the covenant by the definition clause. As to covenants running with the land, see pp. 584 *et seq.*, *post.*

(*f*) *Doe* d. *Calvert* v. *Reid* (1830), 10 B. & C. 849, where the covenant was to take beer from the lessors or their successors "in their late or present trade of brewers." This was held to be restricted to the business carried on at the lessors' brewery, and the covenant did not bind the lessee after the business had been assigned and the brewery closed. But the decision has been confined to the particular case. To ensure such a restriction the brewery should be specifically mentioned; see *Clegg* v. *Hands* (1890), 44 Ch. D. 503, 517, C. A.; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 613.

(*g*) *Manchester Brewery Co.* v. *Coombs, supra.*

(*h*) *Birmingham Breweries, Ltd.* v. *Jameson, supra.*

(*i*) *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767, C. A., where it was held that the lessee was entitled to the benefit of a proviso for reduction of rent so long as he took liquor from the assigns of the business. It was suggested that damages in an action by the lessor for breach of the covenant would not necessarily be nominal. The assignment of the business did not include an assignment of the covenant, and even if it had, such latter assignment would have been ineffectual; see *ibid.*, *per* RIGBY, L.J., at p. 774; *sed quære;* and compare *Clegg* v. *Hands, supra.*

(*k*) *John Brothers Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 188.

(*l*) *Clegg* v. *Hands, supra.*

(*m*) This follows from the circumstance that the covenant runs with the land, see p. 585, *post;* the lessee is only bound to the reversioner for the time being.

(*n*) *Clegg* v. *Hands, supra.* In this case the lessors at the time of the demise were themselves purchasing part of the beer which they supplied.

SECT. 5.—*Sporting Rights.*

SECT. 5. Sporting Rights.

1103. A sporting lease authorises the lessee to enter upon land for the purpose of killing game or fishing, and to carry away the game which he kills or the fish which he catches, and is in effect a licence coupled with a *profit à prendre* (*o*). Sporting lease.

To create an effective legal right the lease must be by deed (*p*), though on a verbal letting of lands the owner can reserve the game to himself (*q*); and an agreement for the grant of a sporting lease should be in writing (*r*); but in the absence of writing, it may be enforceable on the ground of part performance (*s*). If there has been actual enjoyment under a parol grant of a right of shooting (*t*) or fishing (*u*), the rent can be recovered in an action for use and occupation, and the lessee is liable under the stipulations in the grant (*a*). Where the lease is by deed, the benefit of a covenant by the lessee—such as a covenant to leave the land as well stocked with game as at the time of the demise—runs with the reversion (*b*). A yearly tenancy of sporting rights may be created by payment of rent, but the tenant is only entitled to a reasonable notice to quit, and not to the customary six months' notice (*c*). How created.

SECT. 6.—*Other Property.*

1104. Certain other classes of property, the leases of which require special consideration, are dealt with elsewhere (*d*).

Part XV.—Assignment and Devolution of Leases.

SECT. 1.—*Right to Assign or Underlet.*

1105. A lessee for years or a tenant from year to year or other term has, in the absence of provision to the contrary, the right to Lessee's right to assign.

(*o*) *Wickham* v. *Hawker* (1840), 7 M. & W. 63; *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331. As to the operation of such leases and the rights arising therefrom, see generally, p. 429, *ante*; titles EASEMENTS and PROFITS À PRENDRE, Vol. XI., pp. 336 *et seq.*; FISHERIES, Vol. XIV., pp. 583 *et seq.*; GAME, Vol. XV., pp. 218 *et seq.*; and see *Browne* v. *Sligo* (*Marquis*) (1859), 10 Ir. Ch. R. 1.

(*p*) See titles EASEMENTS and PROFITS À PRENDRE, Vol. XI., p. 341; FISHERIES, Vol. XIV., p. 584; GAME, Vol. XV., p. 219. For form of lease see Encyclopædia of Forms and Precedents, Vol. VII., pp. 613 *et seq.* The shooting tenant is not entitled to interfere with the land (*e.g.*, by burning heather) in order to stop a fire; except so far as such interference is in fact necessary for the protection of his shooting rights (*Cope* v. *Sharpe* (1911), 104 L. T. 718).

(*q*) *Jones* v. *Williams* (1877), 36 L. T. 559.

(*r*) *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A.

(*s*) See *McManus* v. *Cooke* (1887), 35 Ch. D. 681.

(*t*) *Tomlinson* v. *Day* (1821), 2 Brod. & Bing. 680; *Dawes* v. *Dowling* (1874), 22 W. R. 770.

(*u*) *Holford* v. *Pritchard* (1849), 3 Exch. 793.

(*a*) See *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403; and p. 442, *ante*.

(*b*) *Hooper* v. *Clark* (1867), L. R. 2 Q. B. 200.

(*c*) *Lowe* v. *Adams*, [1901] 2 Ch. 598 (where a month's notice to determine a shooting tenancy, given at the end of the season, was held to be sufficient).

(*d*) As to allotments and small holdings, see titles ALLOTMENTS, Vol. I., p. 354; SMALL HOLDINGS AND SMALL DWELLINGS. As to mining leases, see title MINES, MINERALS, AND QUARRIES.

SECT. 1. Right to Assign or Underlet.

assign his term or tenancy, or to create sub-leases or sub-tenancies (*e*); but a restraint on assignment or underletting is valid, and such restraint may be created either by condition making the lease void in those events (*f*), or by covenant not to assign or underlet (*g*). Whichever form the restraint takes, an assignment in breach of the condition or covenant is not void. It is effectual to vest the term in the assignee, but the lessor can treat the assignment as a cause of forfeiture provided, in the case of a covenant against assignment, that it is accompanied by a proviso for re-entry (*h*).

Covenant against assignment or parting with possession.

1106. A covenant "not to assign" (*i*), or "not to assign or otherwise part with" (*k*), the premises is only broken by a legal assignment for the entire residue of the term. Consequently the covenant is not broken by a declaration of trust of the premises in favour of a third person (*l*), or by the deposit of the lease as security for an

(*e*) See *Doe* d. *Mitchinson* v. *Carter* (1798), 8 Term Rep. 57, 60; *Church* v. *Brown* (1808), 15 Ves. 258, 264. Similarly, an agreement for a lease, or an option to require a lease, or a renewal of a lease is assignable (*Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Tolhurst* v. *Associated Portland Cement Manufacturers and Imperial Portland Cement Co.*, [1903] A. C. 414, 423). But an assignment by a tenant at will determines the tenancy so soon as the landlord has notice; see p. 437, *ante*. As to dedication by a lessee of a right of way, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 35. For forms of assignment, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 831 *et seq.*, Vol. XVII., p. 895.

(*f*) See *Doe* d. *Henniker* v. *Watt* (1828), 8 B. & C. 308. But since forfeiture is a matter *stricti juris*, an assignment which is void does not give cause for forfeiture (*Doe* d. *Lloyd* v. *Powell* (1826), 5 B. & C. 308, 313).

(*g*) *Paul* v. *Nurse* (1828), 8 B. & C. 486; see *Re Johnson, Ex parte Blackett* (1894), 70 L. T. 381. The covenant may be binding notwithstanding that the lessor has re-entered on part of the land (*Collins* v. *Sillye* (1651), Sty. 265).

(*h*) *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739; but see *Elliott* v. *Johnson* (1866), L. R. 2 Q. B. 120, 126. This is in accordance with the rule that it is at the lessor's option whether a forfeiture shall avoid the lease (see p. 530, *ante*). The statement of HOLROYD, J., in *Paul* v. *Nurse*, *supra*, that an assignment in breach of condition is void is not now correct (see *Donoughmore* (*Earl*) v. *Forrest* (1871), 5 I. R. C. L. 443, Ex. Ch.) In Ireland there is a statutory prohibition of assignment in breach of covenant (Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict. c. 154), s. 10, and on this ground the assignment has been held not to pass the term, though it is none the less a ground for forfeiture (*Clifford* v. *Reilly* (1870), 4 I. R. C. L. 218; *Donoughmore* (*Earl*) v. *Forrest*, *supra*; *Tobin* v. *Cleary* (1875), 7 I. R. C. L. 17, C. A.; *Wogan* v. *Doyle* (1883), 12 L. R. Ir. 69). In *Donoughmore* (*Earl*) v. *Forrest*, *supra*, it was suggested that a limitation to the lessee and his licensed assigns would prevent the term passing to an unlicensed assign; but this is the construction which the law gives to assigns (see *Weatherall* v. *Geering* (1806), 12 Ves. 504, 511): nevertheless it does not, it is believed, prevent the assignability of the term.

(*i*) *Gentle* v. *Faulkner*, [1900] 2 Q. B. 267, C. A. An assignment of a greenhouse which the lessee is entitled to remove is not a forfeiture (*Moss* v. *James* (1877), 37 L. T. 715).

(*k*) *Doe* d. *Pitt* v. *Hogg* (1824), 4 Dow. & Ry. (K. B.) 226, 229; see S. C., *sub nom. Doe* d. *Pitt* v. *Laming* (1824), Ry. & M. 36. But in a mining lease it is a breach if the lessee gives to a third person the right to get and carry away part of the minerals (*Mostyn* v. *Manger* (1901), 17 T. L. R. 199); see title MINES, MINERALS, AND QUARRIES.

(*l*) The declaration of trust is not converted into an assignment by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (4) (*Gentle* v. *Faulkner*, *supra*). *Richards* v. *Crawshay* (1892), 8 T. L. R. 446, so far as to the contrary, is overruled

advance (*m*). A covenant "not to assign or part with the possession of the premises" goes further and is broken if the lessee makes an equitable assignment of the lease and places the assignee in possession (*n*). The retention of possession by one partner alone on a dissolution of the partnership is not a breach of a covenant against assignment contained in a lease to both (*o*); but if one executes a formal assignment to the other this is a breach (*p*). A covenant not to part with the possession of the premises is not broken by the lessee parting with a part of the premises (*q*).

Involuntary assignments.

1107. A covenant against assignment is restricted in its operation to voluntary assignments. Hence it is not broken when the lease is taken in execution (*r*), provided the execution is *bonâ fide* (*s*); nor when it vests in a trustee in bankruptcy (*t*); nor when it passes on the death of the lessee, whether as part of his personal estate (*a*), or under a specific bequest (*b*); nor when it is acquired by a public body under the Lands Clauses Acts (*c*).

Effect of death of lessee.

1108. A covenant against assignment entered into by the lessee on his own behalf only is not binding upon his personal representatives (*d*) or assigns (*e*); but if executors and administrators are mentioned the covenant is binding on them (*f*); and if "assigns" are mentioned, the word includes voluntary assigns *inter vivos*, but

(*m*) *Doe* d. *Pitt* v. *Hogg* (1824), 4 Dow. & Ry. (K. B.) 226, 229; *Re Hand, Ex parte Cocks* (1836), 2 Deac. 14; *Ex parte Drake* (1841), 1 Mont. D. & De G. 539; *M'Kay* v. *M'Nally* (1879), 4 L. R. Ir. 438, C. A.; compare *Swanley Coal Co.* v. *Denton*, [1906] 2 K. B. 873, C. A.

(*n*) The sale of the business on the premises to a company is not a breach if the possession of the premises is retained by the lessee, notwithstanding that the company uses them (*Peebles* v. *Crosthwaite* (1897), 13 T. L. R. 198, C. A.). As to a covenant not to charge or incumber, see *Croft* v. *Lumley* (1858), 6 H. L. Cas. 672. For form of covenant not to assign or underlet, see Encyclopædia of Forms and Precedents, Vol. VII., p. 195.

(*o*) *Bristol Corporation* v. *Westcott* (1879), 12 Ch. D. 461, C. A.

(*p*) *Varley* v. *Coppard* (1872), L. R. 7 C. P. 505; *Langton* v. *Henson* (1905), 92 L. T. 805; doubted in *Bristol Corporation* v. *Westcott, supra.*

(*q*) *Church* v. *Brown* (1808), 15 Ves. 258, 265; *Grove* v. *Portal*, [1902] 1 Ch. 727.

(*r*) *Doe* d. *Mitchinson* v. *Carter* (1798), 8 Term Rep. 57.

(*s*) *Doe* d. *Mitchinson* v. *Carter* (1799), 8 Term Rep. 300.

(*t*) *Doe* d. *Goodbehere* v. *Bevan* (1815), 3 M. & S. 353, 360. See *Weatherall* v. *Geering* (1806), 12 Ves. 504; *Doe* d. *Cheere* v. *Smith* (1814), 5 Taunt. 795; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 88, 149, 150.

(*a*) *Seers* v. *Hind* (1791), 1 Ves. 294.

(*b*) *Crusoe* d. *Blencowe* v. *Bugby* (1771), 3 Wils. 234, 237; *Doe* d. *Goodbehere* v. *Bevan, supra*, at p. 361; see *Fox* v. *Swann* (1655), Sty. 482. Originally the covenant forbade a devise (*Windsor* (*Lord*) v. *Burry* (1582), Dyer, 45, pl. 3, n.; *Parry* v. *Harbert* (1539), Dyer 45 b.

(*c*) *Slipper* v. *Tottenham and Hampstead Junction Rail. Co.* (1867), L. R. 4 Eq. 112. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 36, 58.

(*d*) *Seers* v. *Hind, supra.*

(*e*) See p. 585, *post.*

(*f*) *Roe* d. *Gregson* v. *Harrison* (1788), 2 Term Rep. 425. If "assigns" only are mentioned, executors or administrators may nevertheless be bound as voluntary assigns in law (*More's* (*Sir William*) *Case* (1584), Cro. Eliz. 26); see *Doe* d. *Goodbehere* v. *Bevan, supra.*

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not involuntary assigns, such as a trustee in bankruptcy, or an execution creditor (*g*), nor does it include an underlessee (*h*).

Covenant against underletting.

1109. A covenant against underletting is not broken by a letting of lodgings (*i*); but it is broken whenever the lessee parts with the exclusive possession of the premises or, if the covenant is so worded, any part of the premises, to an undertenant (*k*), though, if it is against underletting simply, an underletting of part is no breach (*l*). A covenant not to underlet is broken by an underletting from year to year (*m*). To constitute a covenant against underletting it is not necessary that words appropriate to underletting should be used; it is sufficient if the covenant prohibits a disposition for a part only of the term (*n*). But the court is strict not to let a condition of forfeiture go beyond the proper meaning of the words, and in the absence of reference to a mere change of occupancy, or to a disposition for part of the term, words primarily importing assignment will not include underletting (*o*). On the other hand, words which are appropriate to underletting may have their scope widened, and may extend to assignment, if they are intended to be applicable to an alienation for the entire residue of the term (*p*).

(*g*) *Doe* d. *Goodbehere* v. *Bevan* (1815), 3 M. & S. 353, at p. 358. In *Dyke* v. *Taylor* (1861), 3 De G. F. & J. 467, C. A., on appeal against an interlocutory injunction, this was not treated as clear. A letting by a receiver under the direction of the court is perhaps not a breach (see *Rogers* v. *Bateman* (1841), Fl. & K. 432).

(*h*) *Villiers* v. *Oldcorn* (1903), 20 T. L. R. 11.

(*i*) *Doe* d. *Pitt* v. *Laming* (1814), 4 Camp. 73, 77. As to letting cottages on the premises to labourers, see *Browne* v. *Sligo* (*Marquis*) (1859), 10 Ir. Ch. R. 1.

(*k*) *Roe* d. *Dingley* v. *Sales* (1813), 1 M. & S. 297; compare *Greenslade* v. *Tapscott* (1834), 1 Cr. M. & R. 55, 59. To constitute a breach there must be a substantial parting with a substantial part of the premises (*Mashiter* v. *Smith* (1887), 3 T. L. R. 673). A mere advertising for a tenant is not a breach (*Gourlay* v. *Somerset* (*Duke*) (1812), 1 Ves. & B. 68). A statutory body in whom the term is vested is subject to the restriction of the covenant (*Metropolitan Water Board* v. *Solomon*, [1908] 2 Ch. 214). The mere fact that a third person is in occupation is not evidence of a breach of covenant if he alleges that he is tenant to some one other than the lessee (*Doe* v. *Payne* (1815), 1 Stark. 86); but if he appears to be tenant to the lessee this is *primâ facie* evidence of underletting (*Doe* d. *Hindly* v. *Rickarby* (1803), 5 Esp. 4).

(*l*) *Wilson* v. *Rosenthal* (1906), 22 T. L. R. 233.

(*m*) *Timms* v. *Baker* (1883), 49 L. T. 106.

(*n*) *Doe* d. *Holland* v. *Worsley* (1807), 1 Camp. 20 (proviso that the lessee should not assign or otherwise part with the premises or any part thereof for the whole or any part of the term); *Dymock* v. *Showell's Brewery Co.* (1898), 79 L. T. 329, C. A. (proviso for re-entry if the lessee did any act whereby the premises became vested for the whole or any part of the term in any person other than the lessee, broken by a sub-letting from year to year). The grant by the lessee of a theatre to a third person of the exclusive use of the refreshment rooms and bars is not a breach of a covenant against assigning or parting with the premises or any interest therein (*Daly* v. *Edwardes, Warr & Co.* v. *Edwardes* (1900), 48 W. R. 360); as to leasing boxes in a theatre, see *Croft* v. *Lumley* (1858), 6 H. L. Cas. 672.

(*o*) *Crusoe* d. *Blencowe* v. *Bugby* (1771), 3 Wils. 234; 2 Wm. Bl. 766 (covenant not to "assign, transfer, or set over, or otherwise do or put away with" the lease or the demised premises); *Church* v. *Brown* (1808), 15 Ves. 258, 265; compare *Kinnersley* v. *Orpe* (1779), 1 Doug. (K. B.), 56.

(*p*) *Greenaway* v. *Adams* (1806), 12 Ves. 395 (covenant not to "let, set, or demise the premises for the whole or any part of the term"). But the words "set or let" alone, without reference to the whole of the term, forbid underletting only and leave the lessee free to assign (*Re Doyle and O'Hara's Contract*, [1899] 1 I. R 113).

A forfeiture will be incurred although the underletting is only a mortgage by way of sub-demise (*q*).

Conditions of lessor's consent to assignment.

1110. Where a lease contains a covenant or condition against assigning, underletting, or parting with the possession of the demised premises without licence or consent, the covenant or condition, unless the lease contains an expressed provision to the contrary, is to be deemed subject to a proviso that no fine or sum of money in the nature of a fine shall be payable for such licence or consent. This does not preclude the right to require payment of a reasonable sum for costs (*r*), nor does it prevent the lessor from requiring the assignee to covenant to pay the rent and perform the lessee's covenants during the residue of the term (*s*); nor, in the case of a lease granted under a building contract, from requiring a deposit as security for the completion of the works (*t*); but it precludes him from demanding an increased rent (*a*). If consent is refused except on payment, the lessee is entitled to assign without consent (*b*); but the above provision does not make payment of a fine for consent illegal, and if the lessee pays it, not under protest, he cannot require repayment (*c*); and if the assignee has covenanted to pay a sum in the nature of a fine, he is liable on the covenant (*d*).

Arbitrary or unreasonable withholding of consent.

1111. A covenant against assignment or underletting without the lessor's consent is frequently qualified by the proviso that such consent shall not be arbitrarily or unreasonably withheld. The proviso is not construed as implying a covenant on the part of the lessor not to refuse his consent arbitrarily or unreasonably; but if in fact it is so refused, the result is that the lessee is at liberty to assign without the lessor's consent (*e*); and he can obtain a declaration by the court of his right to do so (*f*). The effect is the

(*q*) *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304, C. A.

(*r*) Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3. As to "fine," see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (ix.); *Waite* v. *Jennings*, [1906] 2 K. B. 11, 18, C. A. As to the right of the lessor to insist on payment previously to this enactment, see *Hilton* v. *Tipper* (1868), 18 L. T. 626. The Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), applies to all leases, whether made before or after the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), or not (*West* v. *Gwynne*, [1911] 2 Ch. 1, C. A.). For form of consent, see Encyclopædia of Forms and Precedents, Vol. VII., p. 678.

(*s*) See *Waite* v. *Jennings*, *supra*.

(*t*) *Re Cosh's Contract*, [1897] 1 Ch. 9, C. A.

(*a*) *Jenkins* v. *Price*, [1907] 2 Ch. 229; the point was not decided on appeal, S. C., [1908] 1 Ch. 10, C. A.

(*b*) *Andrew* v. *Bridgman*, [1908] 1 K. B. 596, C. A.; see *Waite* v. *Jennings*, *supra*, at p. 16.

(*c*) *Andrew* v. *Bridgman*, *supra*; *West* v. *Gwynne*, *supra*; see *Jenkins* v. *Price*, *supra*.

(*d*) *Waite* v. *Jennings*, *supra*.

(*e*) *Treloar* v. *Bigge* (1874), L. R. 9 Exch. 151; *Hyde* v. *Warden* (1877), 3 Ex. D. 72, C. A.; *Sear* v. *House Property and Investment Society* (1880), 16 Ch. D. 387.

(*f*) *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112, C. A.; *Evans* v. *Levy*, [1910] 1 Ch. 452; and he is entitled to the costs of the action for this purpose (*Young* v. *Ashley Gardens Properties, Ltd.*, *supra*; *West* v. *Gwynne*, *supra*, overruling on this point *Jenkins* v. *Price*, *supra*, and *Evans* v. *Levy*, *supra*). Even without such declaration he can obtain specific performance of a contract of assignment if it is clear that the lessor's consent is

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same where the consent is not to be withheld in the case of an assignment to a respectable and responsible person; and, unless the nature of the lease shows that it is to be held by an individual, a company may be such a person (*g*). But the lessee before he assigns is bound to ask for the consent, even though it could not properly be refused (*h*), and if through forgetfulness he omits to do so he cannot obtain relief from the forfeiture (*i*).

Grounds of refusal of consent.

1112. Where the lessor's consent to assignment is not to be arbitrarily or unreasonably withheld, he must not withhold it in order to get some advantage for himself, as, for example, to obtain a surrender of the lease (*k*); but he may be justified in withholding it if he is acting "upon advice," even though the grounds of refusal are not stated (*l*); or if in his opinion the intended use of the premises by the assignee will be prejudicial to other property of his own (*m*); or if such use is different from the purpose for which the lease was granted (*n*); though if the lease imposes serious liability on the lessee—where, for instance, the rent is heavy—substantial ground for refusing consent should be shown (*o*). In the case of a proposed re-assignment by an assignee, it is unreasonable to require him to covenant to pay the rent and perform the covenants for the residue of the lease (*p*).

Licences, form and effect.

1113. If the licence to assign is required to be in writing, a verbal licence is insufficient (*q*). The licence extends only to the actual assignment or underlease which it authorises (*r*), though it is usual expressly so to provide in the licence (*s*). If it is intended that the

improperly withheld (*White* v. *Hay* (1895), 72 L. T. 281; *contra*, *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202; see *Day* v. *Singleton*, [1899] 2 Ch. 320, C. A.); and see title SPECIFIC PERFORMANCE.

(*g*) *Willmott* v. *London Road Car Co., Ltd.*, [1910] 2 Ch. 525, C. A.; following *Re Jeffcock's Trusts* (1882), 51 L. J. (CH.) 507, and overruling *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (1891), 39 W. R. 250. If personal residence is required the lease is not assignable to a company (*Jenkins* v. *Price*, [1908] 1 Ch. 10, C. A.).

(*h*) *Eastern Telegraph Co.* v. *Dent*, [1899] 1 Q. B. 835, C. A.; *Burford* v. *Unwin* (1885), 7 Cab. & El. 494, *contra*, is overruled.

(*i*) *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417, C. A.

(*k*) *Lehmann* v. *McArthur* (1867), L. R. 3 Eq. 746; *Bates* v. *Donaldson*, [1896] 2 Q. B. 241, C. A.

(*l*) *Treloar* v. *Bigge* (1874), L. R. 9 Exch. 151.

(*m*) *Bridewell Hospital (Governors)* v. *Fawkner and Rogers* (1892), 8 T. L. R. 637; compare *Re Spark's Lease, Berger* v. *Jenkinson*, [1905] 1 Ch. 456 (where the landlord occupied part of same premises).

(*n*) *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation*, *supra*.

(*o*) *Sheppard* v. *Hong Kong and Shanghae Banking Corporation* (1872), 20 W. R. 459.

(*p*) *Evans* v. *Levy*, [1910] 1 Ch. 452; though it may be reasonable to require such a covenant, limited to the time during which the assignee holds the lease (*ibid.*).

(*q*) *Richardson* v. *Evans* (1818), 3 Madd. 218; though if the verbal licence has been given as a snare, relief will be given in equity (*ibid.*); and see *Walker* v. *Ballamie* (1605), Cro. Jac. 102. As to indorsement of the consent on the assignment in Ireland, see *Re Ulster Permanent Building Society and Junior Army and Navy Stores* (1884), 13 L. R. Ir. 67.

(*r*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 1; *Eyton* v. *Jones* (1870), 21 L. T. 789.

(*s*) Formerly the effect of a licence for a single assignment was to put an

assignee shall not be let into possession until the assignment is complete, this also should be expressly stated (*t*). Upon an agreement for sale of a lease it is the duty of the vendor to procure the lessor's licence (*u*), and if he fails to do so the agreement will not be enforceable (*a*); though if the purchaser procures the lessor's refusal he may be liable to make any payment due under the agreement (*b*).

Remedy for breach of the covenant.

1114. Where there is a covenant against assignment or underletting, with a proviso for re-entry on breach of covenant, the lessor can either re-enter for the forfeiture or sue for damages for the breach; and if he is not immediately aware of the breach, he can forfeit the lease as soon as he hears of it (*c*), subject to the Statute of Limitations (*d*). If he sues on the covenant, the damages will be measured by the loss naturally flowing from the assignment (*e*) or underletting (*f*).

Position of unlawful assignee.

1115. So long as the assignee or undertenant is in possession he is subject to the stipulations of the lease, notwithstanding the want of the lessor's consent (*g*).

Acceptance by landlord of assignee as tenant.

1116. The lessor will be debarred from insisting on the necessity of consent if he has accepted the assignee as tenant in the place of the assignor, but this acceptance is not to be inferred merely from the fact that possession has been given to the assignee with the knowledge of the lessor and without objection on his part; this, while an important element, is not conclusive where the facts show that the lessor did not intend to accept the assignee (*h*). Further, the lessor is not bound to assent to the assignment on the ground that he stood by while the assignee was spending money on the

end to the condition or covenant against assignment altogether; see p. 539, *ante*.

(*t*) *West* v. *Dobb* (1869), L. R. 4 Q. B. 634.

(*u*) *Lloyd* v. *Crispe* (1813), 5 Taunt. 249; *Mason* v. *Corder* (1816), 7 Taunt. 9. It is enough if the lessee makes reasonable efforts to procure the licence (*Lehmann* v. *McArthur* (1868), 3 Ch. App. 496); compare *Day* v. *Singleton*, [1899] 2 Ch. 320, C. A. If the lessor's consent cannot be obtained the intending assignee will recover any deposit he has paid notwithstanding that he has negotiated unsuccessfully for a new lease (*Winter* v. *Dumergue* (1866), 14 W. R. 699).

(*a*) But as to a purchaser's suit, see *Leitch* v. *Simpson* (1871), 5 I. R. Eq. 613.

(*b*) See *Davis* v. *Nisbett* (1860), 10 C. B. (N. S.) 752.

(*c*) *Silcock* v. *Farmer* (1882), 46 L. T. 404, C. A.

(*d*) The right of re-entry must be asserted within twelve years of the cause of forfeiture; see title LIMITATION OF ACTIONS.

(*e*) The assignment, when made by an assignee, puts an end to his liability on the covenants in the lease, and if it is made to one of inferior pecuniary liability, the measure of damages will be such a sum as would, as far as money can, put the lessor in the same position as if he still had the assignee's liability for breaches of covenant, past and future (*Williams* v. *Earle* (1868), L. R. 3 Q. B. 739).

(*f*) If the premises are destroyed by reason of special risk attaching to the purposes for which they are sub-let, the damages will be the loss thus caused (*Lepla* v. *Rogers*, [1893] 1 Q. B. 31; compare *Chapman* v. *Mason and Liniline Co.* (1910), 103 L. T. 390).

(*g*) *Silcock* v. *Farmer*, *supra*.

(*h*) *Elphinstone* (*Lord*) v. *Monkland Iron and Coal Co.* (1885), 11 App. Cas. 332, 345.

SECT. 1. Right to Assign or Underlet.

property, unless the circumstances are such as to estop him from setting up the breach of covenant (*i*).

SECT. 2.—*Mode of Assignment.*

Agreement to assign must be in writing.

1117. No action can be brought upon a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the contract, or some memorandum or note thereof, is in writing, signed by the party to be charged therewith, or his agent (*k*); consequently contracts for the assignment of leaseholds or tenancies must be in writing. The above rule applies whenever there is in effect an agreement for the transfer of the premises for the residue of the term; where, for instance, the lessee agrees to give possession to another who is to be tenant for the residue of the term (*l*) or merely to give up possession of a house to another (*m*). Even though the assignment has been completed by transfer of the premises in pursuance of a verbal agreement the vendor cannot recover the price on the contract; but if the purchaser has admitted the amount to be due, it will be recoverable on an account stated (*n*)

Legal assignment must be by deed.

1118. An assignment of a chattel interest, not being copyhold, in any tenements or hereditaments is void at law unless made by deed (*o*). Consequently a deed is necessary to pass the legal interest in leaseholds, including a tenancy from year to year (*p*), though an assignment under hand, if made for value, will operate as an agreement to assign and will vest an equitable interest in the assignee (*q*). The assignor can assign the premises direct to himself and another (*r*). Where an underlease has been created the mere assignment of the head term does not necessarily pass the rent reserved upon, and the benefit of the covenants contained in, the underlease (*s*).

(*i*) *Willmott* v. *Barber* (1880), 15 Ch. D. 96; compare *Burke* v. *Prior* (1863), 15 I. Ch. R. 106; and see titles EQUITY, Vol. XIII., p. 167; ESTOPPEL Vol. XIII., p. 396.

(*k*) Statute of Frauds (29 Car. 2, c. 3), s. 4; see titles CONTRACT, Vol. VII., p. 361; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 419.

(*l*) *Buttemere* v. *Hayes* (1839), 5 M. & W. 456.

(*m*) *Kelly* v. *Webster* (1852), 12 C. B. 283; *Smart* v. *Harding* (1855), 15 C. B. 652; *Hodgson* v. *Johnson* (1858), E. B. & E. 685.

(*n*) *Cocking* v. *Ward* (1845), 1 C. B. 858; see title CONTRACT, Vol. VII., p. 382.

(*o*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3. Under the Statute of Frauds (29 Car. 2, c. 3), s. 4, the assignment might be either by deed or by note in writing; and in Ireland the assignment may now be in writing (Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 9; *Doran* v. *Kenny* (1869), 3 I. R. Eq. 148. See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 368. As to an assignment by the sheriff on sale under an execution, see title EXECUTION, Vol. XIV., p. 44.

(*p*) *Botting* v. *Martin* (1808), 1 Camp. 317, decided on the Statute of Frauds (29 Car. 2, c. 3).

(*q*) See p. 385, *ante*. As to when the assumption of liability by the lessee prevents an assignment from being voluntary, see *Re Greer, a Bankrupt* (1877), 11 I. R. Eq. 502; title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 81, 95. For form of agreement to assign, see Encyclopædia of Forms and Precedents, Vol. XII., p. 246.

(*r*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 21. Compare, as to freeholds, Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 50.

(*s*) See *Franklin* v. *Howes* (1871), 19 W. R. 581.

SECT. 2. Mode of Assignment.

Registration of title.

1119. If the lease is for life or lives, or is determinable on a life or lives, or is for a term of years of which more than twenty-one are unexpired, the assignee can register himself as proprietor at the Land Registry with a possessory, qualified, absolute, or good leasehold title (*t*). If the land is in a district where registration is compulsory, the purchaser of a lease or underlease having at least forty years to run, or two lives yet to fall in, must register himself as proprietor, otherwise he will not obtain the legal estate in the term (*u*). If the leasehold land is already on the register, the assignment will be by transfer in the prescribed form, and must be registered (*a*). But registration of title to the lease makes it unnecessary to register the assignment in the local registries (*b*) referred to in the next paragraph.

Registration of deed in Middlesex and Yorkshire.

1120. If the premises are in Middlesex and outside the City of London, the assignment must be registered at the Land Registry in the Middlesex Deeds Register; but this is not necessary in the case of a lease at a rack-rent, or of a lease not exceeding twenty-one years, where the actual possession and occupation goes with the lease (*c*). If the premises are situate in any riding of Yorkshire, the assignment must be registered at the office for the particular riding (*d*), except in the case of the assignment of a lease not

(*t*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 11, 13; see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 22 (6) (g); Land Transfer Rules, 1903, rr. 50—67, as varied by the Land Transfer Rules, 1908. To obtain registration with an absolute title, the assignee must prove both the title of the lessor to grant the lease, and also his own title to the lease (*ibid.*, r. 53); to obtain registration with a good leasehold title, he has only to prove his own title to the lease, assuming it to be well created (*ibid.*, r. 56). As to registration of title generally, see title REAL PROPERTY AND CHATTELS REAL.

(*u*) Land Transfer Rules, 1903, rr. 68, 69.

(*a*) See Encyclopædia of Forms and Precedents, Vol. XI., p. 364; Land Transfer Rules, 1903, r. 126.

(*b*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 127, amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. 1; Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 61), Sched. I. (14).

(*c*) Middlesex Registry Act, 1708 (7 Ann. c. 20); see the regulations introduced by the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), Sched. I., and the Land Registry (Middlesex Deeds) Rules, 1892. As to "actual possession and occupation," see *Fury* v. *Smith* (1822), 1 Hud. & B. 735, p. 401, *ante*. It has been doubted whether assignments of excepted leases are also excepted from registration (*Fleming's Lessee* v. *Neville* (1830), Hayes, 23); but this is a necessary consequence. Registration gives absolute priority at law over unregistered assurances (*Doe* d. *Robinson* v. *Allsop* (1821), 5 B. & Ald. 142); but does not give priority in equity over an unregistered assurance of which the assignee has notice (*Le Neve* v. *Le Neve* (1748), 3 Atk. 646, 651). Registration is effected by registration of a memorial of the deed, which must set out the date, names and addition of parties and the parcels; see Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), Sched. I.; *R.* v. *Middlesex* (*Registrar*) (1850), 15 Q. B. 976. For form of memorial, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 282 *et seq.*

(*d*) Under the Yorkshire Registry Acts, 1884, 1885 (47 & 48 Vict. c. 54; 48 & 49 Vict. c. 26). Notice of an unregistered assurance does not deprive a registered assurance of priority except in case of actual fraud (Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 7; *Battison* v. *Hobson*, [1896] 2 Ch. 403). An agreement for sale of land is not an "assurance" capable of registration under these Acts (*Rodger* v. *Harrison*, [1893] 1 Q. B. 161, C. A.). The registration is effected by registration of a memorial of the deed (Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 6); see p. 401, *ante*. For form

SECT. 2. Mode of Assignment.

exceeding twenty-one years, where accompanied by actual possession from the making of the assignment, or of a lease of Crown lands (*e*)

SECT. 3.—*Covenants Running with the Land.*

Covenants running with the land.

1121. A covenant entered into between lessor and lessee is primarily binding as between the two personally. But upon an assignment either of the reversion or of the term it may be also binding upon the grantee of the reversion or the assignee of the term; and similarly, the benefit of a covenant may pass to these parties respectively (*f*). There are thus four cases: (1) where the burden of a lessee's covenant runs with the term, or, as it is more usually put, with the land; (2) where the benefit of the lessee's covenant runs with the reversion; (3) where the burden of a lessor's covenant runs with the reversion; and (4) where the benefit of a lessor's covenant runs with the land.

Burden of lessee's covenants. Rules relating thereto.

1122. Whether the burden of a covenant by the lessee runs with the land depends partly on the nature and partly on the form of the covenant (*g*). As regards its nature, the covenant (1) may concern the land itself or something already in existence on the land; in either case, it concerns a thing *in esse;* or (2) though directly relating to the land, it may concern something only contemplated to be brought into existence, a thing *in futuro;* or (3) it may not in strictness concern the land at all, in which case it is said to be collateral. As regards the form of the covenant, (1) it may be entered into by the lessee for himself, or for himself and his representatives, real and personal, only; or (2) it may purport expressly to bind his assigns. The following rules, which apply only where the lease is by deed (*h*), but which apply also to incorporeal hereditaments (*i*), govern these cases (*k*):—

Spencer's Case, first resolution.

(i.) When the covenant relates to a thing *in esse*, and directly concerns the land, it binds the assigns, whether named or not (*l*);

of memorial, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 291 *et seq.*

(*e*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 28, 30.

(*f*) The covenant must be effective in the first instance. Thus, if the same person is joined both as covenantor and covenantee, it will not run with the land (*Napier* v. *Williams*, [1911] 1 Ch. 361). But it is sufficient if the lessor has a reversion by estoppel (*Cuthbertson* v. *Irving* (1860), 6 H. & N. 135, Ex. Ch.), even though the defect in his legal title appear on the lease (see *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; *Merton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.); and see p. 336, *ante;* 1 Smith, L. C., 11th ed., 95.

(*g*) The general rule is that the burden of the covenant never runs with the land at law (*Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A.); though it may run with the land in equity on the ground of notice (*Tulk* v. *Moxhay* (1848), 2 Ph. 774); see p. 590, *post;* titles EQUITY, Vol. XIII., p. 100; SALE OF LAND. But the relation of landlord and tenant gives rise to an exception from the rule (*Austerberry* v. *Oldham Corporation, supra*, at p. 781). And as to covenants between lessor and lessee, see *Chandos* (*Dowager Duchess*) v. *Brownlow* (1791), 2 Ridg. Parl. Rep. 345, 407.

(*h*) *Elliott* v. *Johnson* (1866), L. R. 2 Q. B. 120, 127.

(*i*) *Hooper* v. *Clark* (1867), L. R. 2 Q. B. 200; see *Martyn* v. *Williams* (1857), 1 H. & N. 817.

(*k*) *Spencer's Case* (1583), 5 Co. Rep. 16 a; 1 Smith, L.C., 11th ed., 54.

(*l*) First resolution in *Spencer's Case, supra*. According to the words of the resolution the thing must be parcel of the demise, but it is sufficient if it

(ii.) When it relates to a thing *in futuro* and directly concerns the land, it binds the assigns if they are named, but not otherwise (*m*);

(iii.) When the covenant does not touch nor concern the land, but is merely collateral, it does not bind the assigns, but is a personal covenant only; hence it cannot be made to run with the land (*n*).

Second resolution.

directly concerns the land; see *Lyle* v. *Smith*, [1909] 2 I. R. 58. Of this nature are covenants to pay rent (*Parker* v. *Webb* (*circa* 1700), 3 Salk. 5; *Stevenson* v. *Lambard* (1802), 2 East, 575, 580; *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238); to render services in the nature of rent (*Vyvyan* v. *Arthur* (1823), 1 B. & C. 410; see *Keppell* v. *Bailey* (1834), 2 My. & K. 517, 541); to allow deductions out of rent (*Baylye* v. *Hughes* (1628), Cro. Car. 137); to repair or to leave in repair houses already built (*Matures* v. *Westwood* (1598), Cro. Eliz. 599; *Windsor's* (*Dean and Chapter*) *Case* (1601), 5 Co. Rep. 24 a; *Wakefield* v. *Brown* (1846), 9 Q. B. 209, 223; *Martyn* v. *Clue* (1852), 18 Q. B. 661); to repair and renew fixtures already affixed to the premises (*Williams* v. *Earle* (1868), L. R. 3 Q. B. 739); to insure against fire (*Vernon* v. *Smith* (1821), 5 B. & Ald. 1; see p. 521, *ante*); to use the premises as a private dwelling-house only (*Wilkinson* v. *Rogers* (1864), 2 De G. J. & Sm. 62, C. A.); to reside upon them during the demise (*Tatem* v. *Chaplin* (1793), 2 Hy. Bl. 133); in a lease of a public-house, a covenant to conduct the house properly (*Fleetwood* v. *Hull* (1889), 23 Q. B. D. 35); and to buy liquor from the lessor (*Clegg* v. *Hands* (1890), 44 Ch. D. 503, C. A.; *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767; see p. 573, *ante*); in an agricultural lease a covenant to manure (*Sale* v. *Kitchingham* (1713), 10 Mod. Rep. 158); and not to plough more than a certain quantity of land (*Cockson* v. *Cock* (1606), Cro. Jac. 125); in a mining lease, a covenant to pay compensation for damage done to the surface (*Norval* v. *Pascoe* (1864), 34 L. J. (CH.) 82; *Dyson* v. *Forster*, *Dyson* v. *Seed*, *Quinn*, *Morgan etc.*, [1909] A. C. 98; see title MINES, MINERALS, AND QUARRIES); in a sporting lease, a covenant to leave the land well stocked with game (*Hooper* v. *Clark* (1867), L. R. 2 Q. B. 200; see p. 575, *ante*); in a lease of land near the sea, a covenant to maintain a sea wall though not parcel of the demised premises (*Lyle* v. *Smith*, [1909] 2 I. R. 58).

(*m*) Second resolution in *Spencer's Case* (1583), 5 Co. Rep. 16 a. For this rule to apply the covenant, while relating to a thing *in futuro*, must directly touch or concern the thing demised (*Spencer's Case*, *supra*; *Congleton Corporation* v. *Pattison* (1808), 10 East, 130, 135; *Doughty* v. *Bowman* (1848), 11 Q. B. 444, 454; *Thomas* v. *Hayward* (1869), L. R. 4 Exch. 311). The distinction between covenants relating to a thing *in esse* and a thing *in futuro* rests on no intelligible basis and was questioned in *Minshull* v. *Oakes* (1858), 2 H. & N. 793, but it has not been overruled. Covenants relating to things *in futuro* are:—A covenant to erect new buildings (*Spencer's Case*, *supra*; *Doughty* v. *Bowman*, *supra*); at the end of the term to deliver up at valuation fruit trees then growing (*Grey* v. *Cuthbertson* (1785), 2 Chit. 482); in a colliery lease to convey, upon a railway to be made on the demised land, all coal got from a certain colliery (*Hemingway* v. *Fernandes* (1842), 13 Sim. 228), although the thing *in futuro* is to be done off the land, yet the covenant is treated as directly concerning the land if the thing to be done tends to the maintenance of the demised premises; such as a covenant in a mining lease to build a smelting mill on adjacent waste land not included in the demise (*Sampson* v. *Easterby* (1829), 9 B. & C. 505, 516; affirmed, *Easterby* v. *Sampson* (1830), 6 Bing. 644, Ex. Ch.); see *Bally* v. *Wells* (1769), 3 Wils. 25; *Lyle* v. *Smith*, *supra*; compare *Dewar* v. *Goodman*, [1909] A. C. 72, 77). A covenant not to assign without licence is binding on the assigns, at any rate where they are named (*Williams* v. *Earle* (1868), L. R. 3 Q. B. 739; *McEacharn* v. *Colton*, [1902] A. C. 104, P. C.); see *West* v. *Dobb* (1869), L. R. 4 Q. B. 634, 637, n. (1); compare *Doe* d. *Cheere* v. *Smith* (1814), 5 Taunt. 795; and p. 577, *ante*.

(*n*) Second resolution in *Spencer's Case*, *supra*; *Uxbridge* (*Lord*) v. *Staveland* (1747), 1 Ves. Sen. 56; *Thomas* v. *Hayward*, *supra*. Of this nature are the following covenants:—To pay to the lessor or a stranger a collateral sum; that is, a sum not reserved as rent (*Mayho* v. *Buckhurst* (1617), Cro. Jac. 438; *Inchiquin* (*Earl*) v. *Burnell* (1795), 3 Ridg. Parl. Rep. 376; *Lambert* v. *Norris* (1837), 2 M. & W. 333; see *Flight* v. *Glossopp* (1835), 2 Bing. (N. C.) 125); to

SECT. 3. Covenants Running with the Land.

Although, where the lease is not under seal, the stipulations do not bind an assignee of the term, yet if the assignee goes into occupation, and rent is paid and received on the footing of the old tenancy, an agreement between the lessor and the assignee will be implied that there shall be a new tenancy on the terms of the old (*o*).

Benefit of lessee's covenant. Stat. (1540) 32 Hen. 8, c. 34, s. 1.

1123. At common law the benefit of the lessee's covenants did not run with the reversion, except in the case of covenants for payment of rent or the rendering of services in the nature of rent, such as suit to the lessor's mill (*p*); but under statute (*q*) the grantee of the reversion and his assigns has the like advantages against the lessee by entry for non-payment of rent, or for doing waste or other forfeiture, and the same remedies by action for not performing other conditions, covenants, or agreements contained in the indenture of lease, as the lessor himself had. The statute (*q*) only applies where the condition or covenant concerns the land (*r*), and where the lease is by deed (*s*). If the lease is by parol, the grantee of the reversion does not obtain the benefit of stipulations

pay taxes on premises not included in the demise (*Gower* v. *Postmaster-General* (1887), 57 L. T. 527); to build a house upon other land of the lessor (*Spencer's Case* (1583), 5 Co. Rep. 16 a), the house not being immediately required for the purposes of the demised premises (*Sampson* v. *Easterby* (1829), 9 B. & C. 505, 516); to repair and renew chattels (*Williams* v. *Earle* (1868), L. R. 3 Q. B. 739; see *Gorton* v. *Gregory* (1862), 3 B. & S. 90); not to employ a certain class of persons on the premises (*Congleton Corporation* v. *Pattison* (1808), 10 East, 130; *Walsh* v. *Fussell* (1829), 6 Bing. 163); a condition of re-entry on conviction of the lessee for an offence against the game laws (*Stevens* v. *Copp* (1868), L. R. 4 Exch. 20); in a public-house lease, not to keep a public-house within half a mile of the demised premises (*Thomas* v. *Hayward* (1869), 38 L. J. (EX.) 175, 176).

(*o*) *Buckworth* v. *Simpson* (1835), 1 Cr. M. & R. 834; compare *Elliott* v. *Johnson* (1866), L. R. 2 Q. B. 120.

(*p*) *Vivyan* v. *Arthur* (1823), 1 B. & C. 410; *Bickford* v. *Parson* (1848), 5 C. B. 920, 931; see *Harper* v. *Burgh* (1677), 2 Lev. 206.

(*q*) Stat. (1540) 32 Hen. 8, c. 34, s. 1. The statute was passed on the dissolution of the monasteries, in order to preserve the remedies on leases of their forfeited lands; but though primarily designed for the benefit of grantees from the Crown, it was made to apply to grantees of reversions generally (see Co. Litt. 215 a, resolution 1). As to the running of covenants with the reversion under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, see p. 595, *post*.

(*r*) Within the rules in *Spencer's Case* (1583), 5 Co. Rep. 16 a, 18 a (*ad fin.*); *Stevens* v. *Copp* (1868), L. R. 4 Exch. 20. A covenant by the lessee of a public-house to take liquor from the lessor is of this nature (*Fleetwood* v. *Hull* (1889), 23 Q. B. D. 35); and also a covenant in an agricultural lease against selling hay or manure off the farm (*Chapman* v. *Smith*, [1907] 2 Ch. 97); and apparently a provision for resumption of possession (*Kennedy* v. *Liddy* (1867), 15 W. R. 431 (in the House of Lords on another point, *sub nom. Liddy* v. *Kennedy* (1871), L. R. 5 H. L. 134)). But a covenant for payment in a mortgage of a term does not run with the term (*Canham* v. *Rust* (1818), 8 Taunt. 227).

(*s*) *Standen* v. *Christmas* (1847), 10 Q. B. 135; see *Bickford* v. *Parson* (1848), 5 C. B. 920, 929, 932. But it has been held, in pursuance of the doctrine of *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A., that if the tenant has an agreement specifically enforceable under which a lease by deed would have to be granted, this is to be treated as a lease by deed for the purpose of stat. (1540) 32 Hen. 8, c. 34 (*Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; *Rickett* v. *Green*, [1910] 1 K. B. 253).

by the tenant unless, from receipt of rent or otherwise, the creation of a new tenancy on the old terms can be implied (*t*). Where the benefit of the stipulation is not transferred the grantor continues to be entitled to enforce it (*u*).

Burden of lessor's covenants. Stat. (1540) 32 Hen. 8, c. 34, s. 2.

1124. Probably the grantee of the reversion took it at common law (*v*) with the burden of any covenants by the lessor, and this is also the effect of a further provision (*w*) of the statute referred to in the preceding paragraph, whereby the lessee and his assigns have the like remedy against the grantee of the reversion for any condition, covenant, or agreement contained in his indenture of lease as the lessee might have had against the lessor. But for the burden of the covenant to run with the reversion under the statute, the lease must be by deed (*x*), and the condition or covenant must touch or concern the land. A covenant for quiet enjoyment seems to be of this nature (*a*); but where an underlessor covenants to perform the covenants of the head lease so far as they relate to premises comprised in the head lease but not in the underlease, and to indemnify the underlessee against breach, this is only collateral; it is not treated as touching or concerning the land on the ground that the

(*t*) *Cornish* v. *Stubb* (1870), L. R. 5 C. P. 334, 339; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; compare *Buckworth* v. *Simpson* (1835), 1 Cr. M. & R. 834; *Bourke* v. *Bourke* (1874), 8 I. R. C. L. 221. Under a contract to take over from the lessee a farm held under an expired lease, if the landlord accepts the new tenant on the covenants in the lease, the lease itself must be handed over (*Burton* v. *Banks* (1860), 2 F. & F. 213).

(*u*) *Bickford* v. *Parson* (1848), 5 C. B. 920, 929, 932.

(*v*) The heir, if he has gone into possession, is assignee in law and can be charged as assignee on covenants which run with the land (*Derisley* v. *Custance* (1790), 4 Term Rep. 75).

(*w*) Stat. (1540) 32 Hen. 8, c. 34, s. 2.

(*x*) If the lease is not under seal, the grantee of the reversion is not bound by its terms unless he has adopted them so as to create a new tenancy on those terms (*Smith* v. *Eggington* (1874), L. R. 9 C. P. 145). As to using the lease as evidence of the terms of the implied contract, see *Walliss* v. *Broadbent* (1836), 4 Ad. & El. 877.

(*a*) *Noke* v. *Awder* (1695), Cro. Eliz. 373, 436; *Derisley* v. *Custance*, *supra*; *Campbell* v. *Lewis* (1820), 3 B. & Ald. 392; see *Cole's Case* (1692), 1 Salk. 196; but the contrary was suggested in *Dewar* v. *Goodman*, [1908] 1 K. B. 94, 108, C. A. Other covenants which touch or concern the land for this purpose are:—A covenant to renew (*Richardson* v. *Sydenham* (1703), 2 Vern. 447; *Simpson* v. *Clayton* (1838), 4 Bing. (N. C.) 758, 780; see *Muller* v. *Trafford*, [1901] 1 Ch. 54, 60); a covenant for further assurance (*Middlemore* v. *Goodale* (1638), Cro. Car. 503); a covenant to supply the demised houses with water (*Jourdain* v. *Wilson* (1821), 4 B. & Ald. 266; compare *Athol* v. *Midland Great Western of Ireland Rail. Co.* (1868), 3 I. R. C. L. 333); a covenant to pay rates and taxes (see *South of England Dairies, Ltd.* v. *Baker*, [1906] 2 Ch. 631); and a covenant restrictive of building on adjoining land of the lessor (*Ricketts* v. *Enfield* (*Churchwardens*), [1909] 1 Ch. 544). But a covenant by the lessor to give the lessee a right of pre-emption over adjoining ground is merely collateral (*Collison* v. *Lettsom* (1815), 6 Taunt. 224, 229). A covenant to renew runs with the reversion which is vested in the lessor at the date of the lease. It does not bind the assignee of a different reversion which the lessor subsequently acquires (*Coey* v. *Pascoe*, [1899] 1 I. R. 125; *Muller* v. *Trafford*, *supra*); and see further as to persons bound by a covenant to renew *Shelburne* (*Earl*) v. *Biddulph* (1748). 6 Bro. Parl. Cas. 356, 363; *Hamilton* v. *Patten* (1839), 1 I. Eq. R. 341; *Beere* v. *Cavendish* (1806), 5 I. Eq. R. 472. As to the liability of the lessor for acts of his "assigns," see *Ricketts* v. *Enfield* (*Churchwardens*), *supra*.

SECT. 3. Covenants Running with the Land.

underlessee is liable to be evicted for non-performance of the covenants in the head lease (*b*).

Benefit of lessor's covenants.

1125. The benefit of a covenant by the lessor runs with the land in favour of the assigns of the lessee, provided that the lease is by deed (*c*) and that the covenant is one which touches or concerns the land (*d*).

SECT. 4.—*Liabilities of Lessee and Assignee.*

SUB-SECT. 1.—*Liability to the Lessor.*

Lessee's liability to lessor on covenants

112. The assignment of the lease does not prejudice the personal contract between the lessee and the lessor, and accordingly the lessee remains liable on the covenant for payment of rent and the other covenants on his part contained in the lease (*e*); but as regards covenants which run with the land (*f*), the assignee also becomes liable to the lessor by reason of privity of estate (*g*). The liability arises on the mere assignment, although the assignee has not entered (*h*), and it arises in respect of rent accruing due, and breaches of covenant committed, after the assignment (*i*). Similarly, where the lessor's covenants run with the land, the privity of estate

(*b*) *Dewar* v. *Goodman*, [1909] A. C. 72; and a covenant to pay at the end of the term for articles which are not fixtures is collateral (*Gorton* v. *Gregory* (1862), 3 B. & S. 90).

(*c*) The yearly tenancy arising on holding over after the expiration of a lease by deed, and payment of rent, is a parol tenancy (see p. 439, *ante*), and the assignee is not entitled to the benefit of its special terms unless he has been accepted by the landlord (*Elliott* v. *Johnson* (1866), L. R. 2 Q. B. 120).

(*d*) See *Spencer's Case* (1583), 5 Co. Rep. 16 a, resolution 4, covenant for quiet enjoyment; resolution 6, covenant to repair houses during the term; stat. (1540) 32 Hen. 8, c. 34, s. 2. The assignee of part of the land will be entitled to the benefit of the covenant if it can be apportioned (see *Simpson* v. *Clayton* (1838), 4 Bing. (N. C.) 758, 781).

(*e*) *Barnard* v. *Godscall* (1612), Cro. Jac. 309; *Auriol* v. *Mills* (1790), 4 Term Rep. 94, 98; *Staines* v. *Morris* (1812), 1 Ves. & B. 8, 11; *Orgill* v. *Kemshead* (1812), 4 Taunt. 642. An action on an express covenant will lie against the lessee or his personal representatives at any time during the term (*Brett* v. *Cumberland* (1619), Cro. Jac. 521; *Bachelour* v. *Gage* (1630), Cro. Car. 188); but the lessee ceases to be liable in debt for the rent after the lessor has accepted the assignee as his tenant, whether expressly or impliedly, *e.g.*, by acceptance of rent (*Walker's Case* (1587), 3 Co. Rep. 22 a; *Auriol* v. *Mills*, *supra*; see *Wadham* v. *Marlowe* (1784), 8 East, 314, n. (c); 4 Doug. (K. B.) 54). Similarly the lessee is liable in use and occupation until the landlord accepts the new tenant, but not afterwards (*Shine* v. *Dillon* (1867), 1 I. R. C. L. 277; compare *Hyde* v. *Moakes* (1831), 5 C. & P. 42).

(*f*) See p. 584, *ante*.

(*g*) See *Walker's Case*, *supra*, at p. 23 a; *Wiggins* v. *Masson* (1827), 6 L. J. (O. S.) (K. B.) 93; compare *Napier* v. *Williams*, [1911] 1 Ch. 361.

(*h*) *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238; *Burton* v. *Barclay* (1831), 7 Bing. 745, 761; see *Pilkington* v. *Shaller* (1700), 2 Vern. 374. It is necessary that the lessee should have entered, so that his *interesse termini* has become an estate severed from the reversion (see *Wiggins* v. *Masson*, *supra*). After this severance entry by a successor in title to the term is not required except in the case of a personal representative (see p. 598, *post*).

(*i*) *Grescot* v. *Green* (1700), 1 Salk. 199; *St. Saviour's, Southwark* (*Churchwardens*) v. *Smith* (1762), 3 Burr. 1271; *Hawkins* v. *Sherman* (1828), 3 C. & P. 459.

entitles the assignee of the term to sue in respect of breaches committed after the assignment (*k*).

Who are liable as assignees.

1127. The assignee is only liable on the covenants where he has taken an assignment of the entire residue of the term (*l*), or where he has estopped himself from denying such assignment, as for instance, if he has gone into possession and paid the rent reserved by the lease (*m*). Hence an equitable assignee, whether under an agreement for an assignment (*n*), or as equitable mortgagee by deposit (*o*), is not liable, notwithstanding that he has entered into possession (*p*). A person who gains a title by adverse possession as against the lessee under the Statutes of Limitations (*q*) is not an assignee so as to be liable at law on the covenants in the lease (*r*). On the other hand, one who takes the legal estate by assignment is liable on the covenants, though he takes as trustee (*s*), or as mortgagee (*t*), and has not entered into possession (*a*); and the person equitably interested is not liable (*b*). A trustee under a creditor's deed which contains a general assignment of personal estate is liable on the covenants incident to the debtor's leasehold property (*c*), unless the leaseholds are expressly excluded (*d*), or unless the general words of assignment are not suitable to include leaseholds (*e*).

Similarly, the benefit of stipulations in the lease in favour of the

(*k*) *Lewes* v. *Ridge* (1601), Cro. Eliz. 863.

(*l*) *West* v. *Dobb* (1869), L. R. 4 Q. B. 634; see *Goddard* v. *Lewis* (1909), 101 L. T. 528; *St. Thomas's Hospital* (*Governors*) v. *Richardson*, [1910] 1 K. B. 271, C. A. The word "assigns" does not ordinarily include an underlessee (*Bryant* v. *Hancock & Co.*, [1898] 1 Q. B. 716, C. A.; see S. C., [1899] A. C. 442; *South of England Dairies, Ltd.* v. *Baker*, [1906] 2 Ch. 631; and note (*h*), p. 572, *ante*). Compare *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 612.

(*m*) *Williams* v. *Heales* (1874), L. R. 9 C. P. 177; and as to possession being *primâ facie* evidence of an assignment, see *Doe* d. *Hemmings* v. *Durnford* (1832), 2 Cr. & J. 667.

(*n*) *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815, C. A.; overruling *Close* v. *Wilberforce* (1838), 1 Beav. 112; compare *Friary Holroyd and Healey's Breweries, Ltd.* v. *Singleton*, [1899] 1 Ch. 86, 90.

(*o*) *Moores* v. *Choat* (1839), 8 Sim. 508; *Moore* v. *Greg* (1848), 2 Ph. 717; *Robinson* v. *Rosher* (1841), 1 Y. & C. Ch. Cas. 7; *Lucas* v. *Comerford* (1790), 1 Ves. 235, *contra*, is overruled.

(*p*) Similarly the devisee of the equity of redemption is not liable (*Carlisle Corporation* v. *Blamire* (1807), 8 East, 487); and as to the necessity for a legal assignment, notwithstanding the Judicature Acts, see title EQUITY, Vol. XIII., p. 64.

(*q*) See title LIMITATION OF ACTIONS.

(*r*) *Tichborne* v. *Weir* (1892), 67 L. T. 735, C. A.

(*s*) *Gretton* v. *Diggles* (1813), 4 Taunt. 766; and whether the trustee is lessee or assignee he alone is liable to the lessor, and the lessor cannot sue the *cestui que trust* (*Walters* v. *Northern Coal Mining Co.* (1855), 5 De G. M. & G. 629, 641; see *Arkwright* v. *Colt* (1842), 2 Y. & C. Ch. Cas. 4; compare *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408; see title TRUSTS AND TRUSTEES.

(*t*) *Stone* v. *Evans* (1796), Peake, Add. Cas. 94; *Haig* v. *Homan* (1830), 4 Bli. (N. S.) 380, H. L.; *Anon.* (1701), Freem. (CH.) 253; see title MORTGAGE.

(*a*) *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238.

(*b*) *Nokes* v. *Fish* (1857), 3 Drew. 735.

(*c*) *Ringer* v. *Cann* (1838), 3 M. & W. 343; *White* v. *Hunt* (1870), L. R. 6 Exch. 32.

(*d*) If power is reserved to exclude leaseholds, the trustee is liable until they are actually excluded (*Debenham* v. *Digby* (1873), 28 L. T. 170).

(*e*) *Harrison* v. *Blackburn* (1864), 17 C. B. (N. S.) 678; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 469, 470.

SECT. 4. Liabilities of Lessee and Assignee.

lessee and his assigns—such as an option to purchase—and the benefit of such of the lessor's covenants as run with the land, pass only to the legal assignees of the whole term (*f*).

Assignee of part of premises.

1128. The assignee of part only of the demised premises is liable, like any other occupier, to distress for the rent of the whole of the premises (*g*); but he is not liable to be sued as assignee for the entire rent (*g*), though probably he is liable to be sued for an apportioned part (*h*); he is also liable to an action on every covenant running with the land and affecting the part of the premises assigned to him (*i*).

Liability to observe negative covenants.

1129. Whether a covenant runs with the land at law or not, and whether there has been a legal assignment of the term or not, every person who takes the premises with notice, actual or constructive, of covenants or stipulations affecting the property is bound in equity to observe them so far as they are of a negative nature (*k*), and he will be restrained by injunction from a breach of them. Thus a legal assignee may be bound in equity to observe a negative covenant which is merely collateral, and so does not run with the land at law (*l*); and an underlessee (*m*) or other occupier (*n*) is bound to observe negative covenants, whether running with the land or not. A covenant partly positive and partly negative, if

(*f*) *Friary Holroyd and Healey's Breweries, Ltd.* v. *Singleton*, [1899] 1 Ch. 86; reversed on the ground of waiver, [1899] 2 Ch. 261, C. A. Hence they do not pass to underlessees (*South of England Dairies, Ltd* v. *Baker*, [1906] 2 Ch. 631).

(*g*) *Curtis* v. *Spitty* (1835), 1 Bing. (N. C.) 756, 760; *Orme* v. *Wills* (1878), 2 L. R. Ir. 124.

(*h*) See *Swansea Corporation* v. *Thomas* (1882), 10 Q. B. D. 48; *Baynton* v. *Morgan* (1888), 22 Q. B. D. 74, C. A.; compare *Congham* v. *King* (1631), Cro. Car. 221; *Stevenson* v. *Lambard* (1802), 2 East, 575, 580. Apparently an assignee of an undivided moiety of the land is liable to be sued for half the rent (*Gamon* v. *Vernon* (1678), 2 Lev. 231); compare *Salts* v. *Battersby*, [1910] 2 K. B. 155.

(*i*) *Wollaston* v. *Hakewill* (1841), 3 Man. & G. 297, 322. The assignee of an undivided share, if sued on the covenants solely, should show who are the other persons interested and require them to be joined (*Merceron* v. *Dowson* (1826), 5 B. & C. 479); but the assignee of one of joint lessees who have entered into joint and several covenants is subject to the entire liability (*Norval* v. *Pascoe* (1864), 34 L. J. (CH.) 82); and see p. 343, *ante*.

(*k*) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; *De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 282; *Haywood* v. *Brunswick Building Society* (1881), 8 Q. B. D. 403, C. A.; *Abbey* v. *Gutteres* (1911), 55 Sol. Jo. 364. As to the nature of restrictive covenants, see title EQUITY, Vol. XIII., p. 100. Where there is no continuing breach, a covenantor who has been no party to the breach is not bound to make the breach good (*Powell* v. *Hemsley*, [1909] 2 Ch. 252, C. A.). As to the remedy by injunction, see title INJUNCTION, Vol. XVII., p. 241.

(*l*) *Luker* v. *Dennis* (1877), 7 Ch. D. 227; *Clegg* v. *Hands* (1890), 44 Ch. D. 503, C. A.; compare *Wilkes* v. *Spooner*, [1911] 2 K. B. 473, C. A.; *Keppell* v. *Bailey* (1834), 2 My. & K. 517, so far as it is to the contrary, is overruled.

(*m*) *Parker* v. *Whyte* (1863), 1 Hem. & M. 167; *Clement* v. *Welles* (1865), L. R. 1 Eq. 200; *Wilson* v. *Hart* (1866), 1 Ch. App. 463; *Feilden* v. *Slater* (1869), L. R. 7 Eq. 523; *Maunsell* v. *Hort* (1877), 1 L. R. Ir. 88, C. A.; *Teape* v. *Douse* (1905), 92 L. T. 319; see *Holloway Brothers v. Hill*, [1902] 2 Ch. 612. As to constructive notice to an underlessee, see *Herbert* v. *Maclean* (1860), 12 I. Ch. R. 84; *Abbey* v. *Gutteres*, *supra*. But the underlessee is not liable after he has parted with possession of the premises, if he is no party to the unlawful use of them (*Hall* v. *Ewin* (1887), 37 Ch. D. 74, C. A.).

(*n*) *Mander* v. *Falcke*, [1891] 2 Ch. 554, C. A.; as to an adverse possessor, see *Re Nisbett and Potts' Contract*, [1906] 1 Ch. 386, C. A.

severable, will be enforced so far as it is negative (*o*); and it is sufficient if it is substantially negative (*p*). An underlessee is affected with constructive notice of the covenants contained in the head lease, since it is his duty to inquire into his lessor's title (*q*).

Liability as between adjoining lessees.

1130. Where neighbouring premises have been let to different lessees subject to restrictive covenants, the question frequently arises whether the different lessees are entitled to the benefit of the covenants as against each other. A lessee who has taken, or has contracted to take, an assignment of the benefit of a covenant entered into by a previous lessee thereby obtains a title to enforce it, and where the various lessees enter into a mutual deed of covenant, each is entitled to enforce it against the others (*r*). Apart from such express title to the benefit of the covenant, an implied title arises whenever an estate has been laid out upon a common building scheme and the leases have been taken under this scheme. In such a case each of the lessees can enforce the observance of negative covenants by the other lessees (*s*). But where a lessee has not purchased the benefit of the covenants entered into by neighbouring lessees, and there is no common building scheme, he cannot enforce the covenants (*t*), nor is the lessor a trustee for him so as to be bound to allow the lessee to enforce them in his name (*u*). The lessor himself, however, is entitled to enforce them (*v*), and if on his part he has covenanted with lessees that the restrictions shall be observed, he can, by reason of his continuing liability, enforce the covenants, notwithstanding that he has conveyed away the whole of the property (*w*).

(*o*) *Clegg* v. *Hands* (1890), 44 Ch. D. 503, C. A.

(*p*) *Catt* v. *Tourle* (1869), 4 Ch. App. 654.

(*q*) *Parker* v. *Whyte* (1863), 1 Hem. & M. 167; *Feilden* v. *Slater* (1869), L. R. 7 Eq. 523; see *Thornewell* v. *Johnson* (1881), 50 L. J. (CH.) 641); *Abbey* v. *Gutteres* (1911), 55 Sol. Jo. 364; and see p. 409, *ante*. But the omission to inquire does not affect the underlessee with notice, if in fact the inquiry would not have disclosed the covenant in question (*Carter* v. *Williams* (1870), L. R. 9 Eq. 678). A head lessor who accepts a surrender of the head lease will be bound by covenants entered into by the sub-lessor with the sub-lessee, of which the head lessor has actual or constructive notice (*Phipos* v. *Callegari* (1910), 54 Sol. Jo. 635).

(*r*) See *Renals* v. *Cowlishaw* (1878), 9 Ch. D. 125, 129; affirmed (1879), 11 Ch. D. 866, C. A.; compare *Browne* v. *Flower*, [1911] 1 Ch. 219.

(*s*) *Renals* v. *Cowlishaw*, *supra*; *Spicer* v. *Martin* (1888), 14 App. Cas. 12. And each lessee can enforce the scheme against the lessor; thus, where a building has been let out in flats under regulations requiring the flats to be used for private residential purposes, a tenant can obtain an injunction preventing the landlord from converting part of the building into a club (*Hudson* v. *Cripps*, [1896] 1 Ch. 265). As to what constitutes a building scheme, and as to enforcement of restrictive covenants generally, see titles EQUITY, Vol. XIII., p. 101, note (*b*); SALE OF LAND. The letting of a row of shops for different businesses appears not to constitute such a scheme (*Ashby* v. *Wilson*, [1900] 1 Ch. 66).

(*t*) *Ashby* v. *Wilson*, *supra*; compare *Browne* v. *Flower*, *supra*; but see *Fitz* v. *Iles*, [1893] 1 Ch. 77, C. A.; and compare *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 612.

(*u*) *Kemp* v. *Bird* (1877), 5 Ch. D. 974, C. A.; *Ashby* v. *Wilson*, *supra*.

(*v*) And if the lessor has not assigned the benefit of the covenants expressly or impliedly to other lessees, he can release them (*Zetland* (*Earl*) v. *Hislop* (1882), 7 App. Cas. 427).

(*w*) *Spencer* v. *Bailey* (1893), 69 L. T. 179.

SECT. 4. **Liabilities of Lessee and Assignee.**

Liability of lessee after assignment.

1131. The liability of the lessee to the lessor continues notwithstanding that the lease has been assigned, and that the lessor has a remedy against the assignee for the rent and on the covenants running with the land. The remedy as against the lessee is founded on privity of contract; and as against the assignee on privity of estate But after the assignment the liability against the assignee is treated as the primary liability; the assignee is the principal obligee under the covenants, and the lessee is in the position of a surety (*x*). The lessor may sue either the lessor or the assignee, or both at the same time; but he can only have one satisfaction (*y*).

Liability of assignee after re-assignment.

1132. Since the liability of the assignee depends on privity of estate, it ceases so soon as he re-assigns the land except as regards rent accrued due and breaches of covenant incurred at the time of the assignment (*z*); and the assignee is entitled to avail himself of this principle in order to escape liability, even though the new assignee is a person of no substance (*a*). No notice to or consent of the lessor is required (*b*), and the assignee's liability is terminated by the assignment although the new assignee does not take possession (*c*). A re-assignment of this nature may be made by a trustee in bankruptcy (*d*). But the assignment must be a real assignment (*e*); it is ineffectual to terminate the liability of the assignee, if the new assignee is merely his agent (*f*).

SUB-SECT. 2.—*Liability of Lessee and Assignee inter se.*

Assignee's liability to indemnify lessee.

1133. The assignee, by taking the estate subject to the payment of rent and the performance of the covenants in the original lease, thereby makes it his duty to pay the rent and perform the covenants; and from this duty the law implies a promise on his part to perform it (*g*); so that, while both lessee and assignee are liable to the lessor, yet, as between themselves, the assignee is primarily liable and the lessee is liable only as surety; and after paying the debt, or discharging the obligation to which he is liable, he has

(*x*) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, 660, Ex. Ch.; *Humble* v. *Langston* (1841), 7 M. & W. 517, 530.

(*y*) *Brett* v. *Cumberland* (1619), Cro. Jac. 521; *Bachelour* v. *Gage* (1630), Cro. Car. 188.

(*z*) *Paul* v. *Nurse* (1828), 8 B. & C. 486; see *Pitcher* v. *Tovey* (1692), 1 Salk. 81; *Richmond* v. *London* (*City*) (1703), 1 Bro. Parl. Cas. 516; *Chancellor* v. *Poole* (1781), 2 Doug. (K. B.) 764; *Odell* v. *Wake* (1813), 3 Camp. 394.

(*a*) *Valliant* v. *Dodemede* (1742), 2 Atk. 546; *Barnfather* v. *Jordan* (1780), 2 Doug. (K. B.) 452; *Taylor* v. *Shum* (1797), 1 Bos. & P. 21, 23; see *Odell* v. *Wake*, *supra*.

(*b*) *Valliant* v. *Dodemede*, *supra*; *Lekeux* v. *Nash* (1745), 2 Stra. 1221; *Onslow* v. *Corrie* (1817), 2 Madd. 330; see *Paul* v. *Nurse*, *supra*.

(*c*) *Walker* v. *Reeve* (1781), 3 Doug. (K. B.) 19; see *Valliant* v. *Dodemede*, *supra*

(*d*) *Hopkinson* v. *Lovering* (1883), 11 Q. B. D. 92.

(*e*) *Fagg* v. *Dobie* (1838), 3 Y. & C. (EX.) 96.

(*f*) *Philpot* v. *Hoare* (1741), 2 Atk. 219.

(*g*) *Burnett* v. *Lynch* (1826), 5 B. & C. 589, 602; *Wolveridge* v. *Steward*, *supra*, 659; *Moule* v. *Garrett* (1870), L. R. 5 Exch. 132, 137; or, without any implied promise, the assignee is liable in tort for breach of the duty (*Burnett* v. *Lynch*, *supra*, at pp. 604, 607).

SECT. 4. Liabilities of Lessee and Assignee.

his remedy over against the assignee (*h*). But the liability of the assignee continues only so long as the term remains vested in him (*i*). Upon a re-assignment, the liability devolves upon the new assignee, and the same relation is then constituted between the lessee and the new assignee, the new assignee being primarily liable, and the lessee still being liable only as surety, with a remedy over against the new assignee; and this holds as between the lessee and each subsequent assignee of the term, notwithstanding that the subsequent assignee has entered into an express covenant to indemnify his immediate assignor (*k*). Each assignee is liable for rent accrued and breaches of covenant committed in his own time, although the action is not commenced until after he has re-assigned (*l*).

Extent of lessee's right of indemnity.

1134. The right of indemnity of a lessee against an assignee depends on the assignee taking the entire estate of the lessee. It does not extend to an underlessee of the assignee, even though such underlease is by way of mortgage, and the mortgagee obtains the benefit of the lessee's payment of rent (*m*); nor to a judgment creditor who takes the term in execution as a means to a sale of it (*n*). But where the lessee has executed a declaration of trust he is entitled to be indemnified by the equitable assignee against the liabilities of the lease in the same manner as an ordinary trustee (*o*); and, generally, when there is an agreement to assign, under which the equitable assignee enters and enjoys the premises, he is, it seems, liable to indemnify the lessee, if he is the immediate assignor, in respect of the period of his enjoyment, though not subsequently (*p*).

Express covenant of indemnity.

1135. It is usual for the lessee on assigning the term to take from the assignee an express covenant for payment of rent and performance of the covenants of the lease, and for indemnity, and the assignee takes a similar covenant on re-assignment; and the

(*h*) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, 659, Ex. Ch.; *Humble* v. *Langston* (1841), 7 M. & W. 517, 530. But the lessee has no lien on the premises for payments which he makes (*O'Loughlin* v. *Dwyer* (1884), 13 L. R. Ir. 75); and if he brings an action before he has made any payments he can only recover nominal damages notwithstanding that an action by the lessor is pending (*Beattie* v. *Quirey* (1876), 10 I. R. C. L. 516), though he can claim indemnity against the assignee in the lessor's action (R. S. C., Ord. 16, r. 48).

(*i*) *Burnett* v. *Lynch* (1826), 5 B. & C. 589, 605; *Wolveridge* v. *Steward*, *supra*.

(*k*) *Moule* v. *Garrett* (1870), L. R. 5 Exch. 132; affirmed (1872), L. R. 7 Exch. 101, Ex. Ch.; see *Wolveridge* v. *Steward*, *supra*, at p. 660. As to the covenant of indemnity, see the text, *infra*.

(*l*) *Harley* v. *King* (1835), 2 Cr. M. & R. 18; see *Burnett* v. *Lynch*, *supra*. If the premises are dilapidated after the assignee has re-assigned, substantial damages can be recovered on the implied covenant of indemnity, unless the assignee shows that the dilapidations did not take place in his time (*Smith* v. *Peat* (1853), 9 Exch. 161); and see the text, *infra*.

(*m*) *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q. B. 161, C. A.

(*n*) *Johns* v. *Pink*, [1900] 1 Ch. 296.

(*o*) *Close* v. *Wilberforce* (1838), 1 Beav. 112; *Willson* v. *Leonard* (1840), 3 Beav. 373; see *Nokes* v. *Fish* (1857), 3 Drew. 735, and title TRUSTS AND TRUSTEES.

(*p*) *Crouch* v. *Tregonning* (1872), L. R. 7 Exch. 88, 93.

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lessee, and an assignee who, by reason of his having entered into such a covenant, remains under a continuing liability, are entitled to have this covenant inserted in the assignment (*q*). Such a covenant is binding on the assignee for the residue of the term, and he cannot put an end to his liability by re-assignment (*r*). But the covenant is construed as a covenant of indemnity only (*s*), and the assignor is not entitled to insist on the observance of the covenants in the lease except so far as is necessary for his indemnity (*t*). Usually the covenant is expressly qualified by the introduction of the word "henceforth" or otherwise, so as to bind the assignee to indemnify the assignor against future breaches only (*a*). In the absence of such qualification the covenant may entitle the assignor to indemnity against past breaches, at any rate as regards dilapidations, since these may have been taken into account in fixing the price (*b*).

Enforcement.

The chain of liability constituted by successive covenants of indemnity given on successive assignments may be broken by the bankruptcy of an intermediate assignee; but the lessee can take from the trustee in bankruptcy an assignment of the bankrupt's right of indemnity against a subsequent assignee, and can then recover in full from the latter (*c*).

Costs recoverable under express covenant.

1136. If, after an assignment, the lessor sues the lessee for breach of covenant, it may be reasonable for the lessee to defend the action, whether for the purpose of having the damages ascertained or otherwise; and in an action on the covenant of indemnity the lessee can recover as damages from the assignee the costs properly so incurred, notwithstanding that the defence was unsuccessful (*d*). But when the extent of the liability to the lessor has been ascertained, the assignee has no reason for defending the lessee's claim, and if he does so he cannot recover the costs against a subsequent assignee (*e*).

(*q*) *Staines* v. *Morris* (1812), 1 Ves. & B. 8. For form of such a covenant, see Encyclopædia of Forms and Precedents, Vol. XII., p. 832.

(*r*) See *Harris* v. *Goodwyn* (1841), 9 Dowl. 409; and compare *Crossfield* v. *Morrison* (1849), 7 C. B. 286.

(*s*) *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173, 177, C. A., and as to indemnities, see generally title GUARANTEE, Vol. XV., pp. 445 *et seq.*

(*t*) *Harris* v. *Boots Cash Chemists (Southern), Ltd.*, [1904] 2 Ch. 376.

(*a*) *Hawkins* v. *Sherman* (1828), 3 C. & P. 459.

(*b*) *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148, C. A.; see *Re Russell, Russell* v. *Shoolbred* (1885), 29 Ch. D. 254, C. A.

(*c*) *Re Perkins, Poyser* v. *Beyfus*, [1898] 2 Ch. 182, C. A. And apparently the lessee can obtain the benefit of a subsequent assignee's covenant of indemnity without taking an assignment; see *Re Richardson, Ex parte St. Thomas's Hospital*, [1911] 2 K. B. 705, C. A. As to proof in bankruptcy under the claim to indemnity, see *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; in winding up, *Craig's Claim*, [1895] 1 Ch. 267, C. A.; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 209 *et seq.*; COMPANIES, Vol. V., p. 514.

(*d*) *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; *Murrell* v. *Fysh* (1883), Cab. & El. 80. See *Cousins* v. *Phillips* (1865), 3 H. & C. 892. As to the scale of costs to be awarded, see titles DAMAGES, Vol. X., p. 328; GUARANTEE, Vol. XV., pp. 485, 524.

(*e*) *Smith* v. *Howell* (1851), 6 Exch. 730.

SECT. 5.—*Rights and Liabilities of Successors to Reversion.*

SECT. 5. Rights and Liabilities of Successors to Reversion.

Devise of reversion.

1137. At common law a devise of the reversion upon a lease was effectual to place the devisee in the position of landlord to the lessee and to entitle him to the rent reserved by the lease without any attornment by the tenant; but a grant of the reversion was not complete without attornment (*f*). Under statute (*g*), the grant is effectual without attornment (*h*), but the tenant is not prejudiced by payment of rent to the grantor before notice of the grant given to him by the grantee (*i*). This statute applies to all tenancies, though by instrument not under seal (*k*), but it gives no right of action for rent against a yearly tenant by parol who has parted with all his estate in the premises before the assignment of the reversion (*l*).

Persons who can enforce covenants.

1138. When the lease is by deed, such of the lessee's covenants as touch or concern the land, and the condition for re-entry and other conditions, are capable of running with the reversion—that is, the grantee of the reversion is entitled to enforce the covenants, and to take advantage of the conditions (*m*). But for this result to follow, it was formerly necessary that the covenants should have been entered into with the legal owner, and that his legal estate should have passed *inter vivos*, or on death, to the new owner (*n*).

(*f*) Shep. Touch., ed. Preston, 256, 257; Littleton's Tenures, s. 586; *Doe* d. *Wright* v. *Smith* (1838), 8 Ad. & El. 255, 260; see *Vigers* v. *St. Paul's (Dean and Chapter)* (1849), 14 Q. B. 909, 928, Ex. Ch. The assignment of the reversion, including a reversion on a yearly tenancy (*Brawley* v. *Wade* (1824), M'Cle. 664), must be by deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361; parol evidence of a contemporary arrangement varying the rights under the deed is not admissible (*Flinn* v. *Calow* (1840), 1 Man. & G. 589).

(*g*) Stat. (1705) 4 & 5 Ann. c. 3, s. 9.

(*h*) *Lumley* v. *Hodgson* (1812), 16 East, 99; *Rennie* v. *Robinson* (1818), 1 Bing. 147. Where a remainderman upon a life estate grants a term of years to commence immediately, the effect of the statute is to enable the grantee, without attornment, to take an immediate estate carved out of the remainder (*Doe* d. *Agar* v. *Brown* (1853), 2 E. & B. 331, 348). See *Edwards* v. *Wickwar* (1866), L. R. 1 Eq. 403, which was decided in accordance with the 4th resolution in *Rawlyns's Case* (1587), 4 Co. Rep. 52 a, in forgetfulness, apparently, of the statute; see *Edwards* v. *Wickwar* (No. 2) (1866), 35 L. J. (CH.) 309, n.

(*i*) Stat. (1705) 4 & 5 Ann. c. 16, s. 10. Notice of the grant is not necessary before ejectment for breach of covenant other than a covenant for payment of rent (*Scaltock* v. *Harston* (1875), 1 C. P. D. 106), though now a notice under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, is usually required; see p. 540, *ante*. As to the vesting of the reversion and the rent in different persons, see note (*e*), p. 466, *ante*; and compare *Taylor* v. *Martindale* (1842), 1 Y. & C. Ch. Cas. 658; *Vigers* v. *St. Paul's* (*Dean and Chapter*), *supra*, at p. 917.

(*k*) *Brydges* v. *Lewis* (1842), 3 Q. B. 603.

(*l*) *Allcock* v. *Moorhouse* (1882), 9 Q. B. D. 366, C. A.

(*m*) Stat. (1540) 32 Hen. 8, c. 34, s. 1; see p. 584, *ante*. After a purchase the tenant holds of the purchaser on the same terms as previously he held of the vendor until the tenancy is regularly determined (*Greenwood* v. *Bairstow* (1836), 5 L. J. (CH.) 179; and see title EQUITY, Vol. XIII., p. 87, note (*k*). As to the mode of pleading the assignee's title, see *Davis* v. *James* (1884), 26 Ch. D. 778; *Derbyshire* v. *Leigh*, [1896] 1 Q. B. 544; and compare *Harris* v. *Beavan* (1848), 4 Bing. 646.

(*n*) *Derby* (*Earl*) v. *Taylor* (1801), 1 East, 502; see *Chandos* (*Dowager Duchess*) v. *Brownlow* (1791), 2 Ridg. Parl. Rep. 345, 413. Thus in a lease by a mortgagor and mortgagee the benefit of a covenant by the lessee with the mortgagor did not pass to an assignee of the mortgagee (*Webb* v. *Russell* (1789),

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This necessity for tracing the devolution of the legal estate is avoided, as to leases made after the 31st December, 1881, by the provision (*o*), that the lessee's covenants and the conditions shall be capable of being enforced by the person for the time being entitled, subject to the term, to the income of the land leased. Thus, the person entitled to the income of the land—for example, a mortgagor in possession—may sue on the covenants in the lease, notwithstanding that he has not the legal estate and did not grant the lease (*p*).

Severance of reversion.

1139. The reversion may be divided either as regards the estate or the land. It is divided as regards the estate when it is granted for life or years with remainder over, and the owner of such limited interest in the reversion can by the statute already referred to (*q*) enforce the lessee's covenants and take advantage of the conditions. It is divided as regards the land when the reversion in part of the land becomes vested in one person and the reversion in another part in another person. This is known as a severance of the reversion. Under the same statute, the lessee's covenants could be severed also (*r*), but a condition could be apportioned only when the severance of the reversion took place by act of law (*s*). It is,

3 Term Rep. 393; *Russell* v. *Stokes* (1791), 1 Hy. Bl. 562 Ex. Ch.). Upon a lease by a tenant for life under a power, the remainderman was treated as an assign on the ground that the lease was in effect granted by the settlor (*Whitlock's Case* (1609), 8 Co. Rep. 69 b, 71 a; *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382; *Greenaway* v. *Hart* (1854), 14 C. B. 340). A surrenderee of copyholds is within the statute so as to be entitled to sue on a lease made by the surrenderor (*Whitton* v. *Peacock* (1834), 3 My. & K. 325, 338). As to leases made by several lessors of whom one was legal owner, see *Wakefield* v. *Brown* (1846), 9 Q. B. 209; *Magnay* v. *Edwards* (1853), 13 C. B. 479; and as to the right of the grantee of the reversion to sue for rent reserved on a lease of a wayleave, see *Hastings* (*Lord*) v. *North Eastern Railway*, [1898] 2 Ch. 674; affirmed, [1899] 1 Ch. 656, C. A.; compare *Portmore* (*Earl*) v. *Bunn* (1823), 1 B. & C. 694.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, which speaks of "covenants having reference to the subject-matter" of the lease. These words are equivalent to "which touch or concern the land," so that covenants merely collateral (see p. 584, *ante*) are excluded. This provision does not alter the law as to the class of covenants which will run with the reversion (*Davis* v. *Town Properties Investment Corporation, Ltd.*, [1903] 1 Ch. 797, C. A.).

(*p*) *Turner* v. *Walsh*, [1909] 2 K. B. 484, C. A. Similarly the mortgagee, on going into possession, can enforce the covenants in a lease made by the mortgagor under his statutory power (*Municipal Permanent Investment Building Society* v. *Smith* (1888), 22 Q. B. D. 70, C. A.), and he is also entitled to arrears of rent (see *Re Ind Coope & Co., Ltd., Fisher* v. *The Co., Knox* v. *The Co., Arnold* v. *The Co.*, [1911] 2 Ch. 223). The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5), did not enable the mortgagor to sue on the covenants (*Turner* v. *Walsh*, *supra*); see title MORTGAGE. Where a trustee sues on the covenants in the lease, the lessee can now, it seems, plead payment to the *cestui que trust* (see *Bankes* v. *Jarvis*, [1903] 1 K. B. 549); formerly it was otherwise (*Britten* v. *Perrott* (1834), 2 Cr. & M. 597).

(*q*) Under stat. (1540) 32 Hen. 8, c. 34; Co. Litt. 215 a, resolution 4; *Wright* v. *Burroughes* (1846), 3 C. B. 685; and see p. 595, *ante*).

(*r*) *Twynam* v. *Pickard* (1818), 2 B. & Ald. 105; *Badeley* v. *Vigurs* (1854), 4 E. & B. 71; *Swansea Corporation* v. *Thomas* (1882), 10 Q. B. D. 48; see *Attoe* v. *Hemmings* (1614), 2 Bulst. 281.

(*s*) Co. Litt. 215 a, resolutions 5, 7; *Knight's Case* (1588), 5 Co. Rep. 54 b; *Dumpor's Case* (1603), 4 Co. Rep. 119; *Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134; *contra*, where the reversion in part is assigned to the lessee

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however, now provided generally, as to leases made after the 31st December, 1881, that the lessee's covenants which run with the land, and conditions, shall go with the reversionary estate in the land or any part of it notwithstanding severance (*t*); and although the term has ceased as to part of the land the conditions remain in force with respect to the remainder (*a*).

Extent of right of grantees of reversion.

1140. The grantee of the reversion is not entitled to sue for rent due (*b*), or for a breach of covenant committed (*c*), before the assignment.

Extent of grantee's liability.

1141. The obligation of the lessor's covenants, as has already been stated (*d*), attaches to grantees of the reversion; and it is now provided generally that the obligation of the lessor's covenants which have reference to the subject-matter of the lease (*e*) shall, so far as the lessor has power to bind the reversion, be annexed to the reversion or the several parts thereof, notwithstanding severance of the reversion, and may be taken advantage of by the person in whom the term is for the time being vested; and so far as the lessor has power to bind the reversioner for the time being, the obligation may be enforced against such reversioner (*f*).

Liability of lessor after assignment of reversion.

1142. The lessor remains liable on the covenants in the lease, notwithstanding that he has assigned the reversion (*g*); unless, on the special terms of the covenant, the liability is to be only enforceable against the owner for the time being (*h*).

of that part (*Hyde* v. *Warden* (1877), 3 Ex. D. 72, 86, C. A.); see *Doe* d. *de Rutzen* (*Baron and Baroness*) v. *Lewis* (1836), 5 Ad. & El. 277 (as to coparceners).

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10.

(*a*) *Ibid.*, s. 12. The more general provision of *ibid.*, s. 12, as to apportionment of conditions appears to make the provision for severance of conditions in s. 10 (*ibid.*), needless. S. 12 (*ibid.*) supersedes the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 3.

(*b*) *Flight* v. *Bentley* (1835), 7 Sim. 149. But where the assignee is suing for possession under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 139, on the ground that a half-year's rent is in arrear, this may be composed of rent partly due before and partly due after the assignment (*Rickett* v. *Green*, [1910] 1 K. B. 253).

(*c*) *Lewes* v. *Ridge* (1601), Cro. Eliz. 863; *Canham* v. *Rust* (1818), 8 Taunt. 227; *Johnson* v. *St. Peter, Hereford* (*Churchwardens*) (1836), 4 Ad. & El. 520; *Crane* v. *Batten* (1854), 23 L. T. (o. s.) 220; *Morris* v. *Kennedy*, [1896] 2 I. R. 247, C. A.; compare *Green* v. *James* (1840), 6 M. & W. 656. Where the covenant is to repair on notice, the assignee may sue if he gives the notice, although the premises were out of repair at the date of the assignment (*Mascal's Case* (1587), 1 Leon. 62). As to a covenant to keep in repair, see *Bennett* v. *Herring* (1857), 3 C. B. (N. S.) 370; and p. 511, *ante*.

(*d*) See stat. (1540) 32 Hen. 8, c. 34; and p. 587, *ante*.

(*e*) *I.e.*, which are capable of running with the land, see note (*o*), p. 596, *ante*.

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 11. Like s. 10 (*ibid.*), this provision refers only to covenants which concern the land (*Davis* v. *Town Properties Investment Corporation, Ltd.*, [1903] 1 Ch. 797, C. A.); but it makes the covenant binding on the lessor's successors whenever the lessor, though not absolute legal owner, has power to create a legal term which will be valid against his successors.

(*g*) *Stuart* v. *Joy*, [1904] 1 K. B. 362, C. A.; see *Eccles* v. *Mills*, [1898] A. C. 360, P. C.

(*h*) See *Bath* v. *Bowles* (1905), 93 L. T. 1; see note (*d*), p. 459, *ante*.

SECT. 6. **Devolution on Death of Lessee.**

SECT. 6.—*Devolution on Death of Lessee.*

Lease devolves on personal representatives.

1143. The interest of a lessee, whether for a term of years or from year to year, in the demised property vests, upon his death, in his personal representatives (*i*); and this is so notwithstanding that the lessee has bequeathed the property; but upon the executor's express or implied assent to the bequest the term vests in the legatee (*k*).

Liability of executor as assignee.

1144. The personal representative (*l*) takes the leasehold property as assignee (*m*), but he does not become personally liable for rent or on the covenants in the lease unless he has entered (*n*). Further, even though he has entered and has thus made himself *primâ facie* liable as assignee both for rent and on the covenants, yet he is entitled to

(*i*) See titles DESCENT AND DISTRIBUTION, Vol. XI., p. 6; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 230; and as to a yearly tenant, see also *Doe* d. *Hull* v. *Wood* (1845), 14 M. & W. 682. Where leaseholds have been mortgaged by sub-demise, and a trust is declared of the outstanding days, administration may be granted to the mortgagee limited to the outstanding days, on his citing the persons entitled to a grant (*In the Goods of Kingwell* (1899), 81 L. T. 461). As to actions by the representatives of the lessor, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 225.

(*k*) As to the effect of assent, and as to assent by implication, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 265 *et seq.* After an unconditional assent the executor is not entitled to an indemnity out of the testator's estate in respect of the covenants in the lease (*Shadbolt* v. *Woodfall* (1845), 2 Coll. 30); but assent of an executor to a bequest to himself and others as trustees is not implied from the mere fact that debts have been paid and a considerable period of time has elapsed; there must be affirmative evidence (*Hawkins* v. *Williams* (1862), 10 W. R. 692).

(*l*) Including an administrator *ad colligenda bona* (*Whitehead* v. *Palmer*, [1908] 1 K. B. 151).

(*m*) *Tilney* v. *Norris* (1700), 1 Ld. Raym. 553; and an executor *de son tort* can also be treated as assignee (*Paull* v. *Simpson* (1846), 9 Q. B. 365; compare *Williams* v. *Heales* (1874), L. R. 9 C. P. 177). But where the term is vested in the survivor of two joint tenants, the executors of the deceased joint tenant are not liable to assignees of the reversion for want of privity of estate, notwithstanding that there was a tenancy in common in equity (*Goddard* v. *Lewis* (1909), 101 L. T. 528).

(*n*) Originally in charging an assignee it was necessary to allege that he had entered; see *Cook* v. *Harris* (1698), 1 Ld. Raym. 367; and in *Eaton* v. *Jaques* (1780), 2 Doug. (K. B.) 454, it was held that entry was necessary in the case of a mortgage by assignment; compare *Traherne* v. *Sadleir* (1705), 5 Bro. Parl. Cas. 179; but the allegation of entry was only formal (*Cook* v. *Harris*, *supra*), and entry is not necessary to constitute the liability of an assignee, whether the assignment is absolute (*Walker* v. *Reeves* (1781), 2 Doug. (K. B.) 461, n.), or by way of mortgage (*Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238, overruling *Eaton* v. *Jaques*, *supra*). As regards executors, entry was originally required; see *Helier* v. *Casebert* (1664), 1 Lev. 127; *Ipswich Corporation* v. *Martin* (1616), Cro. Jac. 411; *Buckley* v. *Pirk* (1710), 1 Salk. 316; and the requirement has been maintained notwithstanding its abolition in other cases of assignment (*Wollaston* v. *Hakewill* (1841), 3 Man. & G. 297; compare *Nation* v. *Tozer* (1834), 1 Cr. M. & R. 172). Since the executor cannot accept the executorship as to part of the property only (*Billinghurst* v. *Speerman* (1695), 1 Salk. 297; *Rubery* v. *Stevens* (1832), 4 B. & Ad. 241, 244; *Nation* v. *Tozer*, *supra*, at p. 176), its maintenance is a matter of obvious convenience. In effect he disclaims the lease by not entering, and in this sense he is said to "renounce" or "waive" it (*Wilkinson* v. *Cawood* (1797), 3 Anst. 905, 909; *Stephens* v. *Hotham* (1855), 1 K. & J. 571, 575; compare *Howse* v. *Webster* (1607), Yelv. 103). But in pleading the executor should not deny the assignment to himself; he should plead that he took as executor and never entered (*Green* v. *Listowel* (*Earl*) (1840), 2 I. L. R. 384; *Wollaston* v. *Hakewill*, *supra*; *Kearsley* v. *Oxley* (1864), 2 H. & C. 896; and see note to *Goodland* v. *Ewing* (1883), Cab. & El. 43, 44).

limit his liability for rent to the yearly value of the premises (*o*); but he cannot limit his liability in respect of any other covenant (*p*). Where he is sued as assignee, the liability, subject to the limitation just mentioned, must be satisfied *de bonis propriis* (*q*); but he may also be sued as executor (*r*), and then the judgment, whether for rent (*s*) or breach of covenant (*t*), is only *de bonis testatoris*, and the claim can be met by a plea of *plene administravit* (*a*).

Avoidance of executor's liability.

1145. An executor who has become personally liable as assignee can get rid of future liability by assigning the lease (*b*); and where the testator was an assignee, the executor can by assigning avoid any future liability of the testator's estate (*c*). Moreover, if he assigns the leaseholds on sale, he can, by satisfying all liabilities then accrued due and claimed, and setting apart a sufficient fund to answer any future claim in respect of any fixed sum covenanted to be laid out on the property, avoid personal liability for all claims which have not then been made (*d*). This does not affect the liability of the testator's estate, but the lessor is not entitled to have the assets impounded to answer the future rent and covenants (*e*). On the other hand, it is unnecessary for the executor to require an indemnity as to leaseholds on distributing the estate (*f*).

(*o*) *Helier* v. *Casebert* (1664), 1 Lev. 127; *sub nom. Hellier* v. *Casbard*, 1 Sid. 266, *per* WINDHAM, J.; *Rubery* v. *Stevens* (1832), 4 B. & Ad. 241, 245, 247; *Hornidge* v. *Wilson* (1840), 11 Ad. & El. 645; *Re Bowes, Strathmore (Earl)* v. *Vane, Norcliffe's Claim* (1887), 37 Ch. D. 128; and other cases cited in title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 307. As to whether an executor is in as assignee or under a new tenancy on the terms of the lease, see *Drury-Lane Co.* v. *Chapman* (1843), 1 Car. & Kir. 14. The executor may similarly limit his liability if he is sued for use and occupation (*Patten* v. *Reid* (1862), 6 L. T. 281). As to limitation of liability by an heir under a lease for lives, see *De la Poer* v. *Kirwan* (1876), 9 I. R. C. L. 519; and as to the liability of an executor for use and occupation, see *Atkins* v. *Humphrey* (1846), 2 C. B. 654; *Nixon* v. *Quinn* (1868), 2 I. R. C. L. 248; and note (*n*), p. 598, *ante*.

(*p*) *Tilney* v. *Norris* (1700), 1 Ld. Raym. 553; *Rendall* v. *Andreæ* (1892), 61 L. J. (Q. B.) 630; and other cases cited in title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 307.

(*q*) *Tilney* v. *Norris, supra*; *Buckley* v. *Pirk* (1710), 1 Salk. 316; and executors who become yearly tenants by occupying and paying rent impliedly undertake to observe the terms of the original contract (*Buckworth* v. *Simpson* (1835), 1 Cr. M. & R. 834).

(*r*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 306.

(*s*) *Buckley* v. *Pirk, supra*; *Lyddall* v. *Dunlapp* (1742), 1 Wils. 4; see *Hargrave's Case* (1601), 5 Co. Rep. 31 a.

(*t*) *Wilson (Lady)* v. *Wigg* (1808), 10 East, 313.

(*a*) *Lyddall* v. *Dunlapp, supra*; *Wilson (Lady)* v. *Wigg, supra*.

(*b*) *Taylor* v. *Shum* (1797), 1 Bos. & P. 21; *Goodland* v. *Ewing* (1883), Cab. & El. 43. For form of assignment, see Encyclopædia of Forms and Precedents, Vol. V., p. 626.

(*c*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 306. The original lessee may be entitled to indemnity against the testator's estate, and in his action the executor can plead *plene administravit*; he is not bound to keep the assets as an indemnity fund (*Collins* v. *Crouch* (1849), 13 Q. B. 542).

(*d*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 27; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 255.

(*e*) *King* v. *Malcott* (1852), 9 Hare, 692; see *Re King, Mellor* v. *South Australian Land Mortgage and Agency Co.*, [1907] 1 Ch. 72, 75.

(*f*) *Dodson* v. *Sammell* (1861), 1 Drew. & Sm. 575; see *King* v. *Malcott, supra*, at p. 695.

SECT. 7. Devolution on Bankruptcy of Lessee.

Devolution on bankruptcy.

SECT. 7.—*Devolution on Bankruptcy of Lessee.*

1146. Upon the bankruptcy of a lessee who is beneficially interested in the leasehold property (*g*) the term vests in his trustee (*h*), who thereupon, as assignee, becomes personally liable for the rent and under the covenants (*i*); but he can terminate his liability by assigning over (*k*), or avoid the liability altogether by disclaiming (*l*). Leaseholds acquired by the bankrupt after the bankruptcy follow the rule applicable to personal property generally, and do not vest in the trustee until he interferes and claims them. Until then the bankrupt may dispose of them (*m*).

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(*h*) *Ibid.*, s. 54; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 155. This result is not prevented by a covenant against assignment contained in the lease (p. 577, *ante*). Where a trustee holds leasehold property for his *cestui que trust* subject to his own right of indemnity, this gives him a beneficial interest, so that, if the retention of the leaseholds is necessary to give full effect to his rights, the leaseholds will pass to his trustee in bankruptcy (*St. Thomas's Hospital (Governors)* v. *Richardson*, [1910] 1 K. B. 271, C. A.); and see p. 594, *ante*.

(*i*) *Re Solomon, Ex parte Dressler* (1878), 9 Ch. D. 252, C. A.; *Wilson* v. *Wallani* (1880), 5 Ex. D. 155, 163; *Titterton* v. *Cooper* (1882), 9 Q. B. D. 473, C. A.; but he is entitled to be indemnified out of the estate of the bankrupt (*Lowrey* v. *Barker* (1880), 5 Ex. D. 170, 173, C. A.).

(*k*) *Wilkins* v. *Fry* (1816), 1 Mer. 244, 265; the assignment may be made even to a pauper, for the express purpose of getting rid of the liability (see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 194, note (*t*)), notwithstandingthat the lease contains a covenant against assignment which purports to bind assigns in law (*Re Johnson, Ex parte Blackett* (1894), 70 L. T. 381). For form of assignment, see Encyclopædia of Forms and Precedents, Vol. XII, p. 919.

(*l*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 193. For form of disclaimer, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 707 *et seq.*

(*m*) *Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 139. As to disclaimer of after-acquired property, see *ibid.*, p. 192, note (*n*).

LAPSED LEGACY.

See EXECUTORS AND ADMINISTRATORS; WILLS.

LARCENY.

See CRIMINAL LAW AND PROCEDURE.

LATIN INFORMATION.

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See CUSTOM AND USAGES.

LAW OFFICERS.

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LIBEL AND SLANDER.

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Part I.—Introductory.

SECT. 1.—*In General.*

1147. The actions of libel and slander are private legal remedies, the object of which is to repair the plaintiff for the private injury done to his right of reputation by the wrongful publication of defamatory statements concerning him. The defendant therefore in these actions may justify the truth, and thus show that the plaintiff has received no injury. For though there may be sufficient damage accruing from the publication, yet, if the facts published be true, there is no injury, and the law gives no remedy by action (*a*). Actions of libel and slander.

But an indictment (or criminal information) for libel is for a public offence, as tending to a breach of the peace by provoking the person libelled to break it. Criminal proceedings for libel.

(*a*) 3 Bl. Com. 125, 126. The passage, from which the text is taken, speaks of actions of damages for libel and slander as actions on the case. The subject of this title is defamation which reflects upon the plaintiff or prosecutor personally. Other actions on the case for false and malicious statements, attended by special damage, are only dealt with incidentally; see p. 736, *post*; and see, further, titles TORT; TRADE AND TRADE UNIONS.

SECT. 1. In General.

Hence the defendant in a prosecution for libel was never allowed at common law (*b*) to allege the truth by way of justification (*c*).

Distinctions in respect of—(i.) justification; (ii.) publication.

Again, whereas the publication to the person libelled may support a prosecution for libel as tending to a breach of the peace, the publication of a libel or slander will not support an action, unless it is a publication to some person other than the plaintiff. For if the communication be to the plaintiff alone, he suffers no damage (*d*).

SECT. 2.—*Definitions.*

Defamatory statement.

1148. A defamatory statement (*e*) is a statement which, if published of and concerning a person, is calculated to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his trade, business, profession, calling or office (*f*).

Actionable libel.

1149. A libel for which an action will lie is a defamatory statement, as above defined, expressed or conveyed by written or printed words or in some permanent form (*g*), published of and

(*b*) But see the Libel Act, 1843 (known as Lord Campbell's Act) (6 & 7 Vict. c. 96), s. 6 (referred to at p. 743, *post*), which now allows the defendant in criminal proceedings to plead that the libel complained of is true, provided that he further pleads that the publication was for the public benefit, a plea which emphasises the public nature of the wrong. For the difference in object of civil and criminal remedies for libel, see also *R.* v. *Holbrook* (1878), 4 Q. B. D. 42, *per* LUSH, J., at p. 46. An action of libel or slander will not lie in respect of the defamation of a dead person; see *Broom* v. *Ritchie & Co.* (1905), 6 F. (Ct. of Sess.) 942. In *R.* v. *Labouchere* (1884), 12 Q. B. D. 320, Lord COLERIDGE, C.J., at p. 324, said, "It must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead." See also *R.* v. *Topham* (*E.*) (1791), 4 Term Rep. 126; *R.* v. *Mead* (1840), 4 Jur. 1014, *per* PATTESON, J.; 1 Hawk. P. C., ch. 28, s. 3, and the other cases referred to in *R.* v. *Labouchere, supra.* In *R.* v. *Ensor* (1887), 3 T. L. R. 366, STEPHEN, J., at p. 667, expressed the opinion (therein differing from WILLS, J., in his charge to the grand jury) that it is not a criminal libel to traduce the dead merely because such an attack tends to a breach of the peace. "It is possible under the mask of attacking a dead man to attack a living one," but, "to speak broadly, to libel the dead is not an offence known to our law" (*ibid.*). See also the note of STEPHEN, J., as to *R.* v. *Ensor, supra,* in his Digest of the Criminal Law (1904 ed.), p. 227.

(*c*) See 3 Bl. Com. 125, 126.

(*d*) For other distinctions between civil actions and criminal prosecutions for libel, see pp. 737 *et seq.*, *post.* Apart from questions of procedure, the most important distinction not hitherto mentioned is due to the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7, referred to at p. 743, *post.*

(*e*) This and the following definitions are discussed and illustrated hereafter; see pp. 618 *et seq.*, *post.*

(*f*) See pp. 630 *et seq.*, *post.*

(*g*) "Libels are generally in writing or in print; but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel" (*Monson* v. *Tussauds, Ltd., Monson* v. *Louis Tussaud,* [1894] 1 Q. B. 671, C. A., *per* LOPES, L.J., at p. 692). See also Com. Dig., tit. Libel (A), and Bac. Abr., tit. Libel (A), instancing (on the authority of *De Libellis Famosis* (1605), 5 Co. Rep. 125 a, b) the fixing up a

concerning the plaintiff (*h*), to a person other than the plaintiff (*i*) without lawful justification or excuse (*k*).

1150. A defamatory statement actionable *per se* (*l*), that is to say, actionable without proof of special damage, is a defamatory statement which—

Defamatory statements actionable *per se* of a person—

(i.) if published of and concerning a person in the way of his trade, business, profession, calling or office of profit, carried on or held by him at the time of the publication, is calculated to convey an imputation on him disparaging or injurious to him therein; or

(i.) in the way of his trade etc.;

(ii.) if published of and concerning a person in the way of his office, being an office of honour held by him at the date of the publication, imputes to him dishonesty in the discharge thereof or such misconduct therein as would justify his dismissal; or

(ii.) in the way of his office of honour;

(iii.) if published of and concerning a person, imputes that he has committed a crime punishable by imprisonment; or

(iii.) imputing crime;

gallows at a man's door as a libel, and citing *Jefferies* v. *Duncombe* (1809), 11 East, 226 (placing a lighted lamp before a man's door and keeping it burning there all day to indicate that his house is a house of ill fame); *Du Bost* v. *Beresford* (1810), 2 Camp. 511 (libel by picture); and *Levi* v. *Milne* (1827), 4 Bing. 195 (ignominious wood-cut heading and ridiculous doggerel). See also *Austin* v. *Culpeper* (1683), Skin. 123 (pillory drawn); *Spall* v. *Massey* (1819), 2 Stark. 559 (printed inscription exhibited on a board opposite a man's house insinuating that it was a house of ill fame); *Smith* v. *Wood* (1813), 3 Camp. 323 (caricature print); and *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671, C. A. (wax-work exhibits). In the case of a libel by written or printed words an innuendo is not always necessary; otherwise where the libel is by picture or the like, for without an innuendo it cannot be understood to be levelled at the plaintiff (3 Bl. Com. 126). An innuendo is also necessary for the same reason where a slander is by sounds, gestures or the like. As to the innuendo, see, further, pp. 645 *et seq.*, *post*.

(*h*) As to the meaning of these words, see pp. 608, 618, 619, note (*e*), p. 641, and note (*t*), p. 657, *post*.

(*i*) Publication to the prosecutor alone may support a criminal libel; see p. 606, *ante*, and p. 738, *post*. As to publication, see pp. 655 *et seq.*, *post*.

(*k*) As to the meaning of these words, see pp. 669 *et seq.*, *post*. The above definition of an actionable libel, when expanded in accordance with the preceding definition, approximates to the (not exhaustive) definition of Lord BLACKBURN in *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at p. 771, where it was said: "A libel for which an action will lie, is defined to be a written statement, published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs injurious to them in their trade, or holding them up to hatred, contempt or ridicule." The following cases relating to the definitions of actionable libel and slander may be usefully consulted:—*Parmiter* v. *Coupland* (1840), 6 M. & W. 105, *per* PARKE, B., at p. 108 (a publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel); *O'Brien* v. *Clement* (1846), 15 M. & W. 435, *per* PARKE, B., at p 437 (everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel); *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., *per* Lord HERSCHELL, at pp. 800 *et seq.*; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at pp. 527 *et seq.*; *Booth* v. *Arnold*, [1895] 1 Q. B. 571, C. A.; *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L.; *Hulton (E.) & Co.* v. *Jones*, [1910] A. C. 20; affirming, [1909] 2 K. B. 444, C. A. As to what are and are not defamatory statements within the definition in the text, see, further, pp. 618 *et seq.*, *post*.

(*l*) As to special damage, see pp. 609, 730 *et seq.*, *post*. As to statements which are slanderous *per se* within the definition, see pp. 620, 623 *et seq.*, *post*.

SECT. 2. Definitions.

(iv.) imputing venereal disease;

(v.) imputing unchastity to a woman or girl.

(iv.) if published of and concerning a person, imputes that he is at the time of the publication suffering from a venereal disease; or

(v.) if published of and concerning a woman or girl, imputes to her unchastity or adultery.

Actionable slander.

1151. A slander for which an action will lie is a defamatory statement as before defined, expressed or conveyed by spoken words, sounds, gestures, or in some form which is not permanent (*m*), published (*n*) of and concerning the plaintiff (*o*), to a person other than the plaintiff (*p*), without lawful justification or excuse (*q*), whereby the plaintiff has suffered special damage (*r*) (which he must allege and prove) (*s*), or which is a defamatory statement actionable *per se*, as above defined (*t*).

Publication without lawful justification or excuse.

1152. The preceding definitions, it will be noticed, do not state that the defamatory matter must be false and malicious, but state that the defamatory matter must be published without lawful justification or excuse.

Plaintiff must plead that statement is false.

1153. The statement of claim in actions of libel and slander must allege that the words complained of are false (*a*). For unless the statement is untrue the plaintiff has suffered no injury to his right of reputation, and has no cause of action. But the law presumes that the words alleged by the plaintiff to be false are false unless and until the defendant pleads and proves that they are true (*b*).

Plea that publication was malicious.

1154. As to malice, the plaintiff in practice always alleges in his statement of claim, in actions of libel and slander, that the defendant falsely and maliciously wrote, or spoke, and published of and concerning the plaintiff the words complained of. But it is not necessary for the plaintiff to allege that the defendant did so maliciously. A publication calculated to convey an actionable imputation is *primâ facie* a libel, or a slander. The law implies malice if the words are defamatory and untrue, unless indeed the occasion is privileged, in which case malice in fact must be proved.

Implied malice.

When presumption of malice rebutted.

If the occasion is such that there was either a duty or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice (which here means actual, or, as it is technically called, "express" malice) may be proved; or, as it is sometimes put, the defendant is not answerable for it, so long as he is acting in compliance with that duty or exercising that right; and the burden of

(*m*) The reported cases are confined to words. For a Scottish case as to the effect of acts, see *Drysdale* v. *Rosebery* (*Earl*), [1909] S. C. 1121. In libel the form is "permanent." See note (*g*), p. 606, *ante*.

(*n*) See note (*i*), p. 607, *ante*.

(*o*) See note (*h*), p. 607, *ante*.

(*p*) See note (*i*), p. 607, *ante*.

(*q*) See note (*k*), p. 607, *ante*.

(*r*) See p. 730, *post*; and as to damages generally, see pp. 718 *et seq.*, *post*.

(*s*) See pp. 718 *et seq.*, *post*.

(*t*) See p. 607, *ante*.

(*a*) *Bromage* v. *Prosser* (1825), 4 B. & C. 247, *per* BAYLEY, J., at p. 255.

(*b*) As to justification, see pp. 669 *et seq.*, *post*.

proof is on those who allege that he is not so acting (*c*). But apart from the question of express malice, the intention or motive with which the words are used is immaterial in determining the liability of the defendant (*d*), though the animus of the defendant may be material on the question of damages (*e*). If the defendant, without justification or excuse, did what he knew or ought to have known was calculated to injure the plaintiff, he must, at least civilly (*f*), be responsible for the consequences, though his object might have been to injure a person other than the plaintiff, or though he may have written in levity only. No one (it has been said) can cast about firebrands and death and then escape from being responsible by saying he was in sport (*g*).

How far intention or motive of defendant immaterial.

1155. The chief distinctions in practice between libel and slander, or, in other words, between written and spoken defamation, are two in number.

Distinctions between written and spoken defamation.

(i.) Every actionable libel can be dealt with either by civil action or by criminal proceedings, whereas no slander, even though actionable, is a criminal offence (*h*).

(i.) Libel criminal; slander never;

(ii.) No special damage need be alleged or proved in the case

(ii.) As to special damage.

(*c*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 787; compare *Bromage* v. *Prosser* (1825), 4 B. & C. 247, 255, citing *Anon.* (1652), Sty. 392, and *Mercer* v. *Sparks* (1587), Owen, 51; *Abrath* v. *North Eastern Rail. Co.* (1886), 11 App. Cas. 247, *per* Lord BRAMWELL, at pp. 253, 254; *R.* v. *Munslow*, [1895] 1 Q. B. 758, C. C. R., *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 763; *Jones* v. *Hulton* (*E.*) *& Co.*, [1909] 2 K. B. 444, C. A., *per* Lord ALVERSTONE, C.J., at pp. 455 *et seq.*; affirmed [1910] A. C. 20. There is no difference in this respect between actions and prosecutions for libel (*R.* v. *Munslow*, *supra*, at p. 762; compare *Heymann* v. *R.* (1873), L. R. 8 Q. B. 102; *R.* v. *Harvey* (1823), 2 B. & C. 257, *per* HOLROYD, J., at p. 266); see further note (*p*) p. 741, *post*. The word "maliciously" found in statements of claim in actions of libel and slander and indictments for libel means "without lawful excuse." As to privilege, see pp. 677 *et seq.*, 685 *et seq.*, *post*. In the case of absolute privilege, the existence of actual malice is immaterial; see pp. 677, 711 *et seq.*, *post*.

(*d*) *Jones* v. *Hulton* (*E.*) *& Co.*, [1909] 2 K. B. 444, C. A.; affirmed [1910] A. C. 20.

(*e*) *Ibid.*, [1909] 2 K. B. 444, C. A., *per* FARWELL, L.J., at p. 479, note (*a*); and see pp. 642, 643, *post*.

(*f*) *Capital and Counties Bank* v. *Henty*, *supra*, *per* Lord BLACKBURN, at p. 772 (quoted with approval by Lord ALVERSTONE, C.J., in *Jones* v. *Hulton* (*E.*) *& Co.*, [1909] 2 K. B. 444, C. A., at p. 456), from which the statement in the text is taken.

(*g*) *Capital and Counties Bank* v. *Henty*, *supra*, when Lord BLACKBURN was referring to the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill.

(*h*) The statement in the text does not refer to obscene, blasphemous, or seditious spoken words, or contempt of court by spoken words; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 460, 501, 530. At p. 570 (*ibid.*) it is said that "to slander a private person by mere spoken words is not indictable, *unless they tend immediately to a breach of the peace* or are blasphemous or seditious." As to the words in italics, see *Ex parte Chapman* (1836), 4 Ad. & El. 773, and the other cases cited in title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 502, note (*s*). The offence of *scandalum magnatum* was formerly an exception to the rule stated in the text, but that ceased to be a criminal offence when the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59), repealed stats. (1275) 3 Edw. 1, c. 34, (1379) 2 Ric. 2, c. 5, and (1388) 12 Ric. 2, c. 11. Excluding cases of obscene, blasphemous, or seditious words, and contempt of court by spoken words, the statement in the text appears to be substantially correct.

SECT. 2. **Definitions.**

of a libel, whereas, unless the defamatory words complained of are actionable *per se*, no action of slander will lie, if the plaintiff does not both allege and prove that he has suffered actual damage (*i*).

Damage need not be alleged and proved in libel.

1156. It follows from the definitions that a plaintiff in an action of libel need not allege or prove that he has suffered damage. If he has been libelled without lawful justification or excuse, he is entitled to such general damages as the jury can properly find, though he neither alleges nor proves special damage, and in any case to at least nominal damages for the injury to his right of reputation. It is, however, open to the plaintiff in an action of libel to claim special damages; and, if he does so, and proves special damage, he is entitled to recover for his special damage in addition to the general damages; but not otherwise.

Special damage must be alleged and proved.

Position in slander where words actionable *per se*.

1157. The plaintiff in an action of slander, when the words complained of are actionable *per se*, is in the same position, so far as special and general damages are concerned, as the plaintiff in an action of libel.

Position in slander where words not actionable *per se*.

1158. The plaintiff in an action of slander, where the words complained of are not actionable *per se*, is not entitled to any general damages; and he can only recover such damages as he alleges and proves. If he fails to allege and prove that he has suffered such damages, there must be judgment for the defendant, since the existence of some actual damage is an essential part of his cause of action (*j*).

SECT. 3.—*Who may and may not Sue.*

SUB-SECT. 1.—*In General.*

He who is personally defamed is the proper plaintiff.

1159. The proper party to bring an action of libel or slander properly so called is, as a general rule, the person who is personally defamed. A statement, however, which is apparently defamatory

(*i*) See pp. 730 *et seq.*, *post*.

(*j*) As to damages, see, further, pp. 718 *et seq.*, *post*; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at pp. 527 *et seq.*, and *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., in which case Lord HERSCHELL said, at p. 800,: "Now I think that no one can examine the authorities upon the law of slander without seeing that there are a number of distinctions to be found which cannot be supported on any satisfactory principle. Obviously, the idea lying at the root of the distinction between slander and libel was this, that it never would do to permit actions to be brought in respect of every word spoken which might reflect on the character or conduct of another. But, on the other hand, it was considered necessary to put some qualification on this by enabling an action to be brought when the charges are of a certain gravity and likely to be pecuniarily injurious, and in certain cases, injurious in another fashion" [imputing dishonesty or misconduct in an office of honour, held by the plaintiff at the date of the publication, which would justify dismissal; see p. 607, *ante*]. . . . "Of course where special damage can be shown, the action will lie." The authorities were considered and regarded as unsatisfactory by MANSFIELD, C.J., in *Thorley* v. *Kerry* (*Lord*) (1812), 4 Taunt. 355, at p. 364, where he said that the distinctions between libel and slander had been made as far back as Charles II.'s time, and had been recognised by the courts for at least a century before 1812. If he had had to lay down the law for the first time, he would have confined actionable libel within the narrow limits of actionable slander. As to the reasons for the distinction, see notes to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 335 (ed. 1871), and the cases there cited.

SECT. 3. Who may and may not Sue.

only of a man's goods or of some other person, may sometimes reasonably convey to persons to whom it is published a meaning defamatory of the plaintiff personally; and if this is properly alleged by an innuendo and proved, the plaintiff may succeed, even though the defendant never intended to defame the plaintiff or was unaware of his existence (*k*).

Actions on the case.

In some cases a person who is not able to maintain an action of libel or slander properly so called may be able, on proof of special damage, to maintain an action on the case (*l*) for imputation, whether by word of mouth or in writing, or otherwise, falsely and maliciously made on his goods, or on his property, or on some other person.

Who are necessary and proper plaintiffs.

1160. The general rules of law and practice in actions of tort (*m*) are, in certain cases, modified by the status of the persons injured; and questions sometimes arise as to who are necessary and proper plaintiffs to bring actions of libel and slander (*n*).

SUB-SECT. 2.—*Aliens.*

Aliens.

1161. An alien friend may maintain an action of libel (*o*) or slander (*p*), or any personal action (*q*), although he is resident out of the jurisdiction (*r*).

SUB-SECT. 3.—*Bankrupts and their Trustees.*

Bankrupts.

1162. Every action of libel or slander properly so called is founded on a reflection on the plaintiff personally. Such a right of action

(*k*) The above general principles are discussed later; see pp. 618, 628, 643, 647, *post*.

(*l*) As to the meaning of this phrase, and as to the history of actions on the case, see Smith's Action at Law (1868), 10th ed., Appendix, p. 521. As to slander of title and kindred actions on the case, see the passage from Dr. Odgers' work on Libel and Slander approved in *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771, 775. As to slander of title, see notes to *Coryton* v. *Lithebye* (1670), 2 Wms. Saund. (ed. 1871) 361, 383. As to actions on the case, see title ACTION, Vol. I., pp. 39—41, and p. 736, *post*.

(*m*) As to these, see title TORT.

(*n*) This section of this title is intended to state the law where it is necessary to supplement the general law. As to the general law dealing with civil liability and actions by and against particular parties, see titles ACTION, Vol. I., pp. 17 *et seq.*; AGENCY, Vol. I., p. 224; ALIENS, Vol. I., pp. 308 *et seq.*; BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 62, 137; COMPANIES, Vol. V., pp. 293, 311, 318 *et seq.*; CONFLICT OF LAWS, Vol. VI., pp. 248 *et seq.*; CONSTITUTIONAL LAW, Vol. VI., pp. 319, 383, 415; CORPORATIONS, Vol. VIII., p. 386; CROWN PRACTICE, Vol. X., p. 28; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 312; HUSBAND AND WIFE, Vol. XVI., p. 436; INFANTS AND CHILDREN, Vol. XVII., p. 74; LUNATICS AND PERSONS OF UNSOUND MIND; PARTNERSHIP; PRACTICE AND PROCEDURE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS. As to parties, see also R. S. C., Ord. 16, and p. 616, *post*; change of parties, R. S. C., Ord. 17; joinder of causes of action, R. S. C., Ord. 18, and, generally, Yearly Practice of the Supreme Court, 1911, pp. 194 *et seq.* As to lack of jurisdiction of the county courts, see title COUNTY COURTS, Vol. VIII., p. 432.

(*o*) *Pisani* v. *Lawson* (1839), 6 Bing. (N. C.) 90; see also *Thoene* v. *Lockwood & Co., Ltd.* (1911), *Times*, 11th April.

(*p*) *Tiriot* v. *Morris* (1611), 1 Bulst. 134.

(*q*) *Ibid.*; approved in *Pisani* v. *Lawson*, *supra*, at p. 95.

(*r*) *Pisani* v. *Lawson*, *supra*; see also *Thoene* v. *Lockwood & Co., Ltd.*, *supra*, and title ALIENS, Vol. I., p. 308. As to security for costs, see title PRACTICE AND PROCEDURE.

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accruing before or after bankruptcy remains with the bankrupt and does not pass to his trustee in bankruptcy (*s*). But a right to bring an action of slander of title, or an action on the case, for false and malicious words, which are defamatory of the goods of a bankrupt and do not reflect upon him personally, passes to his trustee in bankruptcy, if it arose before bankruptcy; and, if it arises after bankruptcy, but before discharge, his trustee in bankruptcy can intervene (*t*).

Trustees in bankruptcy.

SUB-SECT. 4.—*Companies and Corporations.*

Companies and corporations.

1163. No company or corporation can bring an action of libel or slander for a statement which reflects not upon itself, but on its members or officials only. Again, a statement imputing misconduct to a corporation or company of which it cannot be guilty does not give the corporation or company a cause of action (*u*). Thus, a statement that a municipal corporation has been guilty of corrupt practices gives no cause of action to the corporation as distinguished from its individual members or officials (*a*). But an imputation on the goods sold or manufactured by a trading corporation or company may involve a reflection on the corporation or company in the way of its business (*b*); and if a statement be made as to the mode in which a trading corporation or company carries on its business, such as to lead people of ordinary sense to the opinion that it conducts its business badly and inefficiently, the law is the same

Effect of imputation on goods sold.

(*s*) *Benson* v. *Flower* (1629), W. Jo. 215 (slander); *Re Wilson, Ex parte Vine* (1878), 8 Ch. D. 364, C. A. (slander). See also *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579; and in particular the opinions of ERLE, J., at p. 604, WILLIAMS, J., at p. 597, and CRESSWELL, J., at p. 612 (*ibid.*). "Rights of action for injuries to the person or feelings of a bankrupt do not pass to his trustees" (*ibid.*, at p. 613, citing the *dictum* of LITTLEDALE, J., in *Wright* v. *Fairfield* (1831), 2 B. & Ad. 727, at p. 732, and *Howard* v. *Crowther* (1841), 8 M. & W. 601). As to what rights of action do and do not vest in the trustee, see further title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137—139; and as to after-acquired property, *ibid.*, pp. 139, 164 *et seq.*, and the cases there cited.

(*t*) See the cases cited in title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137 *et seq.*, 164 *et seq.*

(*u*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*(1860), 4 H. & N. 87, *per* POLLOCK, C.B., at p. 90 (approved in *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A., *per* LOPES and KAY, L.JJ., at pp. 142, 147, and *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94, 96), where it was held that actions of libel and slander might be brought by a company registered under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), against one of its shareholders for libel and slander imputing insolvency, dishonesty, and misconduct in the management of its business. It had previously been held in *Williams* v. *Beaumont* (1833), 10 Bing. 260, that a trading association not incorporated, entitled by Act of Parliament to sue or be sued in the name of its chairman, might sue in his name for a libel on the association in the way of its business. As to libels on corporations, see also title CORPORATIONS, Vol. VIII., p. 390. As to libels by or against companies or their agents, see title COMPANIES, Vol. V., pp. 309—312. As to slanders at companies' meetings, see *ibid.*, pp. 310, 311. See also, as to libels on companies and corporations, Starkie, Law of Slander and Libel, p. 266.

(*a*) *Manchester Corporation* v. *Williams*, *supra*.

(*b*) *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L. If there is no imputation on the plaintiff corporation or company itself, the corporation or company cannot bring an action of libel properly so called. As to actions on the case for false and malicious statements attended by special damage, see p. 736, *post*.

as in the case of an individual, and the trading corporation or company can bring an action of libel or slander, without proof of special damage, for the statement reflecting upon it in the way of its trade or business which is calculated to injure it therein (*c*).

SUB-SECT. 5.—*Executors and Administrators.*

Executors and administrators.

1164. An action for defamation, either of a private character, or of a person in relation to his trade, comes to an end on the death of the plaintiff (*d*), but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives (*e*).

SUB-SECT. 6.—*Married Women.*

Married women.

1165. A married woman can now sue alone for libel and slander without the joinder of her husband (*f*). A married woman can bring an action of libel or slander in her own name against all persons other than her husband, but she cannot bring an action of libel or slander against him, unless the proceedings are for the protection and security of her separate property (*g*), nor in any event can she institute criminal proceedings for libel against him (*h*).

(*c*) As to libel, see *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A., *per* Lord ESHER, M.R. The same principle, it would seem, applies to slander on a trading company in the way of its trade.

(*d*) *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771. "It certainly has been established by a series of authorities ending with the case of *Rogers* v. *Spence* (1846), 12 Cl. & Fin. 700, H. L., in this House that no action can be maintained, either by an executor or an assignee to recover damages for bodily or mental sufferings or personal inconvenience sustained by the deceased or by the bankrupt" (opinion of WILLIAMS, J., as delivered to the House of Lords in *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, at p. 597); and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 137; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 224, 225.

(*e*) *Hatchard* v. *Mège*, *supra* (where it was held that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative). As to property in trade marks, see title TRADE MARKS, TRADE NAMES AND DESIGNS. As to slander of title, see also title TORT.

(*f*) See Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2). As to a married woman's liability to be sued, see p. 617, *post*. At common law the action was always the action of the wife, subject to the right on the part of the defendant to insist on having the husband joined (*Weldon* v. *Winslow* (1884), 13 Q. B. D. 784, C. A., *per* BRETT, M.R., at p. 786). As to civil proceedings by and against married women, see also title HUSBAND AND WIFE, Vol. XVI., pp. 453 *et seq.* As to civil proceedings between husband and wife, see *ibid.*, pp. 459 *et seq.* As to criminal proceedings between husband and wife, and as to where they are competent or compellable to give evidence against each other, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 401, 402 405, 634; HUSBAND AND WIFE, Vol. XVI., p. 462, note (*t*).

(*g*) See title HUSBAND AND WIFE, Vol. XVI., pp. 453, 459. It was suggested by BRETT, J., during the argument in *Summers* v. *City Bank* (1874), L. R. 9 C. P. 580, under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 11 (now superseded), that a wife could sue her husband for a libel on her in her trade, as being a civil remedy for the protection and security of her own property. The Divisional Court in *R.* v. *London* (*Lord Mayor*) (1886), 16 Q. B. D. 772, 777, expressed no opinion on the point.

(*h*) *R.* v. *London* (*Lord Mayor*), *supra*; and see title HUSBAND AND WIFE, Vol. XVI., p. 462, note (*t*).

SECT. 3. Who may and may not Sue.

Libel is ranked among criminal offences because of its supposed tendency to arouse angry passions, provoke revenge, and thus endanger the public peace (*i*). A prosecution for libel, which is criminal only, because of this supposed tendency, cannot be for the protection and security of the separate estate (*k*).

Joint claims.

1166. Claims by and against husband and wife may be joined with claims by and against either of them separately (*l*), and the husband may conveniently be joined as co-plaintiff with his wife when he claims damages sustained by himself arising out of the subject-matter of his wife's cause of action. In such a case the damages recovered in respect of the loss sustained by the wife belong to her as her separate property, and only the damages recovered in respect of the consequential loss sustained by the husband belong to him (*m*).

SUB-SECT. 7.—*Partners.*

Partners.

1167. Partners may maintain a joint action for a libel or slander published of them in the way of their trade (*n*), without alleging or proving that they have suffered special damage (*o*). The damages

(*i*) *R.* v. *London* (*Lord Mayor*) (1886), 16 Q. B. D. 772, *per* A. L. SMITH, J., at p. 777, citing *R.* v. *Holbrook* (1878), 4 Q. B. D. 42, *per* LUSH, J., at p. 46.

(*k*) *Ibid.*

(*l*) R. S. C., Ord. 18, r. 4, but this by *ibid.*, r. 7, is subject to *ibid.*, rr. 1, 8, 9, as to convenience; see title HUSBAND AND WIFE, Vol. XVI., p. 454.

(*m*) This is the effect of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2). As to a husband's cause of action where the wife's action for slander fails by reason that she failed to prove special damage, see *Riding* v. *Smith* (1876), 1 Ex. D. 91. A husband and wife, being separate persons for the purpose of bringing actions, may also be joined in actions in the cases provided for by R. S. C., Ord. 16, r. 1; see p. 617, *post*.

(*n*) See *Coryton* v. *Lithebye* (1670), 2 Wms. Saund. (ed. 1871) 361, 382, 383, notes (2) and (t), and *Cook* v. *Batchellor* (1802), 3 Bos. & P. 150 (action for spoken words imputing fraud to the plaintiffs in weighing goods, where special damage was laid); *Forster* v. *Lawson* (1826), 3 Bing. 452 (libel imputing insolvency); *Le Fanu* v. *Malcomson* (1848), 1 H. L. Cas. 637 (libel on factory owners imputing cruelty to their employees, where it was also held that though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions are capable of being by innuendo shown to be directly applicable to any individual of that class, an action may be maintained by that individual. The expression "some of the Irish factories" was there explained to mean the factory of the plaintiffs). In a libel against a co-partnership the jury may take into consideration, in estimating the damages, the prospective injury which may thereby accrue to the partnership (*Gregory* v. *Williams* (1844), 1 Car. & Kir. 568).

(*o*) As to slander, Serjeant Williams, in his comment on *Cook* v. *Batchellor*, *supra*, notes to *Coryton* v. *Lithebye*, *supra*, at p. 383 (see note (*n*), *supra*), expressed the opinion that though special damage was laid in *Cook* v. *Batchellor*, *supra*, yet if words are actionable only because they were spoken of persons in the way of their trade two or more partners may join in an action for the words, though they have sustained no special damage thereby. This was assumed to be the law in *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, 146, C. A. As to libel, see *Le Fanu* v. *Malcomson*, *supra*, and *Russell* v. *Webster* (1874), 23 W. R. 59, cited in *South Hetton Coal Co.* v. *North-Eastern News Association*, *supra*. In *Russell* v. *Webster*, *supra*, it was held that a libel published of the plaintiffs as co-proprietors of a newspaper in the way of their business might be the subject of a joint action without proof of special damage, and that the jury might give general damages, according to their discretion, under all the circumstances of the case. Two

in such an action are not for any injury to the feelings of the plaintiffs, but for the injury to them in their joint trade (*p*). An individual partner may also maintain a separate action of libel or slander (*q*), for a libel or slander published of him in the way of his trade for the separate injury to him, but he cannot recover for the joint injury to the firm in their trade (*r*). Now, however, claims by plaintiffs jointly may, subject to convenience, be joined with claims by them or any of them separately against the same defendant (*s*).

SUB-SECT. 8.—*Persons Claiming Jointly, Severally, or in the Alternative.*

Claims in respect of the same transaction or series of transactions.

1168. All persons may now be joined in one action as plaintiffs in whom any right to relief, in respect of or arising out of the same transaction or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that if, on the application of any defendant, it appears that such joinder may embarrass or delay the trial, the court or a judge may order separate trials or make such other order as may be expedient, and judgment may be given, for such one or more of the plaintiffs as may be found entitled to relief, for such relief without amendment (*t*). The defendant, though unsuccessful, is, in such a

joint tenants or coparceners could always join in an action of slander of their title to the estate. See the note of Serjeant Williams to *Coryton* v. *Lithebye* (1670), 2 Wms. Saund. (ed. 1871) 361, 382, 383, notes (2) and (t).

(*p*) See *Harrison* v. *Bevington* (1838), 8 C. & P. 708, 713, n. (a).

(*q*) *Haythorn* v. *Lawson* (1827), 3 C. & P. 196 (action by partners for libel), on the principle of *Barratt* v. *Collins* (1825), 10 Moore (C. P.), 446 (action by co-plaintiffs for malicious arrest).

(*r*) See *Harrison* v. *Bevington* (1838), 8 C. & P. 708. But where words imputing insolvency in trade are spoken of one partner, he may maintain an action of slander and recover damages for the injury done to him; and it is not necessarily to be considered as an injury to the partnership for which only a joint action can be maintained (*ibid.*); compare *Robinson* v. *Marchant* (1845), 7 Q. B. 918.

(*s*) R. S. C. Ord. 18, r. 6, which by *ibid.*, r. 7, is to be subject to *ibid.*, rr. 1, 8, 9. As to joinder of parties and causes of action, see the text *infra*, note (*n*), p. 611, *ante*, and title PRACTICE AND PROCEDURE.

(*t*) R. S. C., Ord. 16, r. 1, as altered since the decision in *Smurthwaite* v. *Hannay*, [1894] A. C. 494, by R. S. C., October, 1896. It had been held in *Sandes* v. *Wildsmith*, [1893] 1 Q. B. 771, that, where the statement of claim of the plaintiffs, a mother and daughter, alleged in several paragraphs several separate and distinct slanders, some of which were alleged to have been spoken of the mother only and some of the daughter only, the plaintiffs were improperly joined, that they must elect which plaintiff would proceed, and that so much of the statement of claim as related to the other plaintiff must be struck out; and this decision is unaffected by the words which have been added to the rule, because the right of relief did not arise out of the same transactions or series of transactions. See also *Bedford* (*Duke*) v. *Ellis*, [1901] A. C. 1, *per* Lord BRAMPTON, at p. 23. In a case similar to *Booth* v. *Briscoe* (1877), 2 Q. B. D. 496, C. A., one action can be brought for a libel or slander by the persons defamed thereby, although there is no joint damage; but the plaintiffs are entitled to have the separate damages separately assessed. In *Booth* v. *Briscoe*, *supra*, eight persons, not partners, brought an action of libel for a statement imputing improper management of certain charities by "the trustees," who were the eight plaintiffs. The jury ought to have assessed the damages separately, as there was no joint damage. Instead of so doing they

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case, entitled to his costs occasioned by the joinder of any person who is not found entitled to relief, unless the court or a judge in disposing of the costs otherwise directs (*u*).

SECT. 4.—*Who may and may not be Sued.*

SUB-SECT. 1.—*In General.*

Defendants. Proper defendant is he who published.

1169. As a general rule the proper person to be sued, as the defendant in an action of libel or slander, or to be prosecuted on an indictment or information for a libel, is he who published or caused to be published the defamatory statement (*a*).

gave a single verdict of 40*s.* for the plaintiffs. The court held that the action was properly brought, and refused to disturb the verdict on the ground that the jury had not assessed the damages separately, the plaintiffs being content to take the 40*s.* and divide it among themselves, and the defendant not being injured by the single verdict. See further as to R. S. C., Ord. 16, and Ord. 18, Yearly Practice of the Supreme Court, 1911, pp. 143, 211.

(*u*) R. S. C., Ord. 16, r. 1.

(*a*) See pp. 658 *et seq.*, *post*. As to the special procedure applicable to persons under disability, see note (*n*), p. 611, *ante*. As to joining defendants, see R. S. C., Ord. 16, rr. 4, 5, 7. As to misjoinder, see *ibid.*, r. 11. As to applications to add or strike out a defendant, see *ibid.*, r. 12. As to service on a new defendant, see *ibid.*, r. 13. A judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause, although such judgment be unsatisfied (*Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584 (detinue), where WILLES, J., said, at p. 586, "It is impossible to decide that this plea is other than a good answer without overruling *King* v. *Hoare*" [(1844), 13 M. & W. 494], and *Broome* v. *Wooton* [(1605), Yelv. 67], "because Lord WENSLEYDALE (then PARKE, B.), upon the authority of the last-mentioned case, treated it as quite clear that if two commit a joint tort, the judgment against one is, of itself, a sufficient bar to an action against the other for the same cause. So far as tort is concerned, that is precisely to the same effect as the law laid down by Chief Baron Comyns in Com. Dig. tit. Action (K. 4)." In *Brinsmead* v. *Harrison*, *supra*, MONTAGUE SMITH, J., at p. 587, said, "The case of joint tortfeasors would seem from the only authorities cited to be different. I must confess I should have thought that a judgment against one was not a bar to an action against another, because joint tortfeasors may be sued separately. I feel myself, however, bound by the authority of Chief Baron COMYNS and Lord WENSLEYDALE, and the current of authorities which have followed them, to hold that the plea in this case is good." See also title ESTOPPEL, Vol. XIII., p. 335. In *Munster* v. *Cox* (1885), 10 App. Cas. 680, H. L., to a writ issued against R. & Co. claiming damages for a libel, an appearance had been entered for "R. trading as R. & Co., the defendant in this action." The statement of claim and subsequent proceedings continued in that form down to judgment. At the trial, by consent, a verdict was found for the plaintiff for 40*s.*, and judgment entered accordingly. After issuing execution against R., the plaintiff, under the rules in force before 1883, took out a summons for liberty to amend the judgment (and the pleadings if necessary) by striking out the words "R. sued as" from the title of the action; to enter judgment against R. & Co., and to issue execution against C. on the ground that C. had been since discovered to be a partner in the firm. The House of Lords, affirming *Munster* v. *Railton & Co.* (1883), 11 Q. B. D. 435, C. A. (which reversed S. C., 10 Q. B. D. 475), held that the proceedings having been conducted against R. alone and judgment having been signed against R. alone by consent, the judgment could not be converted into a judgment against the firm. On principle it would seem that if A., an author, sends to B., a proprietor of a newspaper, a libel on C., in order that B. may publish it, and B. does publish it, A. and B. are joint tortfeasors in respect of the publication by B., and if C. sues and recovers judgment against B. alone, in respect of the publication by B., he cannot afterwards, whether the judgment is satisfied or not, maintain an action against the author A. in respect of the

SUB-SECT. 2.—*Companies and Corporations.*

SECT. 4. Who may and may not be Sued.

Companies and corporations.

1170. The position of companies and corporations in relation to their liability for the acts of their servants and agents is discussed elsewhere (*b*). A corporation may be indicted for a libel (*c*).

SUB-SECT. 3.—*Husband and Wife.*

Wife sued without joining husband.

Criminal liability.

1171. A married woman can be sued for libel or slander without joining her husband (*d*). A wife is criminally liable for a libel published by her in the absence of her husband; and there would seem to be no presumption of coercion arising from the mere presence of her husband which would entitle her to be acquitted for a libel published by her (*e*).

Husband's liability.

1172. A husband is, subject to certain statutory restrictions, liable for the antenuptial torts of his wife (*f*), including libel and

publication for which he has already recovered judgment against B., though he might maintain an action against A. in respect of the publication by A. to B. *Frescoe* v. *May* (1860), 2 F. & F. 123, is, it is submitted, not an authority to the contrary. The defendant there wrote a libel published in the *Medical Circular* imputing that the plaintiff, a dentist, was a quack. The defendant pleaded not guilty; (2) that the plaintiff was not a surgeon-dentist; (3) that the libel was true. There had been a former action for the same libel against one Y., as the proprietor and publisher, in which action the defence was that the libel was supplied to Y. as a report, and the jury had given a verdict for plaintiff, but only for 40*s.* damages. In *Frescoe* v. *May*, *supra*, ERLE, C.J., left the case to the jury, telling them that there was no privilege; that the publication was neither excused nor justified, and that the defendant sued in that action was responsible for any injury which the plaintiff had sustained, and they found a verdict for the plaintiff, damages £450. It is to be observed that in *Frescoe* v. *May*, *supra*, there was a separate publication by the author to Y. Further, there was, it would seem from the report, no plea of estoppel. In *Brunswick* (*Duke*) v. *Pepper* (1848), 2 Car. & Kir. 683, there was a plea of estoppel set out in the note to the report as well as a plea of not guilty, the defendant alleging as a bar to the further maintenance of the action that the plaintiff had recovered one farthing damages against one P. for the same grievances. To that plea the plaintiff now assigned (see the note to the report) that he issued his writ and declared thereon for other and different grievances than those in the plea mentioned. To the new assignment the defendant pleaded not guilty. ERLE, J., held that this did not admit the innuendoes in the declaration, and that by pleading not guilty to the new assignment the defendant had raised precisely the same issue as if the libel now assigned had been set out in the declaration. Evidence having been given to show a publication of the libel different from that on which the plaintiff had recovered in the action againt P., the jury returned a verdict for the plaintiff. As to there being no contribution between joint tortfeasors, see title TORT.

(*b*) See pp. 662, 663, *post;* and see title COMPANIES, Vol. V., p. 293.

(*c*) See title CORPORATIONS, Vol. IV., p. 391, citing *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857, *per* Lord BLACKBURN, at p. 870. As to actions against a company or its directors for libel, see title COMPANIES, Vol. V., p. 311. As to company's liability for libel by its agent, see *ibid.*, pp. 309, 310. As to criminal liability, see *ibid.*, p. 311. As to "causing to be published," see p. 660, *post.*

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2), and see note (*f*), p. 613, *ante;* title HUSBAND AND WIFE, Vol. XVI., pp. 407, 436.

(*e*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 244; HUSBAND AND WIFE, Vol. XVI., p. 435. A husband cannot prosecute his wife for libel (*R.* v. *London* (*Lord Mayor*) (1886), 16 Q. B. D. 772.

(*f*) As to these restrictions see Married Women's Property Act, 1882 (45 &

SECT. 4. Who may and may not be Sued.

slander; and he is still liable as at common law for torts committed by his wife since their marriage (*g*).

Part II.—The Statement.

SECT. 1.—*What Statements are Defamatory.*

SUB-SECT. 1.—*The Statement must Reflect on the Plaintiff Personally.*

Statement must be made and published of and concerning the plaintiff.

1173. A statement is not actionable either as a libel or slander unless it is made and published of and concerning the plaintiff. It is not, however, necessary that the defendant should have intended in fact to make or publish the statement of and concerning the plaintiff, or even that the defendant should have been aware of the existence of the plaintiff, if people to whom it was published would reasonably understand it to refer to the plaintiff (*h*).

Statement must not reflect merely on goods or property of plaintiff.

1174. It is essential to the preceding definitions (*i*) that the statement which is made and published of and concerning the plaintiff should be calculated to convey an imputation on the plaintiff himself. A statement is not defamatory of a person which merely disparages his property (*j*). But a statement which disparages the property of another sometimes reflects upon its owner (*k*).

When questions should, and should not, be left to the jury.

1175. A judge is not justified in leaving the question of libel or no libel, slander or no slander, to the jury merely because some person or another might possibly understand the statement as making an imputation on the plaintiff (*l*). It is unreasonable that, where there are a number of good interpretations, the only bad one

46 Vict. c. 75), ss. 13, 14, 15; title HUSBAND AND WIFE, Vol. XVI., pp. 407 *et seq.*

(*g*) See title HUSBAND AND WIFE, Vol. XVI., p. 436. In an action against a husband and wife jointly for a libel published by his wife during coverture there cannot be separate judgments, and the husband and wife cannot plead inconsistent defences (*Beaumont* v. *Kaye*, [1904] 1 K. B. 292, C. A.). In that case the statement of claim was framed solely on the common law right of action against husband and wife jointly, and carefully abstained from introducing anything in the nature of a claim against the wife under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The husband pleaded payment into court in satisfaction. The wife denied liability. The court held that the judge was right in striking out that part of the wife's defence which was inconsistent with an admission of liability.

(*h*) *Hulton (E.) & Co.* v. *Jones*, [1910] A. C. 20; see also *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 772, p. 609, *ante*, and note (*i*), p. 642, *post*.

(*i*) See p. 606, *ante*.

(*j*) *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L.; *Griffiths* v. *Burn* (1911), 27 T. L. R., 346, C. A.; and see pp. 628 *et seq.*, *post*, and the cases there cited.

(*k*) *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.*, *supra*, where it was held that an imputation on a trader's goods may support an action of libel or slander without proof of special damage, if the words reflect upon the trader in the way of his trade and are not merely defamatory of the goods themselves; and see pp. 627 *et seq.*, *post*.

(*l*) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, 73, 76; *Capital and Counties Bank* v. *Henty*, *supra*.

should be seized upon (*m*). The defamer, it has been said, is he who, of many inferences, chooses a defamatory one (*n*). The true test according to the authorities is, whether, in the circumstances in which the statement was published, reasonable men, to whom the publication was made, would understand it in a defamatory sense (*o*). Sometimes that test may be satisfied from the mere words of the statement (*p*).

SUB-SECT. 2.—*The Statement must be Disparaging.*

Statement tending to lower another in opinion of men whose standard of opinion the court will recognise.

1176. A statement is defamatory within the foregoing definitions, as being calculated to expose a person to hatred, contempt, or ridicule (*q*), if it tends to lower him (*r*) in the opinion of men whose standard of opinion the court can properly recognise (*s*), or to induce them to entertain an ill opinion of him (*t*).

(*m*) *Capital and Counties Bank* v. *Henty* (1880), 5 C. P. D. 514, C. A., *per* BRETT, L.J., at p. 541; approved in *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, *per* Lord HALSBURY, L.C., at p. 73. As to functions of judge and jury, see pp. 652, 719 *et seq.*, *post*.

(*n*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BRAMWELL, at p. 792.

(*o*) This statement is taken from the judgment of Lord SELBORNE, L.C., in *Capital and Counties Bank* v. *Henty*, *supra*, at p. 745. Compare *Hulton* (*E.*) *& Co.* v. *Jones*, [1910] A. C. 20 (where it was held that it was no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people to whom it was published would think the language to be defamatory of the plaintiff).

(*p*) *Capital and Counties Bank* v. *Henty*, *supra*, where Lord SELBORNE, L.C., was dealing with the question of libel or no libel; but there is no difference in this respect between libel and slander.

(*q*) See p. 606, *ante*.

(*r*) "That which may tend to lower the plaintiff in the estimation of others we cannot withhold from a jury" (*Fray* v. *Fray* (1864), 17 C. B. (N. S.) 603, *per* ERLE, C.J., at p. 605). Compare *Hoare* v. *Silverlock* (1848), 12 Q. B. 624, *per* ERLE, J., at p. 634.

(*s*) *Mawe* v. *Pigott* (1869), 4 I. R. C. L. 54. On the principle that no court will (as Lord MANSFIELD, C.J., said in *Holman* v. *Johnson* (1775), 1 Cowp. 341, at p. 343), lend its aid to a plaintiff who founds his cause of action upon an immoral or illegal act, it was held in *Hunt* v. *Bell* (1822), 1 Bing. 1, that a plaintiff who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation; see also *Morris* v. *Langdale* (1800), 2 Bos. & P. 284. But, where the defendant imputed that the plaintiff had fraudulently withdrawn his horse from a race, it was held that, even if the fact of engaging in a horse race were illegal (and it was held not to be illegal), the plaintiff was not thereby deprived of all protection to his character in other matters connected with the transaction (*Greville* v. *Chapman* (1844), 5 Q. B. 731); see also *Yrisarri* v. *Clement* (1826), 3 Bing. 432 (to the effect that if a man is guilty of an illegal transaction, fraud *ultra* that transaction may not on that account be imputed to him with impunity). The principle for which *Mawe* v. *Pigott*, *supra*, is cited is, of course, entirely distinct from the principle underlying the other cases cited in this note. The former shows that a plaintiff cannot complain of an imputation which merely tends to lower him in the opinion of law-breakers; the latter, that the court will not assist or protect a law-breaker in respect of a transaction which is a breach of the law.

(*t*) Scandalous matter is not essential. It is enough if the defendant induces an ill opinion to be had of the plaintiff or makes him contemptible or ridiculous: so an action was adjudged to lie by the husband "for riding Skimmington," because it made him ridiculous (*Cropp* v. *Tilney* (1693), 3 Salk. 225, *per* HOLT, C.J., where the court held that it was actionable to print of the plaintiff, a candidate for Parliament, that he had said, "There is a war with

SECT. 1. What Statements are Defamatory.

It is generally useless, and often misleading, to quote authorities to show that particular words have been held in particular cases to be defamatory (*a*); for the meaning of particular words may vary with the context and the circumstances in which they are published. Even when the meaning of the words has been ascertained, the defamatory tendency must be tested by the opinion of reasonable men, which varies from time to time with the changes of public opinion.

Statement imputing immoral conduct.

1177. A statement which reflects upon the character of another may be defamatory (*b*), although it does not expose him to hatred. It is enough that it tends to hold a person up to contempt or ridicule (*c*). In general, any charge of immoral conduct is defamatory, although in matters not punishable by law (*d*).

Statement imputing fraud, dishonesty etc.

1178. It is beyond question defamatory to charge another with fraudulent, dishonest, or dishonourable conduct or motives. More than a hundred years ago it was held that it was defamatory to call a man a villain (*e*), a swindler (*f*), a rogue or a rascal (*g*). Such words obviously throw contumely (*h*) on the person traduced.

Statement imputing unchastity etc.

So at common law it has always been defamatory to impute unchastity to a woman or girl (*i*), and such an imputation is now actionable *per se* (*k*).

France, of which I can see no end, unless the young gentleman on the other side of the water" (innuendo, the Prince of Wales) "be restored").

(*a*) See *Linotype Co., Ltd.* v. *British Empire Type-setting Co., Ltd.* (1899), 81 L. T. 331, H. L.

(*b*) See *O'Brien* v. *Clement* (1846), 15 M. & W. 435, *per* PARKE, B., at p. 437.

(*c*) *Cropp* v. *Tilney* (1693), 3 Salk. 225, *per* HOLT, C.J.

(*d*) *Tuam* (*Archbishop*) v. *Robeson* (1828), 5 Bing. 17, *per* BEST, C.J., at p. 21 (where it was held to be a libel to publish of a Protestant archbishop that he attempted to convert Roman Catholic priests by offers of money and preferment). In *Fray* v. *Fray* (1864), 17 C. B. (N. S.) 603, where the plaintiff declared upon a letter written by the defendant, in which it was alleged that the plaintiff had for years without cause systematically done everything to annoy the defendant, and had unnecessarily dragged him into the Court of Chancery, it was held on demurrer that, assuming the allegations in the declaration to be true, the court ought not to withdraw the case from the jury, and judgment was given for the plaintiff.

(*e*) *Bell* v. *Stone* (1798), 1 Bos. & P. 331.

(*f*) *I'Anson* v. *Stuart* (1787), 1 Term Rep. 748; but it is not a defamatory statement actionable *per se* to say that the plaintiff is a swindler, there being no allegation that the word is spoken of the plaintiff in relation to his trade, office, business, profession, or calling (*Black* v. *Hunt* (1878), 2 L. R. Ir. 10).

(*g*) *Villers* v. *Monsley* (1769), 2 Wils. 403, *per* GOULD, J., at p. 404.

(*h*) *Bell* v. *Stone*, *supra* (where the court expressed itself clearly of opinion that any words written and published throwing contumely on the plaintiff were actionable without proof of special damage, and Le Blanc for the defendant declined to argue to the contrary).

(*i*) *Roberts* v. *Roberts* (1864), 5 B. & S. 384. Spoken words imputing unchastity to a woman were not actionable at common law without special damage, though if written they were actionable without proof of special damage (*ibid.*, *per* BLACKBURN, J., at p. 390). Since the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), was passed a large number of cases on what amounted to special damage have become valueless, but the following instances may be noticed:—*Wilby* v. *Elston* (1849), 8 C. B. 142; *Allsop* v. *Allsop* (1860), 5 H. & N.

(*k*) For note (*k*) see next page.

Having regard to the present standard of public opinion, it may be doubted whether in an action of libel for a statement imputing sexual incontinence to a man (*l*), or intemper-

534 (where it was held that the illness of the wife was too remote); and *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, *per* Lord CAMPBELL, at p. 593. Loss of *consortium vicinorum* is not special damage (*Roberts* v. *Roberts* (1864), 5 B. & S. 386, *per* COCKBURN, C.J., at p. 389); and loss of membership of a sect of Protestant dissenters to which no material advantages attach is not special damage (*ibid.*). The loss of marriage is special damage (*Davis* v. *Gardiner* (1593), 4 Co. Rep. 16 b), because marriage has always been considered a valuable consideration (*Roberts* v. *Roberts*, *supra*, *per* BLACKBURN, J., at p. 387); see also *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, C. A., *per* LOPES, L.J., at p. 232, referred to in note (*d*), p. 666, *post*. As to whether loss of conjugal society is special damage, see title HUSBAND AND WIFE, Vol. XVI., p. 319, note (*c*). The loss of *consortium* of the wife was always considered a temporal damage in an action by the husband for criminal conversation (*Roberts* v. *Roberts*, *supra*, *per* CROMPTON, J., at p. 388). Subsequently in *Davis* v. *Solomon* (1871), L. R. 7 Q. B. 112, a declaration by husband and wife charged a slander imputing want of chastity to the wife, whereby she was "injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship, and ceased to receive the hospitality of divers friends, and especially of her husband" and others named, who had "by reason of the premises withdrawn from the companionship and ceased to be hospitable or friendly to her," and it was held on demurrer that the loss of the hospitality of friends was the reasonable and natural consequence of the slander and a loss to the wife herself of benefits which her husband was not bound to bestow upon her; and therefore that such loss of hospitality was special damage which would support an action by husband and wife. In that case the court relied on *Moore* v. *Meagher* (1807), 1 Taunt. 39, Ex. Ch., as deciding that the loss of the hospitality of friends was a temporal loss and sufficient to sustain an action of slander, whereas in *Roberts* v. *Roberts*, *supra*, the loss was not a temporal loss. As to special damage, see also pp. 730 *et seq.*, *post*. As to allegations of loss of customers by the husband in his business by reason of words spoken of his wife, see *Bateman* v. *Lyall* (1860), 7 C. B. (N. S.) 638; and *Riding* v. *Smith* (1876), 1 Ex. D. 91.

(*k*) *I.e.*, since the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), by which words spoken and published which impute unchastity or adultery to any woman or girl do not require special damage to render them actionable, provided that in any action for words spoken and made actionable by that Act a plaintiff shall not recover more costs than damages, unless the judge certifies that there was reasonable ground for bringing the action.

It is libellous for a newspaper to state in the notices of births that a woman had given birth to a child at a date which was in fact within two months of her marriage (*Morrison* v. *Ritchie & Co.* (1902), 4 F. (Ct. of Sess.) 645); compare *Wood* v. "*Edinburgh Evening News*," *Ltd.*, [1910] S. C. 895 (where the court held that the words in an advertisement for a wet nurse were not libellous in themselves, and would not bear the innuendo assigned). It was said by Lord KINCAIRNEY in *A. B.* v. *Blackwood & Sons* (1902), 5 F. (Ct. of Sess.) 25, that it is not actionable *per se* to say of a woman that she wanted delicacy.

(*l*) See *Jones* v. *Hulton* (*E.*) *& Co.*, [1909] 2 K. B. 444, 457, C. A.; affirmed [1910] A. C. 20. Though it is actionable *per se* to speak of a man as then suffering from a venereal disease (*Bloodworth* v. *Gray* (1844), 7 Man. & G. 334), it is not so where the words refer to a past disease (*Carslake* v. *Mapledoram* (1788), 2 Term Rep. 473). In *Carslake* v. *Mapledoram*, *supra*, it was said that the report of *Austin* v. *White* (1591), Cro. Eliz. 214, to the contrary was not to be relied upon, and the other cases relied on by the plaintiff, namely, *Backster's Case* (*Boxe's Case* (1582), Cro. Eliz. 2), cited in *Miller's Case* (1617), Cro. Jac. 433, and *Crittal* v. *Horner* (1618), Hob. 219, were there explained as cases where special damage was alleged; see also *Taylor* v. *Hall* (1743), 2 Stra. 1189. Since the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), it is actionable *per se* to say that a woman has in time past suffered from a venereal disease, if incontinence is imputed thereby, and to that extent *Carslake* v. *Mapledoram*, *supra*

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ance (*m*) to a man or woman, a judge would withdraw the case from the jury. Nearly a hundred years ago it was held to be

(where the slander was of a woman) is no longer law. In *Lumby* v. *Allday* (1831), 1 Cr. & J. 301, 305, where a verdict had been recovered by a clerk of a gas company on a declaration alleging that the defendant, wishing it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said of him, "You are unfit to hold your situation," and then imputed incontinence as the reason of his unfitness, the court arrested judgment, BAYLEY, B., laying down the doctrine to be deduced from the earlier cases in the following terms (which were approved in *Ayre* v. *Cravin* (1834), 2 Ad. & El. 2; and in *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., by Lord HERSCHELL, at p. 800): "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity etc., or connects the imputation with the plaintiff's office, trade, or business." In *Ayre* v. *Cravin*, *supra*, where a declaration for slander alleged that the defendant used words imputing adultery to the plaintiff, a physician, and the words were laid to have been spoken "of him in his profession," but no special damage was laid, judgment was arrested after verdict for the plaintiff, because such words merely spoken of a physician are not actionable without special damage; and if they were so spoken as to convey an imputation on his conduct in his profession, the declaration should have shown how the speaker connected the imputation with the professional conduct. In *Dixon* v. *Smith* (1860), 5 H. & N. 450, where the declaration stated that the plaintiff was a surgeon and accoucheur, and that the defendant spoke certain words imputing that the plaintiff's female servant had had a child by him, the court treated the imputation as one which was not actionable without special damage, and held that though the jury might consider how much damage, in the nature of consequential special damage, the plaintiff had probably sustained through the special damage laid, they were not entitled to give such general damages as might be supposed to have arisen from repetitions of the slander. In *Brayne* v. *Cooper* (1839), 5 M. & W. 249, it was held that words spoken of a staymaker, imputing to him that his trade was maintained by the prostitution, after the shop was shut, of a female employed by him, were not actionable *per se*, although laid to be spoken of him in his trade, unless they could be construed as imputing that he kept a bawdy house: Lord ABINGER, C.B., in refusing the plaintiff a rule for a new trial, said that the words did not relate to the plaintiff in his business, and that the court could not consider them as used in any other sense than as a general imputation on his moral conduct. If incontinence is imputed by word of mouth to a clergyman, and the clergyman is beneficed, or in the actual receipt of professional temporal emolument as a preacher, lecturer, or the like at the time of the speaking of the words, an action will lie without proof of special damage, as the charge, if true, would be a cause of deprivation of the benefice in the first case, and also of degradation from orders, and consequently of the loss of the emoluments in the other cases (*Gallwey* v. *Marshall* (1853), 9 Exch. 294, *per* POLLOCK, C.B., at p. 299). This was decided in *Sibthorp's (Dr.) Case* (1635), W. Jo. 366; *Dod* v. *Robinson* (1648) Aleyn, 63; in effect overruling *Parrat* v. *Carpenter* (1596), Cro. Eliz. 502. In *Payne* v. *Beuwmorris*, (1668), 1 Lev. 248, cited in the note to *Gallwey* v. *Marshall*, *supra*, at p. 301, where the declaration alleged that the plaintiff was chaplain to a peer, and that the defendant falsely alleged that he had had a bastard, whereby he lost the chaplaincy, the action was held maintainable on the express ground that the chaplaincy was a temporal preferment. But no action will lie without proof of special damage for a verbal imputation of incontinence on a clergyman, unless he is beneficed or holds some clerical office or employment of temporal profit (*Gallwey* v. *Marshall*, *supra*, at p. 300; compare *Alexander* v. *Jenkins*, *supra*, *per* Lord HERSCHELL, L.C. (during argument), at p. 798).

(*m*) In *Alexander* v. *Jenkins*, *supra*, the words complained of were "A." (the plaintiff) "is never sober and is not a fit man for the council," and although it was held that an action of slander would not lie in the absence of proof of special damage, yet beyond all question the words were defamatory, and had the words been written an action of libel would have lain; see the remarks of Lord HERSCHELL, at p. 799, of LINDLEY, L.J., at p. 803,

libellous to charge a plaintiff with hypocrisy, malice, uncharitableness, and falsehood (*n*), and more recently an imputation of ingratitude was held to be defamatory (*o*).

Or other moral defects.

1179. It is not, however, defamatory to impute to another conduct in matters not affecting his trade, business, calling, or office, which is not sufficiently serious to be calculated to bring him into hatred, contempt, or ridicule (*p*). The test, and the only test, is whether the imputation tends to hold the person accused up to hatred, contempt, or ridicule (*q*).

The test is whether imputation tends to expose person accused to hatred, contempt, or ridicule.

and of KAY, L.J., at p. 805, see also remarks of Lord HERSCHELL, at p. 800, quoted in note (*l*), p. 621, *ante*. In *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., the words imputed that the plaintiff was an habitual drunkard. As to what is a sufficient imputation of intemperance to be left to the jury in an action of libel, see *Ritchie & Co.* v. *Sexton* (1891), 64 L. T. 210, H. L.). It may be (though there does not seem to be any reported case which decides the question) that the judge should not, in an action of libel or in an action of slander where there is evidence of special damage, withdraw the case from the jury, even though only a single act of drunkenness is imputed and the statement does not touch the plaintiff in the way of his trade, business, calling, or office.

(*n*) *Thorley* v. *Kerry* (*Lord*) (1812), 4 Taunt. 355, 357 (where it was held that the imputations were defamatory and, being written, were actionable without proof of special damage). As to intolerance, see *Teacy* v. *M'Kenna* (1869), 4 I. R. C. L. 374 (where the plaintiff declared upon a letter which alleged that he, being a coach proprietor by trade and a Presbyterian by religion, had from mere motives of intolerance refused the use of his hearse for the funeral of a deceased servant in a Roman Catholic burying-ground, and it was held on demurrer that the court could not withdraw the case from the jury).

(*o*) *Hoare* v. *Silverlock* (1848), 12 Q. B. 624 (where the defendant stated that the plaintiff was a "frozen snake," and it was held that no innuendo was necessary). Lord DENMAN, C.J., at p. 628, during the argument in that case, said that the words "dog in the manger" would not require an innuendo. *Hoare* v. *Silverlock*, *supra*, was followed in *Cox* v. *Lee* (1869), L. R. 4 Exch. 284, *per* PIGOTT, B., at p. 291, who said that an imputation of ingratitude is calculated to bring the person charged with it into contempt and disrepute. In *Cox* v. *Lee*, *supra*, it was held to be no defence that the facts on which the charge of ingratitude was founded were set out in the statement and did not support the charge. As to all imputations of moral defects, the test to be applied is whether they tend to bring the plaintiff into hatred, contempt, or ridicule. It was assumed in *Forbes* v. *King* (1833), 1 Dowl. 672, that it would be libellous to impute degradation and subserviency to another; but it was held that a count charging that the defendant wrote of the plaintiff that he was a "man Friday" is bad for want of an averment to show that thereby degradation and subserviency were imputed. To write to the members of a charitable institution calling on them to reject "the unworthy claims" of the plaintiff, and alleging that she squandered the money she obtained from the benevolent in printing circulars abusive of the secretary, is libellous, from the tendency that it has to lower the plaintiff's character (*Hoare* v. *Silverlock*, *supra*).

(*p*) Thus, in *R.* v. *Hart* (1762), 1 Wm. Bl. 386, Quakers, having expelled the prosecutrix for frequenting balls and concerts, entered as a reason in their books "For not practising the duty of self-denial": entry held not to be an actionable libel.

(*q*) Thus, in *Clement* v. *Chivis* (1829), 9 B. & C. 172, where it was held to be a libel, actionable without proof of special damage, to publish a notice to the effect that the plaintiff had been guilty of gross misconduct in insulting two females and some gentlemen in the most barefaced manner, it was decided that it was only necessary to inquire whether the publication in question held up the plaintiff to public hatred, contempt, or ridicule. The court came to this conclusion from a consideration of the following authorities, which have been already cited:—*Cropp* v. *Tilney* (1693), 3 Salk. 225; *Villers* v. *Monsley* (1769),

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Imputations of mental incapacity.

1180. Thus, a statement that a person is insane is defamatory, as tending to bring him into contempt (*r*); and to impute serious mental affliction is *primâ facie* and without explanation defamatory (*s*). But it is not defamatory to impute mental affliction or incapacity which does not tend to bring the person to whom it is imputed into hatred, contempt, or ridicule (*t*).

Imputations of unfitness for general or particular society.

1181. Statements which impute that a person is unfit for general society are defamatory, if they are calculated to bring him into hatred, contempt, or ridicule. Thus it is defamatory to state that a person suffers from the itch. It is not defamatory, however, to state of another something which tends to exclude him from general society, but does not tend to expose him to hatred, contempt, or ridicule (*a*). The same principle applies to statements which impute

2 Wils. 403; *Bell* v. *Stone* (1798), 1 Bos. & P. 331; *Thorley* v. *Kerry* (*Lord*) (1812), 4 Taunt. 355; and the following additional authorities:—*King* v. *Lake* (1667) Hard. 470; 1 Hawk. P. C., ch. 73, s. 1 (as to criminal libel), and *Robertson* v. *M'Dougall* (1828), 4 Bing. 670. In *Clement* v. *Chivis* (1829), 9 B. & C. 172, *King* v. *Lake*, *supra*, was cited as showing that it is an actionable libel to publish of the plaintiff that he had presented a petition to the House of Commons "stuffed with illegal assertions, ineptitudes, imperfections; clogged with gross ignorances, absurdities and solecisms." (There was in this case also a charge of disloyalty and violent conduct). The case appears to have been a cross action arising out of a dispute, as in *Lake* v. *King* (1668), 1 Wms. Saund. 131, in which it was held that the action could not be maintained because the communication was privileged. In *Robertson* v. *M'Dougall*, *supra*, the words held to be libellous were: "His object is to extract money from the pockets of the unwary purchaser, or, what is more likely, by this threat of publication to extort money from me." Compare also *M'Gregor* v. *Thwaites* (1824), 3 B. & C. 24, *per* BAYLEY, J., at p. 33, where an imputation in writing or print of defrauding emigrants was held to be actionable as tending to bring the plaintiff into hatred, although it did not impute any crime committed within the jurisdiction. In *Woodard* v. *Dowsing* (1828), 2 Man. & Ry. (K. B.) 74 (libel), it was held that an imputation of oppressive conduct was defamatory as tending to bring the party charged with it into public hatred and disgrace. A writing, in which a party is spoken of in language usually applied to the keeper of a gaming-house, is libellous, whether the words are capable of being applied by an innuendo to specific charges of unfair practices or not (*Digby* v. *Tomlinson* (1833), 1 Nev. & M. (K. B.) 485). It is defamatory to call a person "an affidavit man" (*Anon.* (1742), 2 Atk. 469 (libel)); or "a truck-master" (*Homer* v. *Taunton* (1860), 5 H. & N. 661 (libel), and that, too, although there is no innuendo if the jury think that it was used in a defamatory sense. It may be defamatory to publish a story calculated to hold another up to ridicule though that other has told the same story himself (*Cook* v. *Ward* (1830), 6 Bing. 409 (libel)). "There is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper" (*Cook* v. *Ward*, *supra*, *per* TINDAL, C.J., at p. 415).

(*r*) "To assert falsely of his Majesty or of any other person that he labours under the affliction of mental derangement is a criminal act. In my opinion the publication is a libel calculated to vilify and scandalise his Majesty, and to bring him into contempt among his subjects" (*R.* v. *Harvey* (1823), 2 B. & C. 257, *per* ABBOTT, C.J., at p. 258, a criminal information for libel).

(*s*) *Morgan* v. *Lingen* (1863), 8 L. T. 800, *per* MARTIN, B.

(*t*) Unless the imputation is made of another in relation to his trade, business, calling, profession, or office, so as to amount to a defamatory statement actionable *per se*. See the remarks of MARTIN, B., on the count for slander in his summing up in *Morgan* v. *Lingen*, *supra*, (in that case the plaintiff was a governess).

(*a*) *Villers* v. *Monsley* (1769), 2 Wils. 403 (where the defendant in doggerel verses wrote that the plaintiff was an itching old toad and smelt of brimstone).

that a man is not fit for a particular society. Such statements are defamatory if, and only if, they tend to hold him up to hatred, contempt, or ridicule as before explained (*b*).

On principle, it is also defamatory to state that another has ever suffered from a disease which is of such a character that the imputation is calculated to bring him into present hatred, contempt, or ridicule. It cannot be doubted that the imputation of former venereal disease is defamatory. But the imputation of a present infectious or contagious disease is not defamatory, if the imputation is not calculated to bring the person to whom it is imputed into hatred, contempt, or ridicule, although the imputation tends to exclude him from society. It does not lower the reputation of anyone to impute that he is suffering from scarlet fever or influenza; it is otherwise to say that he has and (probably) to say that he has had a verminous disease. It is, however, sometimes said that every statement which imputes that a person is unfit for general society is for that reason defamatory; and further, that every statement that a person suffering from a contagious or infectious disease is a defamatory statement actionable *per se*. See the *dictum* of BLACKBURN, J., in *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, at p. 399, that to assert of any man that he has an infectious disease would be actionable (*semble*, actionable *per se*), because no one would associate with a person so affected. See also Bac. Abr., tit. Slander (B.), 2: "Man being formed for society . . . it is highly reasonable that any words which import the charge of having a contagious distemper, should be in themselves actionable. It makes no difference whether the distemper be owing to the visitation of God, etc. . . .; for in every one of the cases the being avoided, from whence the damage arises, is the consequence." But the only instances cited by Bacon are leprosy (*Taylor* v. *Perkins* (1607), Cro. Jac. 144; S. C. *sub nom. Taylor* v. *Perr* (1607), 1 Roll. Abr. 44, where it is said: "Si home dit al auter, Thou art a leprous knave and a leaper, Action sur le case gist, car il ne doit vener en le societie des homes si ceo soit issint, coment que ceo soit un natural infirmitie") and venereal disease (*Milner* v. *Reeves* (1617), 1 Roll. Abr. 43; *Whitfield* v. *Powell* (1699), 12 Mod. Rep. 248). So, too, in *Carslake* v. *Mapledoram* (1788), 2 Term Rep. 473, BULLER, J., at p. 475, said that it was actionable *per se* to say that another is suffering from leprosy or venereal disease because "the having a contagious disorder renders the person an improper member of society." Further, there is some confusion in the judgments in *Villers* v. *Monsley* (1769), 2 Wils. 403, WILMOT, C.J., saying: "I see no difference between this" (*i.e.*, a libel by imputing the itch) "and the cases of leprosy and plague; and it si admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, etc."; but the court seems to have decided that the words were defamatory because the itch is a disease the imputation of which tends to bring a person into contempt or ridicule. The more recent definitions of defamatory matter (see p. 606, *ante*) do not go beyond the statement in the text. The modern test is, "Do the words tend to hold the plaintiff up to hatred, contempt, or ridicule?" If their tendency is to exclude the plaintiff from society, they will usually be defamatory, but only when they tend to expose the plaintiff to hatred, contempt, or ridicule. Whatever be the origin of the rule, it is clear that it is actionable *per se* to say that a person is suffering from venereal disease (*Bloodworth* v. *Gray* (1844), 7 Man. & G. 334); and probably it is still actionable *per se* to say that another has leprosy or the plague. It is clear that it is not actionable *per se* to impute that a man has in the past suffered from venereal disease (see note (*l*), p. 621), *ante*, and it is not defamatory to say of another that he has the falling sickness (*Taylor* v. *Perr*, *supra*). The following cases, where it was held that an action on the case lay, are not akin to the foregoing:—The case cited in Com. Dig., tit. Action upon the Case for Defamation (D. 28), from Kitchin, Courts Leet etc. (French ed., 1623), 173 b (English ed., 1663, p. 346) ("he buried people who died of the plague in his house; whereby guests refused his house"); *Levet's Case* (1592), Cro. Eliz. 289 (to impute to an innkeeper that his house is infected with the small-pox: for it is a discredit to the plaintiff and guests would not resort thither).

(*b*) *Robinson* v. *Jermyn* (1814), 1 Price, 11, appears at first sight to conflict

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Imputation as to person (though not a trader) being in pecuniary difficulties.

1182. A statement that a person, although he is not a trader (*c*), is in pecuniary difficulties, or that he cannot pay his debts (*d*), ought not to be withdrawn from the jury. It is not, however, defamatory

with the view stated in the text. There a notice had been posted, purporting to be a regulation of a particular society, in these terms:—"The Rev. J. . . R. . . and Mr. J. . . R. . . inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." Held not to be a libel. "It seems merely that these defendants did not think the plaintiffs were proper persons to be associated with by them . . . There might be reasons not at all affecting the moral character of the plaintiffs . . . It does not appear that the words laid in this declaration are sufficient to show the world at large, that even the inference necessary to support this action can be collected from them, that is, that they were improper persons for general association" (*Robinson* v. *Jermyn* (1814), 1 Price, *per* THOMSON, C.B., at pp. 17, 18). Compare *Goldstein* v. *Foss* (1827), 6 B. & C. 154; affirmed (1828), 4 Bing. 489, Ex. Ch., and considered by Lord BLACKBURN in *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at pp. 780, 781, where he says: "The case is an authority for the proposition that, unless the plaintiff has so far satisfied the onus which lies on him to show it to be a libel that the court can with sufficient certainty say that the writing has a libellous tendency, they should not say so." What Lord BLACKBURN meant by libellous tendency sufficiently appears by his comment on *Hearne* v. *Stowell* (1840), 12 Ad. & El. 719, in *Capital and Counties Bank* v. *Henty*, *supra* at pp. 779, 780: "The written document would be libellous according to the ordinary definition which had been repeated by PARKE, B., in *Parmiter* v. *Coupland* (1840), 6 M. & W. 105, at p. 108, if 'calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule.' It does not seem to me possible to contend that the document which the defendant read was not capable of being read as meaning that the plaintiff, Mr. H., had required one of his flock to crawl on his knees etc. by way of penance . . . The jury must by their verdict have found that it had this meaning, and that in their opinion the statement was calculated to injure his reputation by exposing him to hatred, contempt or ridicule . . . The court took a different view and acted on their own view and arrested the judgment. The plaintiff might have brought error, and plausibly enough have asked the court of error to say that they agreed with the jury and not with the Court of Queen's Bench, but he acquiesced in the judgment."

In *R.* v. *Cooper* (1846), 8 Q. B. 533, it was held that the defendant was guilty of libel, who had caused a newspaper to publish a story of the prosecutor, a clergyman, imputing that the myrmidons of the prosecutor had poisoned foxes in the country hunted over by the squire's hounds and had hung up their bodies by the neck, and that the squire's tenants had hung up effigies of the prosecutor and his brother with foxes' tails appended, and some comments were added, without the express authority of the defendant, exhibiting the prosecutor in a ludicrous light. It was held on demurrer, where the declaration alleged that the plaintiff was employed as a gamekeeper on the terms that he would not kill foxes, that it was a defamatory statement actionable *per se* to say of such a gamekeeper that he killed foxes (*Foulger* v. *Newcomb* (1867), L. R. 2 Exch. 327). This case is distinguishable from *R.* v. *Yates* (1872), 12 Cox, C. C. 233, where an indictment which charged the prisoner with printing the following libel: "B. O., of C. (meaning the said B. O.), game and rabbit destroyer, and his wife (meaning Charlotte, the wife of the said B. O.), the seller of the same in country and town," was held bad by QUAIN, J., on the grounds that the handbill set out therein was not *primâ facie* libellous, and there was no averment or innuendo showing that it charged an indictable offence or related to the calling or occupation of the prosecutor, who was a gamekeeper.

(*c*) As to past pecuniary difficulties, see the *dictum* of KELLY, C.B., in *Cox* v. *Lee* (1869), L. R. 4 Exch. 284, at p. 288. In *Leycroft* v. *Dunker* (1633), Cro. Car. 317, an oral imputation that the plaintiff came a broken merchant from Hamburg was held actionable on the ground that "*Qui semel malus, semper præsumitur esse malus in eodem genere.*"

(*d*) An imputation of insolvency is clearly defamatory (*Eaton* v. *Johns* (1842), 1 Dowl. (N. S.) 602).

to make a statement of another which merely imputes that he has debts (*e*), or even that he quitted a neighbourhood leaving debts unpaid (*f*); but it is clearly defamatory to state that he bolted or left the neighbourhood suddenly, leaving his debts unpaid (*f*).

Statements: (i.) reflecting on the plaintiff; (ii.) in the way of trade etc.

1183. A statement which, being published of another in the way of his lawful trade (*g*), business, profession, calling, or office, conveys a reflection on him calculated to disparage or injure him therein, is a defamatory statement (*h*), even though it be not calculated to hold

(*e*) *R.* v. *Coghlan* (1865). 4 F. & F. 316, *per* BRAMWELL, B., at p. 322. A dispute having arisen between the defendants and the plaintiffs as to a small item of accounts between them, the defendants sent to the plaintiffs a postcard as follows: "Settlement. If you do not remit by return, the matter will be handed to our Dublin solicitors." Held, that a verdict was rightly decided for the defendants (*M'Cann* v. *Edinburgh Roperie and Sailcloth Co.* (1889), 28 L. R. Ir. 24, C. A.). If the words are not libellous in their primary sense the plaintiff must prove circumstances to show they would naturally be held by reasonable people to convey the alleged secondary libellous imputation; otherwise there is no case to go to the jury (*Frost* v. *London Joint Stock Bank, Ltd*, (1906), 22 T. L. R. 760, C. A.). As to alleging and proving the innuendo, see pp. 645 *et seq.*, *post*. The following words are not actionable *per se*: "You have a barman in your employment named G., who has removed from his landlord's house leaving £2 owing for a month's rent, and I cannot get the money from him" (*Speake* v. *Hughes*, [1904] 1 K. B. 138, C. A.); and the special damage there alleged, namely, dismissal from the employment, was held to be too remote. As to imputations of insolvency, see also *Brown* v. *Smith* (1853), 13 C. B. 596 (trader—words actionable *per se*); *Whittington* v. *Gladwin* (1826), 5 B. & C. 180; (1825), 2 C. & P. 146; S. C. *sub nom. Whittaker* v. *Bradley* (1826), 7 Dow. & Ry. (K. B.) 649 (to say of an innkeeper "he is a bankrupt" etc. was held actionable, though he was not in the then state of the law amenable to the bankruptcy laws); *Hall* v. *Smith* (1813), 1 M. & S. 287 (place where trader was said to have been bankrupt held immaterial); *Figgins* v. *Cogswell* (1815), 3 M. & S. 369 (plaintiff of two trades; slander proved of one sufficient).

(*f*) See *O'Brien* v. *Bryant* (1846), 16 M. & W. 168, as to the distinction between a libel as stated in the declaration imputing, by the word "bolting," a fraudulent evasion by the plaintiff of his creditors, he being unable to pay them, and the word "quitting" used in the plea of justification, which was held bad on general demurrer, as "quitting" would be an innocent departure, and consistent with proof that the plaintiff went out of the town for the day, but then returned and paid his debts.

(*g*) As to the law relating to trade generally, see title TRADE AND TRADE UNIONS. As to slander of goods, see *ibid.* As to slander of title generally, see title TORT.

(*h*) See Lord BLACKBURN'S definition in *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at p. 771, referred to in note (*k*), p. 607, *ante*. It has been said that the law has always been very tender of the reputation of tradesmen, and that words spoken of them in the way of their trade will be actionable which would not be actionable in the case of persons not specially favoured (*Harman* v. *Delany* (1731), Stra. 898, cited with approval by Lord HALSBURY, L.C., in *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L.). But see *Evans* v. *Harlow* (1844), 5 Q. B. 624, and note (*i*), p. 628, *post*. The trade must be a lawful trade. A person who pursues an illegal vocation has no remedy by action for a libel (or slander) regarding his conduct therein (*Hunt* v. *Bell* (1822), 1 Bing. 1). Where a stock-jobber sued in respect of the spoken words "He is a lame duck," it was held that the declaration was bad because it did not (having regard to the then state of the law) sufficiently disclose that the plaintiff was a lawful dealer, or that the contracts, referred to in the expression "lame duck" as not having been fulfilled, were lawful contracts (*Morris* v. *Langdale* (1800), 2 Bos. & P. 284); see note (*c*), p. 635, *post*.

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him up to hatred, contempt, or ridicule. This definition is not satisfied (1) unless there is a reflection on the plaintiff himself (*i*), and (2) unless the statement is published of the plaintiff in the way of his trade, business, profession, calling, or office (*k*).

Effect of statement not reflecting on plaintiff personally,

1184. If the first condition is not satisfied, that is, if there is no reflection on the plaintiff himself, his personal reputation is unaffected, and, therefore, no action of libel or slander properly so called will lie (*l*). But a statement which in form is only a criticism

As to libel on owner of race-horse, see *Greville* v. *Chapman* (1844), 5 Q. B. 731; see also *Manning* v. *Clement* (1831), 7 Bing. 362; and note (*s*), p. 619, *ante*.

(*i*) *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L., where it was pointed out that in *Harman* v. *Delany* (1731), 2 Stra. 898, there was in the opinion of the court a reflection on the plaintiff, whereas in *Evans* v. *Harlow* (1844), 5 Q. B. 624, there was not. In *Jenner* v. *A'Beckett* (1871), L. R. 7 Q. B. 11, the defendant published of the plaintiffs, bag manufacturers, a statement in a newspaper as to a bag, which the plaintiffs manufactured and advertised as the "Bag of Bags," that the defendant thought the title "very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public *ad nauseam*." MELLOR and HANNEN, JJ., held on demurrer that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business. LUSH, J., who dissented, was of opinion that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business. All three judges recognised that it was essential to a libel that there should be an imputation on the plaintiff or his conduct.

(*k*) For otherwise he is not entitled to the special protection which the law reserves for traders etc., to protect them in their trade etc.

(*l*) "That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce" (see the judgment of Lord WENSLEYDALE as to this in *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, at p. 600) "and they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred" (*Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at p. 527, in delivering the judgment of the Court of Appeal). See also the judgment of Lord ESHER, M.R., in *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A., at p. 139, quoted in note (*m*), p. 629, *post*; *Alcott* v. *Millar's Karri and Jarrah Forests, Ltd.* (1904), 91 L. T. 722, C. A. (where it was held that it could not be said that a written statement by the defendants, who were importers of wood for paving, that the plaintiffs' American red gum paving blocks became rotten after being laid down a short time, is not capable of being defamatory of the plaintiffs' goods). In *White* v. *Mellin*, [1895] A. C. 154, Lord HERSCHELL, L.C., at p. 161, criticising *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1874), L. R. 9 Exch. 218, and approving *Evans* v. *Harlow* (1844), 5 Q. B. 624, expressed grave doubt whether any action could be maintained for an alleged disparagement of a competitor's goods merely on the allegation that the goods sold by the party alleged to have disparaged his competitor's goods are superior to his competitor's; and see *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86, C. A., to the like effect. The latter case was explained by the Court of Appeal in *Alcott* v. *Millar's Karri and Jarrah Forests, Ltd.*, *supra*, as deciding only that a mere puffing of a trader's own goods is *primâ facie* lawful and that the allegation that the statement was malicious and that special damage resulted could not convert a statement *primâ facie* lawful into one *primâ facie* unlawful. (As to this see *Allen* v. *Flood*, [1898] A. C. 1). But that a trader may bring an action under certain conditions against a rival trader for disparagement of his goods was

of goods may, nevertheless, involve a reflection on the seller or maker, and thus be the foundation of an action of libel or slander properly so called, as if, for instance, it is stated that decomposed fish are habitually sold at the shop of a particular fishmonger, or that the bread of a particular baker is always unwholesome (*m*).

Effect where statement relates to plaintiff's goods.

recognised by Lord WATSON in *White* v. *Mellin*, [1895] A. C. 154, at p. 167, in the following passage which was quoted in *Alcott* v. *Millar's Karri and Jarrah Forests, Ltd.* (1904), 91 L. T. 722, C. A., and *Lyne* v. *Nicholls* (1906), 23 T. L. R. 86: "In order to constitute disparagement, which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning ing the plaintiff's goods, that they were in disparagement of his goods and untrue, and that they have occasioned special damage to the plaintiff." In *Griffiths* v. *Benn* (1911), 27 T. L. R. 346, C. A., there was no special damage proved (see note (*n*), p. 630, *post*). In *Lyne* v. *Nicholls, supra*, where the action failed for want of proof of actual damage, it was said that an untrue statement by the defendant, the owner of a newspaper circulating in the same district as the plaintiff's newspaper, that the circulation of the defendant's newspaper "is 20 to 1 of any other weekly newspaper" was not a mere puff of the defendant's newspaper, but an untrue disparagement of the plaintiff's rival newspaper; see also *Young* v. *Macrae* (1862), 3 B. & S. 264; *Malachy* v. *Soper* (1836), 3 Bing. (N. C.) 371, 386 (slander of title). In *Riding* v. *Smith* (1876), 1 Ex. D. 91, a trader charged that the defendant falsely and maliciously spoke and published of the wife of the plaintiff, who assisted him in his business, and in relation thereto, words imputing that she had committed adultery on the business premises, whereby the plaintiff was injured in his business and certain specified persons and others who had formerly dealt with him ceased to do so. It was held that the action was maintainable, and that the special damage might be proved by general evidence of falling off of the plaintiff's business; and see the criticism of this case in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 534, C. A.

(*m*) *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L., *per* Lord HALSBURY, L.C., at p. 333. It is a question for the jury whether the words reflect on the trader or merely disparage his goods (*ibid.*). For a case where the Court of Appeal set aside a verdict and judgment for the plaintiff see *Griffiths* v. *Benn*, *supra*, referred to note (*n*), p. 630, *post*. For a statement of the law on the subject, see the judgment of Lord ESHER, M.R., in *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A., at p. 139: "If what is stated relates to the goods in which he deals, the jury would have to consider whether the statement is such as to import a statement as to his conduct in business. Suppose the plaintiff was a merchant who dealt in wine, and it was stated that wine which he had for sale of a particular vintage was not good wine; that might be so stated as only to import that the wine of the particular year was not good in whosesoever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be with regard to his goods only, and there would be no libel, although such a statement, if it were false and were made maliciously with intent to injure him and it did injure him, might be made the subject of an action on the case. On the other hand, if the statement were so made as to import that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business and show that he was an inefficient man of business. If so, it would be a libel . . ." On the above principle an action of libel was held to lie without proof of malice or special damage for an untrue statement in a newspaper that a ship of which the plaintiff was owner and master, and which he had advertised for a voyage, was not seaworthy, and that Jews had bought her as a ship to take out convicts (*Ingram* v. *Lawson* (1840), 6 Bing. (N. C.) 212). In *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, P. C., an action for libel, it was held that the word "Ananias," as applied to the plaintiff's newspaper, did not necessarily impute wilful and deliberate falsehood to him; whether it was used extravagantly or for the purpose of conveying an imputation on the plaintiff was a question for the jury. In *Heriot* v.

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Sometimes, however, an action on the case, for false and malicious statements causing actual damage to the plaintiff, may lie, even though no action of libel or slander properly so called would lie, there being no reflection on the plaintiff himself (*n*).

Actions on the case.

On the other hand, if the second condition is not satisfied, that is, if the statement is not published of the plaintiff in the way of his trade, business, profession, calling, or office, though it reflects on him personally, he is not entitled to special consideration, and cannot use the statement as the foundation of an action of libel or slander, unless it is calculated to hold him up as a man (*o*) to hatred, contempt, or ridicule.

Effect where statement does not reflect on plaintiff in the way of his trade etc.

1185. A statement reflects on another in the way of his trade, business, profession, calling, or office if, but only if, it imputes to him the want of some general requisite therefor, as honesty, capacity, fidelity, or the like, or connects the imputation with the plaintiff's trade, business, profession, calling, or office (*p*).

When does a statement reflect on one in the way of his trade etc.?

Stuart (1796), 1 Esp. 437, it is reported that it was admitted by Erskine, for the plaintiff, not to be actionable for one newspaper to describe another newspaper as the most vulgar, ignorant, and scurrilous journal, but contended by him that it was actionable to go on to state: "It is lowest now in circulation, and we submit the fact to the consideration of advertisers," to which the report says Lord KENYON assented.

(*n*) See the notes (*h*)—(*m*), pp. 627—629, *ante*, note (*l*), p. 611, *ante*, and notes (*j*) and (*k*), p. 618, *ante* See also *Griffiths* v. *Benn* (1911), 27 T. L. R. 346, C. A. (disparagement of system worked under a patent; no special damage), where the Court of Appeal allowed the appeal of the defendant from a verdict and judgment at a trial before a judge and a special jury. COZENS-HARDY, M.R. (*ibid.*, at p. 350), said: "Have the plaintiffs in this case satisfied the onus, which admittedly lies on them, of showing that the words used convey to the mind of any reasonable man a personal imputation upon them, either upon their character or upon the mode in which their business is carried on? . . . There is a violent, and, as the jury found, an unjustifiable, attack upon the 'G.B.' system—an attack which has not been proved to have caused any special damage. It seems to me extravagant to argue that an attack upon the system must be regarded as an imputation upon the owner of the patents who supplies the parts and licenses the use of the system." As to the expression "trade libel," see *ibid.*

(*o*) See the passage from the judgment of PARKE, B., in *Boydell* v. *Jones* (1838), 4 M. & W. 446, cited in note (*t*), p. 634, *post.*

(*p*) *Lumby* v. *Allday* (1831), 1 Cr. & J. 301, per BAYLEY, B., at p. 305, approved in *Ayre* v. *Craven* (1834), 2 Ad. & El. 2; *Miller* v. *David* (1874), L. R. 9 C. P. 118, 125; *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., *per* Lord HERSCHELL, at p. 800. See also note (*l*), p. 621, *ante*, and *Botterill* v. *Whytehead* (1879), 41 L. T. 588 (where it was held to be a libel on an architect actually employed to do certain work to write that he has no experience in the work in which he is so employed). In *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A., the plaintiff, a quantity surveyor, brought an action of libel against a building owner for the following statement on a postcard sent to the builder: "There are great errors in the quantities posted to you this morning." Judgment was given for the defendant on the question of privilege, but A. L. SMITH, M.R. (*ibid.*, at p. 4), said that he could not say that the writing was not capable of a defamatory meaning, or that the judge could have withdrawn the case from the jury.

Although as a general rule it is useless to quote authorities to show that particular words have been held to be or not to be defamatory (*Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L., *per* Lord HALSBURY, L.C., at p. 333)—and see the remarks of Lord LOREBURN, L.C., in *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209, at

p. 215, as to cases which do not establish a principle but merely record the application of a principle to a particular set of facts—the following cases may be consulted, in addition to those cited in notes (*h*)—(*o*), pp. 627—630, *ante*, in illustration of the principles referred to in the text:—

(i.) Trades:—The proprietor of a publication, by a mistake in the arrangement of the *London Gazette* notices, inserted the names of the plaintiffs' firm under the head, "First meetings under the Bankruptcy Act" instead of "Dissolutions of Partnership." Held, a libel (*Shepheard* v. *Whitaker* (1875), L. R. 10 C. P. 502). "Messrs. H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the C. and C. Bank": innuendo, that the circular imputed insolvency. Held by the House of Lords (Lord PENZANCE dissenting) that in their natural meaning the words were not libellous, and that the inference suggested by the innuendo was not one which reasonable persons would draw (*Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741). Compare *Capel* v. *Jones* (1847), 4 C. B. 259. Where the defendants published in their trade newspaper under the heading "The Gazette," under the sub-heading "County Court Judgments," a list of county court judgments in which was included a judgment against the plaintiff, and the innuendo was that there was an unsatisfied judgment against the plaintiff in a county court, and that the plaintiff was a person unable and unwilling to pay his debts, whereas the plaintiff had in fact satisfied the judgment, but had not obtained a certificate of satisfaction before the date of the publication of the statement complained of and at the date of the publication the judgment was on the register, the judge held that the words were capable of the alleged defamatory meaning, and left it to the jury to say whether they were libellous; the jury found for the plaintiff. Held, that the direction and verdict were right (*Williams* v. *Smith* (1888), 22 Q. B. D. 134, distinguishing *Fleming* v. *Newton* (1848), 1 H. L. Cas. 363, on the ground that the effect of the judgment of Lord COTTENHAM is to place the publication of a mere extract from a record of judgments kept pursuant to a statute on the same footing as a report of a judicial inquiry, and that in that case the statement published by the defendant was true, and following *M'Nally* v. *Oldham* (1863), 16 I. C. L. R. 298; distinguishing also *Cosgrave* v. *Trade Auxiliary Co.* (1874), 8 I. R. C. L. 349, on the ground that the statement was followed by a note to the effect that the judgment was satisfied). See also, as to publication of registers of judgments and the limits of privilege in the case of trade protection societies, the cases cited in note (*n*), p. 689, *post*. It is actionable *per se* to say that a bank has stopped payment (*Bromage* v. *Prosser* (1825), 4 B. & C. 247); and it is of course libellous to publish such a statement in writing (*Forster* v. *Lawson* (1826), 3 Bing. 452). As to a libel by calling a trader a man of straw and imputing that he is insolvent, see *Eaton* v. *Johns* (1842), 1 Dowl. (N. S.) 602. It is actionable *per se* to impute even past insolvency to a trader (*Leycroft* v. *Dunker* (1633), Cro. Car. 317). For a case of libel by imputing that the plaintiffs had been guilty of personal misconduct and fraud by conniving at the use of false weights, see *Prior* v. *Wilson* (1856), 1 C. B. (N. S.) 95. As to a libellous imputation on a bookseller that he is in the habit of publishing immoral and foolish books see *Tabart* v. *Tipper* (1808), 1 Camp. 350.

(ii.) Business or calling:—Where the plaintiff had been employed by the defendant as his traveller, and the defendant circulated the following notice among his customers: "H. B. is no longer in our employ. Please give him no order or pay him any money on our account." Held, after the jury had found that the notices were libellous and had been circulated maliciously, that the words were not capable of bearing a defamatory meaning, and that the defendant was entitled to judgment (*Beswick* v. *Smith* (1907), 24 T. L. R. 169 C. A.); compare *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68; *Mulligan* v. *Cole* 1875), L. R. 10 Q. B. 549. As to a libel on the secretary of a railway company as such by imputing to him *cacoethes scribendi*, see *Robertson* v. *Wylde* (1838), 7 L. J. (C. P.) 196, where TINDAL, C.J., said: "A more dangerous fault could not be imputed to a secretary than that of writing too much."

(iii.) Professions:—Art teacher: The plaintiff had formerly been a master at a Science and Art Institute. The following notice, signed by the defendants as officers of the institute, was published in a local newspaper:—"

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Institute. The public are informed that Mr. M.'s" (the plaintiff's) "connection with the institute has ceased, and that he is not authorised to receive subscriptions on its behalf." Innuendo, that the plaintiff falsely pretended to be authorised to receive subscriptions on behalf of the institute. Held, that the judge was right in directing a non-suit, since the notice was not capable of a defamatory meaning (*Mulligan* v. *Cole* (1875), L. R. 10 Q. B. 549; compare *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68; *Beswick* v. *Smith* (1907), 24 T. L. R. 169, C. A.). Clergymen:—As to when an imputation of incontinence on a clergyman is actionable *per se*, see note (*l*), p. 621, *ante*. As to fair comment on the conduct of a clergyman respecting the way in which he uses the church and the vestry room, see *Kelly* v. *Tinling* (1865), L. R. 1 Q. B. 699. It is libellous to write of a Protestant archbishop that he attempts to convert Roman Catholic priests by offers of money and preferment (*Tuam (Archbishop)* v. *Robeson* (1828), 5 Bing. 17, 21). As to whether it is libellous to charge a Roman Catholic priest with imposing a degrading penance, see the criticism by Lord BLACKBURN in *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at pp. 778—781, of *Hearne* v. *Stowell* (1840), 12 Ad. & El. 719, and see note (*b*), p. 625, *ante*. Medical men:—See note (*l*), pp. 621, 622, *ante*, and note (*k*), (ii.), pp. 636, 637, *post*:—A medical man has no cause of action for an injunction or damages because of the unauthorised use of his name by the owner of a drug in advertising the drug, unless the publication is defamatory or injures him in his property, business, or profession (*Dockrell* v. *Dougall* (1899), 80 L. T. 556, C. A.). It is libellous to write of the plaintiff, a physician, that another physician, refusing to act with the plaintiff, had discharged his duty to his medical brethren (*Ramadge* v. *Ryan* (1832), 9 Bing. 333). It is not libellous to write of a physician that he has met homœopathists in consultation, though it is alleged that in the opinion of the profession to do so is improper, and a breach of etiquette and disgraceful (*Clay* v. *Roberts* (1863), 9 Jur. (N. S.) 580). As to the expressions "physician extraordinary to several ladies of distinction" and "quack," see *Long* v. *Chubb* (1832), 5 C. & P. 55. As to leaving it to the jury to affix the meaning of the word "quack," see *Dakhyl* v. *Labouchère* (1907), [1908] 2 K. B. 325, n., H. L. As to the medical profession generally, see title MEDICINE AND PHARMACY. Solicitors:—In an action for libel for writing of the plaintiff, an attorney, who was about to commence an action for a client, a letter to the client blaming him for allowing the plaintiff to sue, and concluding, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think that when once you have ordered your attorney to write, he will not do more without your further orders; but if you once set him about it he will go to any length without orders," it was held that it was properly left to the jury whether the letter applied to the plaintiff individually or to the profession at large (*Godson* v. *Home* (1819), 3 Moore (C. P.), 223). In *Reeves* v. *Templar* (1838), 2 Jur. 137, it was held not to be libellous to write of an attorney that he did not deliver his bill of costs for fifteen years, and having made his client's will, delivered the bill after his client's death to his personal representatives. There was no innuendo, but PARKE, B., in his judgment, expressed great doubt whether the view of the rest of the court was correct. It is libellous to write ironially of an attorney, "an honest lawyer" (meaning a dishonest lawyer), "a person of the name of C. B., an attorney, was severely reprimanded . . . for what is called sharp practice in his profession" (*Boydell* v. *Jones* (1838), 4 M. & W. 446; and see further, as to this case, note (*t*), p. 634, *post*). The words "How lawyer B. treats his clients," heading a report of a case, are libellous (*Bishop* v. *Latimer* (1861), 4 L. T. 775). It was held libellous to impute that a proctor had been suspended (*Clarkson* v. *Lawson* (1829), 6 Bing. 266). Such a statement is actionable *per se*. As to the effect of not taking out a certificate, see *Jones* v. *Stevens* (1822), 11 Price, 235, cited in note (*s*), p. 634, *post*. Stockbrokers and dealers:—See *Capel* v. *Jones* (1847), 4 C. B. 259, referred to in note (*p*), (i.), p. 631, *ante*. As to the expression "wrong 'uns," see *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, C. A.

(iv.) Offices:—It is libellous to write of a magistrate that, as chairman of a finance committee, he audited accounts amounting to over £12,000 under the head of furnishing lodgings etc. for the judges, which were really to find accommodation for the magistrates (*Adams* v. *Meredew* (1829), 3 Y. & J. 219, Ex. Ch.).

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Defamatory statements "actionable *per se*" distinguished from ordinary "defamatory statements."

1186. An action will lie without proof of special damage at the suit of a person of and concerning whom a statement in any form has been made and published without lawful justification or excuse, if it be a statement within the preceding definition (*q*) of a "defamatory statement actionable *per se*."

Defamatory statements, not being defamatory statements actionable *per se*, may support an action of libel, if written or expressed in some permanent form, although special damage be neither alleged nor proved, or an action of slander, if spoken, provided that special damage be alleged and proved.

On the other hand, "defamatory statements actionable *per se*" may support not only an action of libel, but also an action of slander, even though special damage be neither alleged nor proved.

Classification of statements defamatory of person:

(1) In the way of his trade etc., or office of profit;

(2) In the way of his office of honour.

1187. "Defamatory statements actionable *per se*" have already (*q*) been divided into five classes, of which the first and second have been defined as statements which,

(1) being published of a person in the way of his trade, business, profession, calling, or office of profit carried on or held by him, at the time of the publication, are calculated to convey an imputation on him disparaging or injurious to him therein; and

(2) being published of a person in the way of his office, being an office of honour held by him at the time of the publication, impute to him dishonesty in the discharge thereof, or such misconduct as would justify his dismissal (*q*).

Distinction in definitions.

1188. It will be seen that there is very little distinction between the above two classes of "defamatory statements actionable *per se*" and those statements (*r*), which, "if published of and concerning a

A newspaper published articles from which an ordinary reader, reading them as newspaper articles are usually read, might reasonably conclude that they meant to impute that the plaintiff took advantage of his position of a town councillor to get the footpaths of his own property repaired at the expense of the borough, but the footpaths of others at their own expense, and that he was unfaithful and corrupt in the discharge of his office. Held, that the question is not the meaning to be derived from a critical reading, but what meaning the words convey to an ordinary reader, reading them as newspaper articles are usually read (*Hunter* v. *Ferguson & Co.* (1906), 8 F. (Ct. of Sess.) 574). As to a returning officer, see *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A. As to an overseer see *Cheese* v. *Scales* (1842), 10 M. & W. 488. In *Parmiter* v. *Coupland* (1840), 6 M. & W. 105, where an action was brought by the plaintiff, a former mayor, for a series of libels imputing partial and corrupt conduct and ignorance of his duties as mayor, it was held that a publication might be a libel on a private person which would not be any libel on a person in a public capacity, but any imputation of unjust or corrupt motives is equally libellous in any case.

(v.) Other illustrations:—See also in addition to the above cases (most of which were libel actions) the cases (most of which were actions of slander) which are cited in note (*k*), p. 635, *post*, to illustrate what statements relating to trades etc. are and are not actionable *per se*.

(*q*) See p. 607, *ante*.

(*r*) Included in the definition of ordinary "defamatory statements." See p. 606, *ante*.

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person, are calculated to convey an imputation on him disparaging or injurious to him in his trade, business, profession, calling, or office." The distinction is that the definition of the latter statements does not make mention of the trade etc. being carried on or held by him "at the time of the publication."

Statement not actionable *per se* unless trade etc. held at time of publication.

1189. It is clear that a statement is not actionable *per se* as reflecting on another in the way of his trade, business, profession, calling, or office (whether it be an office of credit or of honour), unless he exercises or holds it at the time of the publication (*s*), and there seems to be no reason why the law should make a distinction in this respect between statements "actionable *per se*" and ordinary defamatory statements, not actionable *per se*, which reflect on a man in the way of his trade etc. In certain libel cases, it is true, plaintiffs have recovered judgment for statements reflecting on them in the discharge of a former office; but it is believed that on examination it will be seen that those were cases where there was a reflection on the plaintiff as a man calculated to hold him up to hatred, contempt, or ridicule (*t*).

(*s*) See *Bellamy* v. *Burch* (1847), 16 M. & W. 590 (action of slander by a renter of tolls), and the cases there cited; *Tuthill* v. *Milton* (1609), Yelv. 158 (where the plaintiff was a linen draper); *Moore* v. *Synne* (1619), 2 Roll. Rep. 84 (where the plaintiff declared that he had been an attorney for years now elapsed and that the defendant had called him a forging knave); and *Collis* v. *Malin* (1632), Cro Car. 282 (where, in an action for words "Thou art a bankrupt," it was found for the defendant, because the plaintiff, a dealer in cattle, did not say that the words were spoken at the time when he exercised the trade, but "*per magnum tempus usus fuit.*" In *Tuthill* v. *Milton*, *supra*, it was said that it need not be so precisely alleged in actions for defamation on a man in the way of his trade or profession that he was carrying it on at the time of publication as in the case of defamation on a man in the way of his office; "for a man shall not be intended to alter his trade or profession, but by presumption he continues it during his life." In *Jones* v. *Stevens* (1822), 11 Price, 235, in an action for libel on the plaintiff in his profession of an attorney, it was held to be no objection that it appeared that at the time of the publication the plaintiff had omitted to take out his certificate as required by statute for more than a year: for he was still an attorney at the date of the publication, though he could not legally conduct cases for the time being. As to what is a business within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28 (3), see *Re Griffin, Ex parte Board of Trade* (1890), 8 Morr. 1, C. A.

(*t*) See the cases cited in note (*p*), (iv.), p. 632, *ante*. In *Boydell* v. *Jones* (1838), 4 M. & W. 446 (see note (*p*), (iii.), p. 631, *ante*), the defendant contended that the declaration ought to have gone on to allege that the plaintiff continued to practice as an attorney; but PARKE, B., said: "Suppose he had ceased to practice as an attorney—this is not an action for words, but for a libel. This is a libel on him as a man. Suppose he had retired from the profession and taken his name off the roll, to write of him that, whilst he was an attorney, he had been guilty of sharp practice, would be a libel on him"; but, *semble*, only because the words would be defamatory of him as a man. In *Parmiter* v. *Coupland* (1840), 6 M. & W. 105, PARKE, B., at p. 108 (see note (*b*) p. 625, *ante*), by his definition of libel seemed to treat the case as one of a libel on the plaintiff as a man, so far as concerned the question whether the words were defamatory or not. The definition cited in note (*k*), p. 607, *ante*, as to what is a libel on a man in the way of his trade, which has been adopted in the text, does not add the words "carried on by him at the time of the publication," but the words "calculated to convey to those to whom it is published an imputation on the plaintiffs injurious to them in their trade" seems to import it.

1190. Again, the distinction, *quâ* statements "actionable *per se*," between offices of profit on the one hand and offices of honour on the other hand, is established; and there seems to be no reason why a like distinction should not apply to ordinary defamatory statements which are not calculated to hold the plaintiff up to hatred, contempt, or ridicule as a man (*a*).

Distinction: Offices of profit; Offices of honour.

1191. In other respects the principles applicable to ordinary "defamatory statements" of a man in the way of his trade, business, profession, calling, or office, which have been already discussed (*b*), and to "defamatory statements actionable *per se*" of a man in the way of his trade etc. are the same.

General application of principles.

Thus, the trade etc. must be lawful (*c*).

Trade must be lawful;

Again, in order to found an action of libel or slander properly so called, there must be a reflection on the plaintiff himself and not merely on his goods (*d*); but, as has been stated in discussing "defamatory statements," a statement as to the plaintiff's goods may import a reflection on the plaintiff himself (*d*).

Statement must reflect on plaintiff, not on his goods.

The test of whether a statement is "in the way of his trade etc." or not is that which applies to defamatory statements (*e*), subject to the limitation in the case of offices of honour, which is found in the definition of the second class of defamatory statements actionable *per se* (*f*).

Test as to statements "in the way of his trade."

1192. As to offices of profit, a statement is not actionable *per se* unless it imputes that by reason of the want of some general requisite, such as ability or honesty, the plaintiff is unfit to hold the office or unless the imputation is connected with the office (*g*).

Statements as to offices of profit.

As to offices of credit or honour, it is quite clear that the mere imputation of want of ability or capacity is not sufficient to make a statement actionable *per se* (*h*). It is sufficient to impute misconduct in the discharge of such an office which would render him liable to be removed from or deprived of it (*i*), and it is sufficient to impute dishonesty or malversation in a public office of trust, whether there is a power of removal or deprivation for such misconduct or not (*k*).

Statements as to offices of honour.

(*a*) In *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., it was agreed by all the members of the court that the words, which imputed habitual intemperance to the plaintiff, would have been actionable if written; but, *semble*, because they were defamatory of him as a man.

(*b*) See pp. 628 *et seq.*, *ante*.

(*c*) See note (*h*), p. 627, *ante*. The office or trade or calling, if lawful, need not be one of which the court will take judicial notice; see *Foulger* v. *Newcomb* (1867), L. R. 2 Exch. 327, 330.

(*d*) See pp. 611, 618, 628, 629, *ante*.

(*e*) See note (*p*), p. 630, *ante*.

(*f*) See pp. 607, 633, *ante*.

(*g*) See note (*l*), p. 621, and note (*p*), p. 630, *ante*.

(*h*) *Alexander* v. *Jenkins*, *supra*, *per* Lord HERSCHELL, at p. 801, *per* LINDLEY, L.J., at p. 804; *Onslow* v. *Horne* (1771), 2 Wm. Bl. 750; *Gallwey* v. *Marshall* (1853), 9 Exch. 294.

(*i*) *Alexander* v. *Jenkins*, *supra*, *per* Lord HERSCHELL, at p. 802.

(*k*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571, C. A., where an alderman of a borough was charged with using his office for the purpose of dishonestly procuring an advantage for himself, and it was held that an action of slander lay

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(iii.) Statement imputing crime punishable by imprisonment.

1193. An action will lie without proof of special damage at the

without proof of special damage, and (*per* LOPES, L.J., at p. 579) that the words complained of were also actionable *per se* as imputing a criminal offence on the principle laid down by Lord MANSFIELD in *Bembridge's Case* (1783), 22 State Tr. 1, at p. 156, and *Anon.* (1734), 6 Mod. Rep. 96 (case 136).

The following cases are cited as illustrating the principles governing the first two classes of statements actionable *per se*:—

(i.) Trades:—Words are actionable *per se* which impute to a man fraudulent conduct in the business whereby he gains his bread (*Thomas* v. *Jackson* (1825), 3 Bing. 104, *per* BEST, C.J., at p. 105). Any accusation of dishonesty in the trade or business is sufficient (*Griffiths* v. *Lewis* (1845), 7 Q. B. 61 (accusation of use of false weights); *Bryant* v. *Loxton* (1826), 11 Moore (C. P.), 344 (accusing an auctioneer and appraiser of cheating in his business)). It makes no difference that the trade etc. be base (*Terry* v. *Hooper* (1663), 1 Lev. 115, *per* KELYNGE, WYNDHAM, and TWYSDEN, JJ.), and the opinion to the contrary in the case of porters, cooks, and grooms expressed in *Bell* v. *Thatcher* (1675), 1 Vent. 275, would not now be followed. Though it is defamatory to call any person a swindler (*J'Anson* v. *Stuart* (1787), 1 Term Rep. 748), it is not actionable *per se*, if the words are not spoken of the plaintiff in relation to his trade, business etc. (*Black* v. *Hunt* (1878), 2 L. R. Ir. 10; compare *Savile* v. *Jardine* (1795), 2 Hy. Bl. 531, and *Sibley* v. *Tomlins* (1833), 4 Tyr. 90). As to words imputing that a trader uses deceit or other malpractice, see further Com. Dig., tit. Action on Case for Defamation, (D. 26) and (D. 27); Bac. Abr., tit. Slander (B.), 4 (5). It is actionable *per se* to impute insolvency to a tradesman, even though bankruptcy be not imputed (*Read* v. *Hudson* (1700) 1 Ld. Raym. 610; approved in *Whittington* v. *Gladwin* (1826), 5 B. & C. 180 (innkeeper)). Compare *Southam* v. *Allen* (1683), T. Raym. 231, where the words "Deal not with the plaintiff" (an innkeeper) "for he is broken, and there is neither entertainment for man or horse" were held actionable. See also *Stanton* v. *Smith* (1727), 2 Ld. Raym. 1480 (where it was held actionable *per se* to say of a trader, "He is a sorry pitiful fellow and a rogue; he compounded with his debts at 5*s.* in the pound"), approved in *Jones* v. *Littler* (1841), 7 M. & W. 423, *per* PARKE, B., at p. 426, notwithstanding the observations of COLTMAN, J., in *Doyley* v. *Roberts* (1837), 3 Bing. (N. C.) 835. In *Jones* v. *Littler*, *supra*, it was held actionable *per se* to say of a brewer that he had been in a sponging house for debt; and in *Brown* v. *Smith* (1853), 13 C. B. 596, to say of a tradesman, "If he does not . . . make terms with me, I will make a bankrupt of him." See also *Rolin* v. *Steward* (1854), 14 C. B. 595, *per* WILLIAMS, J., at p. 607 (action of damages for dishonour of cheque). As to imputation of past insolvency, see *Leycroft* v. *Dunker* (1633), Cro. Car. 317, and note (*c*), p. 626, *ante*. See also Com. Dig., tit. Action on Case for Defamation, (D. 25).

(ii.) Professions:—Solicitors and attorneys: Words which, though spoken of a professional man, do not touch him in his profession, are not actionable *per se* (*Doyley* v. *Roberts*, *supra*, *per* TINDAL, C.J., at pp. 839, 840), approving *Ayre* v. *Craven* (1834), 2 Ad. & El. 2; and see Com. Dig., tit. Action on Case for Defamation (D. 27). In *Doyley* v. *Roberts*, *supra*, the plaintiff, a solicitor, failed to recover for the above reason. The words complained of were, "he has defrauded his creditors, and has been horsewhipped off the course at Doncaster": the jury found that they were not spoken of the plaintiff in his profession. In *Dauncey* v. *Holloway*, [1901] 2 K. B. 441, C. A., the Court of Appeal held that the following words were not reasonably capable of conveying an imputation on the plaintiff in his profession of a solicitor: "They tell me he has gone for thousands instead of hundreds this time" and "it seems to be a worse job than the other was. Miss A. told me that Mr. D. had lost thousands." A. L. SMITH, M.R., treated the two expressions as meaning that the plaintiff had lost a considerable sum of money. As to the effect of imputations of insolvency and bankruptcy, see *Dauncey* v. *Holloway*, *supra*, *per* WRIGHT, J., at pp. 443, 444. It is actionable *per se* to say of a solicitor "He is no more a lawyer than the devil" (*Day* v. *Buller* (1770), 3 Wils. 59); or "he deserves to be struck off the roll" (*Phillips* v. *Jansen* (1798), 2 Esp. 624); see also Com. Dig., tit. Action on Case for Defamation, (D. 24); Bac. Abr., tit. Slander (B.),

suit of a person of and concerning whom (*l*) a statement in any form has been made and published without justification or excuse imputing that he has committed a crime punishable by imprisonment (*m*). The distinction is not between indictable and non-indictable offences, but between offences for which a man can be made to suffer corporally and those for which the punishment is the mere infliction of a fine (*n*).

4 (3). As to libels, see note (*p*), (iii.), p. 631, *ante*. Barristers: See Com. Dig., tit. Action on Case for Defamation (D. 22); Bac. Abr., tit. Slander (B.), 4 (3). Clergymen: As to accusations of incontinence, see note (*l*), p. 621, *ante;* as to libels, see note (*p*), (iii.), p. 631, *ante*, and *Highmore* v. *Harrington* (*Earl*) (1857), 3 C. B. (N. S.) 142, (where there was also a charge of misappropriating the sacrament money). It is actionable *per se* to say of a clergyman that he performed divine service in a towering passion (*Walker* v. *Brogden* (1865), 19 C. B. (N. S.) 65). As to what charges of dishonesty reflect on a clergyman in his profession and what do not, see *Pemberton* v. *Colls* (1847), 10 Q. B. 461. In *Hopwood* v. *Thorn* (1849), 8 C. B. 293, the plaintiff, a dissenting minister, was accused by spoken words of having cheated his brother-in-law before he had become a minister. Although the defendant had alleged that the plaintiff was unfit to be a minister by reason of his alleged former misconduct, the court held that the words were clearly not actionable *per se*. Medical men: As to accusations of immorality, see *Ayre* v. *Craven* (1834), 2 Ad. & El. 2; *Dixon* v. *Smith* (1860), 5 H. & N. 450, and note (*l*), p. 621, *ante*, and note (*p*), (iii.), p. 631, *ante*. The words "he is a bad character, none of the medical men here will meet him," are, *semble*, actionable *per se* (*Southee* v. *Denny* (1847), 1 Exch. 196, 203), as importing a want of necessary qualification for a surgeon in the ordinary discharge of his professional duties. It is actionable *per se* to impute to a medical man that he is "no scholar" (*Cawdry* v. *Highley* (1632), Cro. Car. 270), or is so deficient in skill or care that he had either caused his patients to die, or at least that inquests had been held inquiring whether he had not been the cause of the death of many persons (*Southee* v. *Denny*, *supra*); see also *Edsall* v. *Russell* (1842), 4 Man. & G. 1090. Where the words deny that the plaintiff is duly qualified, the plaintiff must prove that he practised lawfully (*Collins* v. *Carnegie* (1834), 1 Ad. & El. 695); see also *Pickford* v. *Gutch* (1787), cited in *Moises* v. *Thornton* (1799), 8 Term Rep. 303, 305, n.; compare *Smith* v. *Taylor* (1805), 1 Bos. & P. (N. R.) 196, where the words admit the qualification; and see, further, Bac. Abr., tit. Slander (B.), 4 (2); Com. Dig., tit. Action on Case for Defamation, (D. 23).

(iii.) Offices:—See *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A. cited in notes (*h*) and (*i*), p. 635, *ante;* *Booth* v. *Arnold*, [1895] 1 Q. B. 571, C. A., cited in note (*k*), p. 635, *ante*. As to libels, see note (*p*), (iv.), p. 632, *ante*. For old cases illustrating what words have been held to be actionable *per se*, see Bac. Abr., tit. Slander (B.), 3, (1) Persons in Judicial Offices; *ibid.* (2) Offices of Trust; and Com. Dig., tit. Action on Case for Defamation (D. 13), Judges; (D. 14), Members of Parliament; (D. 15), Justices of Peace, and as to what words are not actionable *per se*, (F. 8); (D. 17), Commissioners to examine Witnesses; (D. 18), Receiver; (D. 19), Parish Officer; (D. 20), Juryman; (D. 21), Steward etc. As to the danger of citing cases of particular words, see note (*t*), p. 639, *post*. The class of cases to which relief will be given for spoken words where no special damage is proved will not be extended; see *Dauncey* v. *Holloway*, [1901] 2 K. B. 441, C. A. In *James* v. *Brook* (1846), 9 Q. B. 7, the following words, "I saw a letter respecting an officer of the Leeds police force . . . who had been guilty of conduct unfit for publication," were held not to be actionable *per se*, although spoken of a superintendent of police, the misconduct not being connected with his official character.

(iv.) Calling:—It is actionable *per se* to impute drunkenness to a sea captain when in command of a vessel at sea (*Irwin* v. *Brandwood* (1864), 2 H. & C. 960).

(*l*) See note (*e*), p. 641, *post*.

(*m*) *Webb* v. *Beavan* (1883), 11 Q. B. D. 609: *Holt* v. *Scholefield* (1796), 6 Term Rep. 691; *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609, *per* BRAY, J.

(*n*) *Webb* v. *Beavan*, *supra*, *per* POLLOCK, B., at p. 610. The words complained

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Words which convey a mere suspicion that plaintiff has committed a crime or a mere intent to do so.

1194. Spoken words which convey a mere suspicion that the plaintiff has committed a crime punishable by imprisonment will not support an action without proof of special damage (*o*). When the words admit fairly of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury (*p*). But this sense is not necessarily what the defendant in fact intended (*q*).

of in that case were thus set out in the statement of claim: "I will lock you' (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there," meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. A demurrer on the ground that to make the words actionable the innuendo should have alleged that they imputed an indictable offence was overruled. Although the words "punishable by imprisonment" were not added to the innuendo, the judgment of POLLOCK, B., at p. 616, draws the distinction mentioned in the text; and the statement in his judgment that "the passages in Comyn's Digest" (tit. Action on Case for Defamation, (D. 5), "words which endanger corporal punishment," and (D. 9), "charge with words that subject to an indictment") "are conclusive to show that words which impute any criminal offence are actionable *per se*" must be read with the following sentence, which draws the above distinction. In *Michael* v. *Spiers and Pond, Ltd.* (1909), 101 L. T. 352, it was held not to be actionable *per se* to say of the plaintiff that he had committed an offence against the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12, rendering a person guilty of it liable to a fine of 10*s*., on the ground that the offence charged was neither indictable nor one for which a person could be made to suffer corporally. In that case it was held that the special damage alleged, that the father of the plaintiff (who had the power to remove) threatened to remove the plaintiff from his office of director of a limited company unless he could succeed in vindicating his character, was insufficient, on the grounds that no pecuniary or temporal damage was alleged to have accrued, and that the alleged threat was not the natural or probable consequence of speaking the words. The court further held that the imputation fairly construed could not be said to amount to a charge of being "drunk on licensed premises and appearing to be incapable of taking care of himself," within the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 1, and intimated (as has often been intimated in the case of actions for slander) that it is not desirable to expand the number of cases for which slander actions will lie without proof of special damage. It has recently been held that words imputing that the plaintiff has been guilty of a criminal offence punishable by fine only, but which involves a liability to summary arrest, will not support an action of slander without special damage (*Hellwig* v. *Mitchell*, [1910] 1 K. B. 609, BRAY, J., in which case *Webb* v. *Beavan* (1883), 11 Q. B. D. 609, and *Michael* v. *Spiers and Pond, Ltd.*, *supra*, were considered).

(*o*) *Tozer* v. *Mashford* (1851), 6 Exch. 539; *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156, 162, P. C.

(*p*) *Simmons* v. *Mitchell*, *supra*, at p. 162. In *Daines* v. *Hartley* (1848), 3 Exch. 200 (approved in *Simmons* v. *Mitchell*, *supra*, at p. 163), it was expressly ruled that a witness may not be asked with respect to spoken words in a slander case merely "What did you understand by those words?" But the question "Was there anything to prevent the words from conveying the meaning which ordinarily they would convey?" may be put, and if it appears that there was something, the question may then be put "What did you understand by them?" (*Daines* v. *Hartley*, *supra*, *per* POLLOCK, C.B., at p. 206).

(*q*) "A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both" (*Hulton* (*E.*) *& Co.* v. *Jones*, [1910] A. C. 20, *per* Lord LOREBURN, L.C. at p. 23). The same principle applies to slander (compare *Hankinson* v. *Bilby* (1847), 16 M. & W. 442, as to the immateriality of the secret intention of the speaker, and *Read* v. *Ambridge* (1834), 6 C. & P. 308, as to secret reservations of the speaker).

It is not actionable *per se* to impute to the plaintiff a mere intention or inclination (*r*) to commit a crime, but it is actionable *per se* to impute an attempt or solicitation to commit a crime which is itself a crime punishable by imprisonment (*r*).

Words must *primâ facie* be understood by court as mankind would understand them.

1195. The words must *primâ facie* be understood by the court in the same sense as the rest of mankind would ordinarily understand them (*s*). The question for the jury is what meaning in the circumstances of the particular case the words conveyed to the hearers (*t*). It is sufficient if they impute that the plaintiff has committed a crime punishable by imprisonment although the language used is popular, and although the exact crime is not specified (*a*); and, if the guilt of the plaintiff be imputed, it matters not that the charge be made in an oblique way or by way of question or conjecture, or by an epithet, or by way of report or exclamation (*b*).

(*r*) *R.* v. *Scofield* (1784), Cald. Mag. Cas. 397, *per* Lord MANSFIELD, C.J.; *Harrison* v. *Stratton* (1800), 4 Esp. 218. Otherwise in the case of treason; for the intent is treason (Com. Dig., tit. Action on Case for Defamation (D. 1).

(*s*) *Woolnoth* v. *Meadows* (1804), 5 East, 463; *Coleman* v. *Goodwin* (1782), 2 B. & C. 285, n.; S. C., *sub nom. Colman* v. *Godwin*, 3 Doug. (K. B.) 90).

(*t*) Hence it is often misleading to cite cases to show what words have been held to be and what words have been held not to be defamatory or actionable *per se;* see *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1889), 81 L. T. 331, H. L., *per* Lord HALSBURY, L.C. Secondly, in considering the old cases, *e.g.*, those collected in Com. Dig., tit. Action on the Case for Defamation, it must be remembered that some crimes, *e.g.*, as to witches and papists, are no longer crimes, and that, on the other hand, certain forms of fraud and dishonesty are now statutory crimes. Thirdly, the doctrine that words are to be construed *in mitiore sensu* has been long exploded (*Roberts* v. *Camden* (1807), 9 East, 93, *per* Lord ELLENBOROUGH, C.J.). Fourthly, that the meaning of many English words has changed. Lastly, by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61 (now repealed, but still acted on in practice), it was enacted that in actions of libel and slander the plaintiff should be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and that such averment should be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, showed a cause of action, the declaration, now the statement of claim, should be sufficient. For pleading generally, see title PLEADING.

(*a*) Thus it was held actionable *per se* to say, "You have committed an act for which I can transport you" (*Curtis* v. *Curtis* (1834), 10 Bing. 477, 478); and to say, "You have done things with the company for which you ought to be hanged, and I will have you hanged before the 1st of August" (*Francis* v. *Roose* (1838), 3 M. & W. 191, in which case PARKE, B., held that the innuendo "thereby meaning that the plaintiff had been guilty of felonies punishable by law with death by hanging" was not necessary); see also *Webb* v. *Beavan* (1883), 11 Q. B. D. 609. An action lies for saying of the plaintiff that "he is a returned convict" (*Fowler* v. *Dowdney* (1838), 2 Mood. & R. 119). As to the words "a convicted felon" and "felon editor" contained in a newspaper article, and as to what amounts to justification, see *Leyman* v. *Latimer* (1878), 3 Ex. D. 352, C. A. By the Civil Rights of Convicts Act, 1828 (9 Geo. 4, c. 32), s. 3, a person convicted of felony after enduring the punishment is in law no longer a felon (*Leyman* v. *Latimer, supra*). See also *Cuddington* v. *Wilkins* (1615), Hob. 67, 81, supported by *Searle* v. *Williams* (1618), Hob. 288, 293; and by 2 Hawk. P. C., ch. 37, approved in *Leyman* v. *Latimer, supra*, at pp. 356, 358.

(*b*) See the illustrations under those headings in Com. Dig., tit. Action on the Case for Defamation, (E.), and p. 651, *post*. As to what words are and what words are not actionable *per se*, see *ibid.* (D.), (F.); Bac. Abr., tit. Slander (B. 1),

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(iv.) Imputation of venereal disease.

1196. The remaining classes of statements actionable *per se*, namely, imputations that a person is suffering from a venereal

subject to the observations in note (*t*), p. 639, *ante*. As to the law relating to the innuendo before 1852, see the note of Serjeant Williams to *Craft* v. *Boite* (1669), 1 Saund. 246 b, n. (3); 1 Wms. Saund. pp. 314 *et seq.*; and as to the effect of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, see *ibid.*, p. 319, n. (k), of Sir E. Vaughan Williams. As to the present law of innuendo, see pp. 645 *et seq.*, *post*. The following more recent cases, in addition to those already cited, illustrate the principles relating to imputations of crime: —In general: the jury will properly consider the whole of the conversation (*Shipley* v. *Todhunter* (1836), 7 C. & P. 680; *Thompson* v. *Bernard* (1807), 1 Camp. 48; *Cristie* v. *Cowell* (1790), Peake 4, where the transaction was a mere breach of contract). Dishonesty and fraud: it is not actionable, *per se*, though it is defamatory, to impute that a person is a swindler or a villain, or dishonest or fraudulent, if an offence is not imputed which is punishable by imprisonment or if the imputation is not actionable as relating to the plaintiff in the way of his trade. See the cases cited at p. 620, *ante*. In the following cases it was held that the words complained of were not actionable *per se*: "welsher" (*Blackman* v. *Bryant* (1872), 27 L. T. 491, where the innuendo was insufficient); "blackleg" (*Barnett* v. *Allen* (1858), 3 H. & N. 376, MARTIN and BRAMWELL, BB., dissenting); "he has defrauded a mealman of a roan horse" (*Richardson* v. *Allen* (1774), 2 Chit. 657); "his shop is in the market" (*Ruel* v. *Tatnell* (1880), 43 L. T. 507, where the innuendo alleged in the pleading was not supported by the evidence); "you are a regular prover under bankruptcies" (*Angle* v. *Alexander* (1830), 7 Bing. 119, Ex. Ch.). Larceny and the like: in *Sibley* v. *Tomlins* (1833), 4 Tyr. 90, the jury found that the following words did not impute a felony: "You are a bloody thief. Who stole F.'s pigs? You did, you bloody thief, and I can prove it; you poisoned them with mustard and brimstone"; and generally speaking an adjective preceding the word "thief" takes the sting out of the accusation. But if one calls another a thief together with other names of general abuse, and, no evidence being given to explain in what sense the word thief is used, the jury finds for the plaintiff, the court will not set aside the verdict (*Penfold* v. *Westcote* (1806), 2 Bos. & P. (N. R.) 335). It has been held actionable *per se* to say of the plaintiff, "He is a thief and robbed me of my bricks" (*Slowman* v. *Dutton* (1834), 10 Bing. 402); "You robbed me, for I found the thing you have done it with" (*Rowcliffe* v. *Edmonds* (1840), 7 M. & W. 12); "He robbed John White" (*Tomlinson* v. *Brittlebank* (1833), 4 B. & Ad. 630; and see note (*m*), pp. 647, 648, *post*). "He was put in the round house for stealing ducks at Crowland" (*Beavor* v. *Hides* (1766), 2 Wils. 300); "You're a thief and robbed J. C. of his money" (*Atkinson* v. *Newton* (1854), 3 W. R. 14). It was held not actionable to say of a churchwarden who had the possession of bell-ropes, "Who stole the parish bell-ropes?" where the innuendo was that the plaintiff, while churchwarden, had stolen the parish bell-ropes, which the court held imported that the plaintiff had been guilty of larceny, which, having regard to his possession, was impossible (*Jackson* v. *Adams* (1835), 2 Bing. (N. C.) 402); and it is not actionable *per se* to say of a man that he has robbed his wife, unless the words allege that the plaintiff was living apart from, or leaving or deserting, or about to leave or desert, his wife, which would bring the case within the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12 (*Lemon* v. *Simmons* (1888), 57 L. J. (Q. B.) 260). It was held not actionable *per se* to say, "She secreted 1*s*. 6*d*. under the till," stating, "These are not times to be robbed" (*Kelly* v. *Partington* (1833), 4 B. & Ad. 700). As to a charge of receiving stolen goods, see *Alfred* v. *Farlow* (1846), 8 Q. B. 854. A newspaper setting out a conviction for "bird-liming" and describing the process of "bird-liming" spoke of the operators as "thieves." The plaintiffs, who admitted they had been convicted, sued, and by the innuendo said that the article imputed that they had been guilty of theft; but it was held that the article would not bear the innuendo (*Campbell* v. *Ritchie & Co.*, *Hay* v. *Ritchie & Co.*, [1907] S. C. 1097). Forgery: it has been held actionable *per se* to say of the plaintiff "You are a rogue, and I will prove you are a rogue, for you forged my name" (*Jones* v. *Herne* (1759), 2 Wils. 87); but not to say "I will take him to Bow Street on

disease (*c*) and imputations of adultery or unchastity to a woman or girl (*d*), require no further illustration.

SECT. 1. What Statements are Defamatory.

SECT. 2.—*The Meaning of the Statement.*

SUB-SECT. 1.—*Introductory.*

(v.) Imputation of unchastity.

Burden of proof on the issue

(i.) whether the statement refers to the plaintiff; and

1197. It is necessary for the plaintiff in an action of libel or slander to show that the statement of which he complains was made and published of and concerning himself (*e*), and that it was defamatory of the plaintiff himself within the meaning of the preceding definitions (*f*). But no words are so plain that they may

a charge of forgery," without an innuendo charging the plaintiff with felony (*Harrison* v. *King* (1817), 4 Price, 46, Ex. Ch., *per* GIBBS, C.J., citing *Wood* v. *Merrick* (1627), 1 Roll. Abr. 73, pl. 21, and *Poland* v. *Mason* (1619), Hob. 305, 326). See also the cases cited in the note to *Harrison* v. *King*, *supra*, as reported 7 Taunt. 431, 432. For the case of an advertisement which was held insufficient to charge the plaintiff with forgery of a bill of exchange, at least without an innuendo, see *Stockley* v. *Clement* (1827), 4 Bing. 162. Bigamy: as to what amounts to a charge of bigamy, see *Heming* v. *Power* (1842), 10 M. & W. 564 (action for slandering the wife of the plaintiff). Murder and manslaughter: see *Peake* v. *Oldham* (1775), 1 Cowp. 275; *Ford* v. *Primrose* (1824), 5 Dow. & Ry. (K. B.) 287, where the following words were held actionable, " . . . he " (the plaintiff) " murdered his first wife, that is, he administered improper medicines to her for a certain complaint, which was the cause of her death." Perjury: it is actionable *per se* to say of the plaintiff that he was perjured (*Holt* v. *Scholefield* (1796), 6 Term Rep. 691), or that he was under a charge of a prosecution for perjury, and that the Attorney-General had given directions to prosecute the plaintiff for perjury (*Roberts* v. *Camden* (1807), 9 East, 93); but it is not actionable *per se* merely to say of another that he is forsworn (*Holt* v. *Scholefield*, *supra*; *Hall* v. *Weedon* (1826), 8 Dow. & Ry. (K. B.) 140), unless it is shown that the words were spoken with reference to some judicial proceeding in which the plaintiff had been sworn (*Holt* v. *Scholefield*, *supra*). Embezzlement: for a case where it was held that the plaintiff was not a person amenable to a charge of embezzlement, see *Williams* v. *Stott* (1833), 1 Cr. & M. 675. Blackmailing action: it is actionable *per se* to impute that the plaintiff has brought a blackmailing action (*Marks* v. *Samuel*, [1904] 2 K. B. 287, C. A.).

(*c*) See note (*l*), p. 621, *ante*.

(*d*) See note (*k*), p. 621, *ante*.

(*e*) It is no defence that the defendant did not intend to defame the plaintiff, if reasonable people would think the language referred to the plaintiff (*Hulton (E.) & Co.* v. *Jones*, [1910] A. C. 20, where it was suggested by Lord LOREBURN during the argument that the question is not who was meant, but who was hit. See also *Harrison* v. *Smith* (1869), 20 L. T. 713; *Latimer* v. *Western Morning News Co.* (1871), 25 L. T. 44; *Gibson* v. *Evans* (1889), 23 Q. B. D. 384. As to the right of a member of a class of persons described generally to bring an action of defamation, see *Le Fanu* v. *Malcomson* (1848), 1 H. L. Cas. 637; compare *Wakley* v. *Healey* (1849), 7 C. B. 591, Ex. Ch.; and contrast *Eastwood* v. *Holmes* (1858), 1 F. & F. 347. The plaintiff must satisfy the jury that the statement referred to him. As to the use of asterisks, see *Bourke* v. *Warren* (1826), 2 C. & P. 307. As to the importance of using the words " of and concerning " both in indictments and statements of claim, see *R.* v. *Horne* (1777), 2 Cowp. 672, H. L.; *R.* v. *Alderton* (1756), Say. 280, cited in *R.* v. *Horne*, *supra*, *per* DE GREY, C.J., at p. 686; *R.* v. *Marsden* (1815), 4 M. & S. 164; *Johnson* v. *Aylmer* (1606), Cro. Jac. 126; *Lowfield* v. *Bancroft* (1732), 2 Stra. 934; *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 315, n. (h), citing *Clement* v. *Fisher* (1827), 7 B. & C. 459; *Jones* v. *Stevens* (1822), 11 Price, 235, *per* WOOD, B., at pp. 276, 277; *Hall* v. *Blandy* (1827), 1 Y. & J. 480; and see note (*t*), p. 657, *post*. The words are never in practice omitted now from the pleading.

(*f*) For the definitions, see p. 606, *ante*.

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(ii.) if so, is defamatory of him.

not be published in connection with such circumstances, and to such persons knowing those circumstances, as to convey a meaning very different from that which would be understood from the same words published in different circumstances (*g*). It follows from the words being construed in the light of the circumstances, and not necessarily literally, that it is not essential that the plaintiff should be named in the statement (*h*), nor that the words should be defamatory of the plaintiff in their primary sense.

Recourse to the innuendo.

1198. On the issue of publication of and concerning the plaintiff, it is enough if the plaintiff be sufficiently referred to so that reasonable persons to whom the statement is published would apply the statement to the plaintiff, and for this purpose recourse may be had to the innuendo pointing out the plaintiff as the particular individual to whom the statement applies in its natural meaning (*i*),

(*g*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 771. See also *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, *per* Lord BLACKBURN, at p. 763, citing notes to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 315; see note (*b*), p. 639, *ante*. As to the consequent danger of citing cases as to the meaning of particular words, see note (*t*), p. 639, *ante*.

(*h*) *Le Fanu* v. *Malcomson* (1848), 1 H. L. Cas. 637, cited note (*e*), p. 641, *ante*; compare *Merywether* v. *Turner* (1849), 19 L. J. (C. P.) 10, Ex. Ch. As to using asterisks and initial letters, see note (*e*), p. 641, *ante*. Where a libel on its face does not expressly refer to the plaintiff, some extrinsic evidence must be given in order to connect it with the plaintiff (*Fournet* v. *Pearson, Ltd.* (1897), 14 T. L. R. 82, C. A.).

(*i*) *Jones* v. *Hulton (E.) & Co.*, [1909] 2 K. B. 444, C. A., *per* FARWELL, L.J., at p. 477; *Le Fanu* v. *Malcomson, supra*, at pp. 664, 668. In *Hulton (E.) & Co.* v. *Jones* [1910] A. C. 20, Lord LOREBURN, L.C., said, at p. 241, "If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff"; and, during the argument, he suggested that the question is not who was meant, but who was hit. This appears to conflict with the following passage from the judgment of FARWELL, L.J. (S. C. [1909], 2 K. B. at p. 481): "The libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him; the manner of proof being such as I have already stated. If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A. lest some other person answering the description should suffer thereby." But it seems to follow from the judgment of Lord LOREBURN that, in the case put by FARWELL, L.J., if the friends and acquaintances of the plaintiff may reasonably fit the cap on the plaintiff, the writer would be liable to the plaintiff if the jury find that the plaintiff was hit, although the defendant also hit, and honestly intended to hit, another person. The intention of the writer is immaterial according to the decision of the House of Lords, and it will henceforth be prudent for writers to use such exclusive descriptions of persons, real or fictitious, when they are using defamatory words, that reasonable men may not apply them to persons whom the writer did not intend to describe. The facts in *Jones* v. *Hulton (E.) & Co., supra*, were as follows:—The defendants, owners and publishers of a newspaper, published in an article, which purported to deal with actual facts and not mere fiction, defamatory statements of a person believed by the author of the article and the editor to be a fictitious personage with an unusual name, "Artemus Jones." The name was that of the plaintiff, who was unknown to the author and the editor. In an action for libel it was admitted that neither the writer nor the editor nor the defendants intended to defame the plaintiff, but evidence was given by his

provided the words complained of could mean or include the plaintiff and there is evidence justifying such an inference. The defendant cannot be heard to say on this issue that he did not intend in his own mind to refer to the plaintiff contrary to the true meaning of his own words as interpreted by relevant surrounding circumstances. But it is open to the defendant to prove the surrounding circumstances, so as to show that although the words appear to refer to the plaintiff, that is not their true intent and meaning (*k*). The question of importance on this issue is,—did the statement as published hit the plaintiff? (*l*).

So, likewise, if the statement applies to the plaintiff, the burden is on the plaintiff, or the defendant according as the words do or do not require an innuendo, to show the actual meaning of the statement as interpreted in the light of the circumstances of its publication, and it is open to the defendant to show that the statement so interpreted is innocent; but the defendant cannot convert a defamatory into an innocent statement by showing that he did not in his own mind intend to convey a defamatory meaning. The question of importance on this issue is, Did the statement as published of the plaintiff defame him? (*m*).

Actual words must be pleaded and proved.

1199. In order that the statement complained of in an action of libel or slander may be construed or interpreted, it is essential that the actual words, and not merely their substance, should be set forth *verbatim* in the statement of claim (*n*) or indictment (*n*), and proved

friends that they thought the article referred to him. On appeal by the defendants from a verdict and judgment for the plaintiff, it was held by the Court of Appeal (Lord ALVERSTONE, C.J., and FARWELL, L.J., FLETCHER MOULTON, L.J., dissenting) that the plaintiff was entitled to succeed ([1909] 2 K. B. 444, C. A.); and on appeal to the House of Lords (Lord LOREBURN, L.C., and Lords ATKINSON, GORELL, and SHAW OF DUNFERMLINE) this decision was affirmed, *sub nom. Hulton (E.) & Co.* v. *Jones*, [1910] A. C. 20. Lords ATKINSON and GORELL (*ibid.*, at p. 25) concurred substantially with the judgment of FARWELL, L.J., in the Court of Appeal as well as with the judgment of Lord LOREBURN, L.C. The question is whether reasonable men in all the circumstances of the publication apply the statement to the plaintiff. If so, it is published of and concerning the plaintiff, no matter what the intention of the writer in his own mind may have been. If the statement complained of appeared in what was apparently a work of fiction, the plaintiff would require very strong evidence to support his case. As to the intention of the defendant and as to the meaning and use of the words "of and concerning" the plaintiff, see note (*e*), p. 641, *ante*, and the cases there cited.

(*k*) *Jones* v. *Hulton (E.) & Co.*, [1909] 2 K. B. 444, *per* FARWELL, L.J., at p. 479. The test is what reasonable persons to whom the words were published would understand them to mean in the circumstances of the particular case.

(*l*) See note (*i*), p. 642, *ante*.

(*m*) On this issue it has always been recognised that the intention of the defendant cannot override the meaning of the words as interpreted in the light of the circumstances of the publication; see notes (*g*) and (*i*), p. 642, *ante*.

(*n*) The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, refers to the "words or matter set forth" (see note (*t*), p. 639, *ante*). By the old rules of pleading the actual words were required to be set forth in the declaration or indictment, and this is still the law (*Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at pp. 771, 772, citing *Bradlaugh* v. *R.* (1878), 3 Q. B. D. 607, C. A., and *Harris* v. *Warre* (1879), 4 C. P. D. 125). See also *Zenobio* v. *Axtell* (1795), 6 Term Rep. 162; *Wood* v. *Brown* (1815), 1

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at the trial (*o*). It is not sufficient for a witness to depose to the substance of the statement, or to the impression made on his mind by a conversation (*p*), or the reading of written matter (*q*); for otherwise the witness would usurp the functions of the judge and jury (*r*).

Whole publication must be read.

1200. The defendant has a right to have the whole of a publication read, from which extracts are set forth in the statement

Marsh. 522; *Wright* v. *Clements* (1820), 3 B. & Ald. 503; *Gutsole* v. *Mathers* (1836), 1 M. & W. 495; and *Solomon* v. *Lawson* (1846), 8 Q. B. 823, cited in notes to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 311, n. (a); see also *Cook* v. *Cox* (1814), 3 M. & S. 110; *West* v. *Smith* (1836), 4 Dowl. 703). But where the plaintiff set forth in his declaration the actual words of which he complained, which were contained in a letter, and omitted to set forth the rest of the letter, which had no bearing on the nature of the imputation and did not in any degree alter its quality or effect, it was held that the omission was not a ground of variance (*Rutherford* v. *Evans* (1830), 6 Bing. 451). Compare *Bourke* v. *Warren* (1826), 2 C. & P. 307; and *Buckingham* v. *Murray* (1825), 2 C. & P. 46 (where the contents of a libellous index were set forth without inserting the article therein referred to). In *Saunders* v. *Bate* (1856), 1 H. & N. 402, where the declaration set out the purport of the libel, the judge at the trial properly allowed it to be amended by introducing a letter alleged to contain the libel followed by the words "meaning thereby" before the libel charged in the declaration. As to amendment, see further R. S. C., Ord. 28, r. 1, note (*o*), *infra*, note (*x*), p. 645, *post*, and note (*o*), p. 648, *post*. As to the rule, making it incumbent to set out the words complained of, being applicable to indictments as well as to statements of claim, see *Bradlaugh* v. *R.* (1878), 3 Q. B. D. 607, C. A., and the cases there cited, and note (*p*), p. 741, *post*. As to it being now unnecessary to set out the obscene passages in any indictment or other judicial proceeding against the publisher of any obscene libel, see the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7; and note (*g*), p. 737, *post*.

(*o*) *M'Connell* v. *M'Kenna* (1860), 10 I. C. L. R. 511; *Armitage* v. *Dunster* (1785), 4 Doug. (K. B.) 291. An allegation of words spoken affirmatively is not supported by proof that they were spoken by way of interrogatory (*Barnes* v. *Holloway* (1799), 8 Term Rep. 150); nor is an allegation of words spoken to the plaintiff in the second person supported by proof of words spoken of him in his presence in the third person (*Stannard* v. *Harper* (1829), 5 Man. & Ry. (K. B.) 295). The words "Hancock's wife is a great thief, and ought to have been transported seven years ago," are not supported by proof of the speaking of the words "Hancock's wife is a damned bad one; she ought to have been transported seven years ago" (*Hancock* v. *Winter* (1816), 7 Taunt. 204: there was no innuendo in that case). Words spoken at different times have been held to be admissible in evidence on one count (*Charlter* v. *Barret* (1790), Peake, 32 [22]). But the plaintiff will, subject to leave being given to amend, be bound by his particulars. The court in *Camfield* v. *Bird* (1852), 3 Car. & Kir. 56, refused to amend when it was of opinion that the defendant did not mean by the words as proved to imply a slanderous charge. But the question is not what the defendant meant, but what the words as proved meant. The proper time to apply to amend the statement of claim, where there is a variance between the statement of claim and the proof, is at the conclusion of the plaintiff's case, though there is jurisdiction to allow an amendment later (*Rainy* v. *Bravo* (1872), L. R. 4 P. C. 287, 298; see R. S. C., Ord. 28, r. 1). The powers of amendment are now very wide (see R. S. C., Ord. 28, r. 1). As to amendment generally, see title PLEADING.

(*p*) *Harrison* v. *Bevington* (1838), 8 C. & P. 708.

(*q*) *Rainy* v. *Bravo*, *supra*, where, the defendant having destroyed the letter containing the words complained of, it was held that secondary evidence of its contents was admissible, but that the actual words as laid must be proved. As to the admission of secondary evidence, see title EVIDENCE, Vol. XIII., pp. 422, 518 *et seq.*

(*r*) *Rainy* v. *Bravo*, *supra*.

of claim (*s*). If the words as set forth in the statement of claim are materially qualified by evidence of words not contained in the statement of claim, it is a "variance," though the words as qualified are still defamatory (*t*). It is, however, sufficient for the plaintiff to prove part only of a sentence set forth in the statement of claim if the remainder does not qualify the part proved, and the part proved is intelligible of itself and actionable (*u*). So where the statement of claim sets forth distinct allegations of slander, the plaintiff is entitled to a verdict on those which he establishes (*v*); but where the whole of the statement as set forth in the pleading constitutes one charge, the whole must be proved (*w*).

Immaterial variances.

The court or a judge may at any stage of the proceedings allow either party to alter or amend his indorsement or pleading in such manner and on such terms as may be just, and all such amendments must be made for the purpose of determining the real question in controversy between the parties (*x*).

Amendment.

SUB-SECT. 2.—*The Innuendo.*

1201. A statement is *primâ facie* defamatory (*y*) if the words in their natural and primary sense, that is, in their plain and popular meaning, are defamatory (*a*). A statement *primâ facie* defamatory

Statements *primâ facie* defamatory.

(*s*) *Cooke* v. *Hughes* (1824), Ry. & M. 112. In an action for libel contained in a newspaper the defendant can insist on having read as part of the plaintiff's case another part of the same newspaper referred to in the libel complained of (*Thornton* v. *Stephen* (1837), 2 Mood. & R. 45). But in *Darby* v. *Ouseley* (1856), 1 H. & N. 1, where the plaintiff had given in evidence, on the question of malice, a paragraph in a subsequent newspaper containing similar imputations, it was held that the defendant was not entitled to have read, as part of the plaintiff's case, a paragraph in that newspaper having no reference to the other paragraph; see also *Hedley* v. *Barlow* (1865), 4 F. & F. 224, *per* COCKBURN, C.J., at p. 227; *Bolton* v. *O'Brien* (1885), 16 L. R. Ir. 97. In an action by an author for an alleged libel in a criticism of his book, there being nothing in the libel which did not relate to the book, and the only question being whether the criticism was fair, the defendant can insist on the whole book being put in as part of the plaintiff's case (*Strauss* v. *Francis* (1866), 4 F. & F. 939). As to the right of the defendant to adduce evidence to explain the meaning of the words as distinguished from his own intention, see *Jones* v. *Hulton (E.) & Co.*, [1909] 2 K. B. 444, C. A., *per* FARWELL, L.J., at p. 479.

(*t*) *Rainy* v. *Bravo* (1872), L. R. 4 P. C. 287; compare *Bourke* v. *Warren* (1826), 2 C. & P. 307.

(*u*) *Orpwood* v. *Barkes* (1827), 4 Bing. 261. If, however, a man were to say "You are a thief, for you stole a woman's heart," the latter words, as explaining the meaning of the charge, could not be omitted (*ibid.*, *per* PARK, J., at p. 263).

(*v*) *Flower* v. *Pedley* (1796), 2 Esp. 491; compare *Compagnon* v. *Martin* (1771), 2 Wm. Bl. 790.

(*w*) *Flower* v. *Pedley*, *supra*.

(*x*) R. S. C., Ord. 28, r. 1. See also note (*n*), p. 643, note (*o*), p. 644, *ante*, and note (*o*), p. 648, *post*; and title PLEADING. As to terms, see *Zenobio* v. *Axtell* (1795), 6 Term Rep. 162; *Jacobs* v. *Schmaltz* (1890), 62 L. T. 121.

(*y*) In the text the word "defamatory" includes "actionable *per se*."

(*a*) *Woolnoth* v. *Meadows* (1804), 5 East, 463; *Colman* v. *Godwin* (1782), 3 Doug. (K. B.) 90. See notes (e) and (k) to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 313 *et seq.*, 319 *et seq.* "In construing the words to see whether they are a libel, the court is, when nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear" (*Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741,

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is *primâ facie* defamatory of the plaintiff if the words specify the plaintiff as the person to whom they apply.

When no cause of action disclosed.

1202. The statement of claim will not disclose a cause of action if the words complained of as therein set forth are not *primâ facie* defamatory (*b*) of the plaintiff, unless he by his statement of claim assigns to them a meaning which is defamatory of him.

Definition of innuendo.

1203. An innuendo is an explanatory averment in the statement of claim defining the meaning which the plaintiff assigns to the words complained of or specifying the plaintiff as the person to whom they apply (*c*).

Prefatory averments unnecessary.

The plaintiff is at liberty, in actions of libel and slander, to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment (*d*) to show how such words or matter were used in that sense (*e*). But though no such matter of inducement need now be stated on the record, yet without some evidence of facts which, when connected with the words complained of, would justify the meaning imputed to them, a case ought not to go to the jury (*f*).

Where good cause of action disclosed.

1204. If the words set forth in the statement of claim are *primâ facie* defamatory of the plaintiff, the statement of claim will show a good cause of action in this respect, though no innuendo be

per Lord BLACKBURN, at p. 772. Compare *Harvey* v. *French* (1832), 2 Tyr. 585, Ex. Ch. (reading heading of paragraph with the rest of it in the natural meaning of the words: rejection of innuendo as surplusage), approved in *Wakley* v. *Healey* (1849), 7 C. B. 591, 605, Ex. Ch. (where the question was whether the words without an innuendo were actionable). It is sufficient for a plaintiff who complains that he has been libelled in a newspaper article to show that the statement would convey a defamatory meaning to the ordinary reader reading it as newspaper articles usually are read, although a different meaning might appear from a critical reading of the article (*Hunter* v. *Ferguson & Co.* (1906), 8 F. (Ct. of Sess.) 574). Where words admit fairly and in their natural sense of two meanings, the sense in which they were uttered should be left to the jury (*Simmons* v. *Mitchell* (1880), 6 App. Cas. 156, P. C.). Where a defendant imputed ingratitude to the plaintiff the latter succeeded, though the facts on which the imputation was based did not support it (*Cox* v. *Lee* (1869), L. R. 4 Exch. 284).

(*b*) An innuendo is necessary not only where the words are not defamatory in their ordinary sense, but also where they have no meaning at all in ordinary acceptation (*Rawlings* v. *Norbury* (1858), 1 F. & F. 341).

(*c*) Where a libel was set out which did not appear on its face to refer to the plaintiff and there was no innuendo to connect it with him, it was held, even after verdict, that the declaration was bad, although it alleged that the defendant "published of and concerning the plaintiff the following matter" (*Clement* v. *Fisher* (1827), 7 B & C. 459). As to pleading an innuendo, to allege that a speech in the House of Lords, to which the defendant directed all readers of her letter in a newspaper, referred to the plaintiff, and that therefore the letter complained of referred to the plaintiff, see *Lawrence* v. *Newberry* (1891), 64 L. T. 797.

(*d*) Under the old system of pleading, an innuendo could not extend the sense of expressions beyond their own meaning, unless something was put upon the record for it to explain (*R.* v. *Horne* (1777), 2 Cowp. 672, *per* DE GREY, C.J., at p. 684).

(*e*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61; see note (*t*), p. 639, *ante*.

(*f*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord SELBORNE, L.C., at p. 748.

added (*g*), but it is usual in such a case for the plaintiff to insert an innuendo.

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Insufficient innuendo.

1205. If the plaintiff inserts an innuendo, and it is insufficient or he fails to establish it, he will, unless he is allowed to amend his statement of claim by alleging another innuendo, be obliged and entitled to rely on the words themselves (*h*).

Innuendo where statement of claim otherwise sufficient.

1206. Where the words or matter set forth in the statement of claim, with or without the meaning alleged by the innuendo, show a cause of action, the statement of claim is sufficient (*i*). If the words are set forth with an innuendo, the statement of claim will be regarded as containing two counts, one with the innuendo and the other without it, proof of either of which is sufficient (*k*).

Burden of proof is on him who assigns a meaning other than primary meaning.

1207. The burden is on the plaintiff of establishing that the meaning which he assigns to the words by an innuendo is the true meaning, if it is traversed by the defendant (*l*). The burden is on the defendant of establishing that the *primâ facie* meaning of the words, if defamatory, is not their true meaning; and it is open to him to show that the context in which the words were used, or the manner of their publication, or other facts, caused them to convey an innocent meaning to those to whom they were published (*m*), though he cannot defend himself by showing that he intended in his own

(*g*) See the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, and note (*t*), p. 639, *ante*.

(*h*) This follows from the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61; see note (*t*), p. 639, *ante*, and *Watkins* v. *Hall* (1868), L. R. 3 Q. B. 396; *Ruel* v. *Tatnell* (1880), 43 L. T. 507; *Maguire* v. *Knox* (1871), 5 I. R. C. L. 408; *Williams* v. *Stott* (1833), 1 Cr. & M. 675. See further, as to rejection of innuendo, note (i) to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 316. If the words in their ordinary meaning impute a criminal offence, an innuendo is unnecessary; and if an innuendo is added, it is sufficient to say, "thereby meaning that the plaintiff had been guilty of an offence punishable by imprisonment" without specifying the particular offence (*Kinahan* v. *M'Cullagh* (1877), 11 I. R. C. L. 1). The report there referred to "indictable offence," but the test is whether the crime imputed is punishable by corporal punishment; see p. 637, *ante*. In cases where it is clear that the words complained of do not support the innuendo, the court may strike out the statement of claim, if an innuendo is necessary, as disclosing no cause of action; see *Michael* v. *Spiers and Pond, Ltd.* (1909), 101 L. T. 352. As to impossible innuendoes, see *Jackson* v. *Adams* (1835), 2 Bing. (N. C.) 402; note (i) to *Craft* v. *Boite*, *supra*, and note (*b*), pp. 639, 640, *ante*.

(*i*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61.

(*k*) *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396.

(*l*) There must be evidence of facts which would reasonably make them defamatory in the secondary sense alleged by the innuendo (*Ruel* v. *Tatnell* (1880), 43 L. T. 507). Interrogatories as to the meaning of the defendant in reference to the innuendo will be disallowed (*Heaton* v. *Goldney*, [1910] 1 K. B 754, C. A.; see the adverse criticism in that case of *Foster* v. *Perryman* (1891), 8 T. L. R. 115, as to ordering particulars to the like effect). See also title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 99 *et seq.*

(*m*) See *Jones* v. *Hulton (E.) & Co.*, [1909] 2 K. B. 444, C. A., *per* FARWELL, L.J., at p. 479. Thus in *Cromwell's (Lord) Case* (1581), 4 Co. Rep. 12 b, 13 b, 14 a, where the plaintiff sued on the words "Thou art a murderer," the defendant explained that the conversation was about killing hares, and that the words meant "thou art a murderer of hares." As to the form of special plea in that case, see Starkie, Law of Slander and Libel, p. 385. See the illustrations in Com. Dig., tit. Action on Case for Defamation (F. 15), where words

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breast not to defame anyone, or not to defame the plaintiff, if he did both (*n*).

Where innuendo is required.

(i.) Foreign language.

1208. An innuendo will be required if the statement complained of is in a foreign language. In such a case the actual words must be set out in the statement of claim together with a translation (*o*). If the statement as translated is not *primâ facie* defamatory, an innuendo is also required assigning to the words a defamatory meaning. If the action is for slander and no special damage is alleged, and the statement as translated is not *primâ facie* actionable *per se* (*p*), an

apparently defamatory were explained by other words. Each case stands on its own particular facts; see *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L. T. 331, H. L. Where the Australian Newspaper Co. published the following statement: "According to the Market Street Evening Ananias both Kemp and McLean won the boat race yesterday. Poor little noozy," and the jury found for the defendant, there being evidence on which the jury could properly find that the defendant had not reflected on the plaintiff's character, it was held that the word "Ananias," as applied to the plaintiff's newspaper, did not necessarily impute wilful and deliberate falsehood to him; and that whether it was used extravagantly or for the purpose of conveying an imputation on the plaintiff was for the jury (*Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, P. C.). "Whether a word is, in any particular instance, used, and would be understood as being used, for the purpose of conveying an imputation upon the character must be for the jury" (*ibid.*, *per* Lord HERSCHELL, L.C., at p. 288). So it is *primâ facie* actionable to call the plaintiff a thief, and where the defendant said of the plaintiff, "He robbed John White," it was held that if the words were used in a sense which did not impute a crime, it was for the defendant to show it (*Tomlinson* v. *Brittlebank* (1833), 4 B. & Ad. 630). In *Jackson* v. *Adams* (1835), 2 Bing. (N. C.) 402, and in *Lemon* v. *Simmons* (1888), 57 L. J. (Q. B.) 260, cited in note (*b*), pp. 639, 640, *ante*, a good cause of action was not shown. As to the words "damned thief" and the like, see *Sibley* v. *Tomlins* (1833), 4 Tyr. 90, and note (*b*), p. 640, *ante*. For a case where the word "thieves" was held not to bear the innuendo alleged, see *Campbell* v. *Ritchie & Co.*, *Hay* v. *Ritchie & Co.*, [1907] S. C. 1097. As to the words "liar and fraud" being merely abusive language, see *Agnew* v. *British Legal Life Assurance Co., Ltd.* (1906), 8 F. (Ct. of Sess.) 422. In *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, it was said, "We must take the document as a whole, and if we take it with the opening passage it appears to me that these words are not calculated to convey or suggest any imputation against the plaintiff. . . . It is said that an imputation may be inferred, but that inference certainly is not a necessary inference, and, as it appears to me, it is neither a natural nor a reasonable inference to draw from the words in the circumstances in which we find them" (*ibid.*, *per* Lord SHAND, at p. 78). There was in that case no innuendo. Compare *Beswick* v. *Smith* (1907), 24 T. L. R. 169, C. A. As to taking the statement as a whole, see also *Chalmers* v. *Payne* (1835), 5 Tyr. 766.

(*n*) *Hulton* (*E.*) *& Co.* v. *Jones*, [1910] A. C. 20, *per* Lord LOREBURN, L.C., at p. 23.

(*o*) *Zenobio* v. *Axtèll* (1795), 6 Term Rep. 162; *Jenkins* v. *Phillips* (1841), 9 C. & P. 766; and *ibid.*, n. (a), citing *Cook* v. *Cox* (1814), 3 M. & S. 110; *Slater* v. *Franks* (1616), Hob. 126; and as to Welsh words, *Anon.* (1616), Hob. 126, and note (*p*), *infra*. In *Zenobio* v. *Axtell*, *supra*, it was said that the plaintiff should have set forth the original words and then have translated them on payment of costs, showing their application to him. The court there gave leave to the plaintiff to amend his declaration by inserting the original words. Compare *Jenkins* v. *Phillips*, *supra* (slander in Welsh), where the judge postponed the trial to the next day on the terms that the plaintiff paid the costs of the day and deposited a sum in respect of costs. In *R.* v. *Goldstein* (1821), 3 Brod. & Bing. 201, eight out of ten judges held that the indictment was bad for want of a translation. See as to this case *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 312, n. (c).

(*p*) Where the original Welsh words meant that the plaintiff was "perjured,"

innuendo is required assigning to the words a meaning which would make them actionable *per se*. If the translation does not sufficiently refer to the plaintiff as the person defamed, an innuendo must be included in the statement of claim to explain the omission (*q*). If there is no innuendo in the above cases, the statement of claim will disclose no cause of action. In other words, the translation takes the place of the original statement for the purpose of determining whether a further innuendo is required. The translation and any innuendo must be proved. Further, it is necessary for the plaintiff to prove at the trial that the foreign words were understood by persons to whom they were published in the sense of the translation (*r*), or, where there is a further innuendo, in the sense of that innuendo.

Translation.

Translation and innuendo must be proved.

1209. It is always prudent to explain by an innuendo "slang" words and expressions (*s*), words with a local meaning (*t*), words

(ii.) Slang words.

but they were translated "forsworn," it was held that a good cause of action was not shown (*Ross* v. *Lawrence* (1651), Sty. 263). But in such a case the court has jurisdiction to amend.

(*q*) See *Zenobio* v. *Axtell* (1795), 6 Term Rep. 162, *per* Lord KENYON, C.J., at p. 163.

(*r*) It is still usual and safer to aver in the statement of claim that foreign words were understood by those to whom they were published. The latter part of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61 (see note (*t*), p. 639, *ante*), might appear to dispense with the necessity of so doing. But in *Amann* v. *Damm* (1860), 8 C. B. (N. S.) 597, WILLIAMS, J., during the argument, commenting on the fact that there was no averment in the declaration that the persons in whose hearing the words were spoken understood German, said, at p. 600: "In *Fleetwood* v. *Curley* (1619), Hob. 267, 268, Lord HOBART says—The slander and damage consist in the apprehension of the hearers" (compare *Hankinson* v. *Bilby* (1847), 16 M. & W. 442, and see note (*a*), p. 666, *post*), "and therefore slanderous words in Welsh bear no action, except you affirm that they were spoken in the hearing of them that understood the Welsh tongue"; and he also cited *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, notes (1) (a) and (e), *Price* v. *Jenkings* (1601), Cro. Eliz. 865 (which decided that slander spoken in a language not understood by those who hear it is not actionable), and *R.* v. *Goldstein* (1821), 3 Brod. & Bing. 201; but did not refer to the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). It was not necessary to aver in actions brought in the Courts of Great Sessions in Wales (abolished by the Law Terms Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 70), s. 14) that the hearers understood the Welsh language; for it was so intended; see *Craft* v. *Boite* (1669), 1 Wms. Saund., 310, 311, n. (1). As to the Latin language, in *Jones* v. *Davers* (1596), Cro. Eliz. 496, the plaintiff declared that the defendant "dixit et propalavit hæc Latina verba in præsentiâ diversorum, qui intellexerunt Romanam linguam, viz., 'inimicus meus'" (innuendo the plaintiff) "'is an extortioner.'"

(*s*) Decisions as to the meaning of particular phrases and expressions are of little value when applied to cases where the context and circumstances in which they are used are different. The slang of one generation is rarely the slang of the succeeding generation. A slang word which once required an innuendo may later be accepted as a recognised English word and require no innuendo to explain it, *e.g.*, "boycott." Another may become obsolete. The meaning may vary from time to time. The old cases are for this purpose dangerous to rely on as authorities. Even the modern cases are for the most part useless to cite as to the meaning of words. The following words and expressions have been the subjects of reported cases:—Physicians: "Quack-salver" (*Allen* v. *Eaton* (1629), 1 Roll. Abr. 54 (actionable)); "quack" (*Dakhyl* v. *Labouchere* (1907),

(*t*) For note (*t*) see next page.

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used by particular classes of persons (*a*), words which have no meaning at all in the ordinary acceptation (*b*), novel combinations

[1908] 2 K. B. 326, n., H. L.; "empiric" and "mountebank" (*Goddart* v. *Haselfoot* (1636), 1 Roll. Abr. 54 (actionable)). Lawyers and barristers: "Daffadown-dilly" (*Peares' Case* (1634), 1 Roll. Abr. 55 (actionable, because it signifies an "ambidexter")); "ambodexter" (*Anon.* (1613), Godb. 214 (case 304) (actionable, because it signifies one who takes money from both sides)); "jackanape" (*Palmer* v. *Boyer* (1594), Cro. Eliz. 342, where it was held that the following words, "He is a paltry lawyer and hath as much law as a jack-an-ape" were actionable). In *Cawdry* v. *Tetley* (1632), Godb. 441, it was said that the action in *Palmer* v. *Boyer*, *supra*, would not have lain had the words been "He hath no more wit than a jackanapes." Newspapers: "Ananias" and "poor little noozy" (*Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, P. C.). Justices: "Beetle-headed" (*How* v. *Prinn* (1702), 2 Salk. 694, considered in *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., *per* Lord HERSCHELL, at p. 801 (not actionable *per se*)); "half-eared" (*Masham* v. *Bridges* (1631), Cro. Car. 223). Other instances: "Welsher" (*Blackman* v. *Bryant* (1872), 27 L. T. 491); "his shop is in the market" (*Ruel* v. *Tatnell* (1880), 43 L. T. 507); "regular prover under bankruptcies" (*Angle* v. *Alexander* (1830), 7 Bing. 119, Ex. Ch.; the decision in which case that a prefatory averment was necessary is no longer law, though an innuendo is required); "swindler" (see the cases cited in note (*b*), pp. 639, 640, *ante*); "wrong 'uns" (*Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, C. A., where the term "bucket-shop" was also referred to); "lame-duck" (*Morris* v. *Langdale* (1800), 2 Bos. & P. 284); "black sheep" (*M'Gregor* v. *Gregory* (1843), 11 M. & W. 287; decided before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61; compare *Angle* v. *Alexander*, *supra*); "blackleg" (*Barnett* v. *Allen* (1858), 3 H. & N. 376); but in *O'Brien* v. *Clement* (1846), 16 M. & W. 159, POLLOCK, C.B., at p. 167, said that it was hardly necessary to explain either "black sheep" or "blackleg" to be libellous, *i.e.*, defamatory as distinguished from being actionable *per se*, if spoken; "man of straw" (*Eaton* v. *Johns* (1842), 1 Dowl. (N. S.) 602).

(*t*) See *Tuck's Case* (1608), 1 Roll. Abr. 86; cited in *Anon.* (1616), Hob. 126 ("Thou art an healer of felons," which in some places meant "a smotherer or coverer of felons"), referred to in *M'Gregor* v. *Gregory* (1843), 11 M. & W. 287, by PARKE, B., at p. 295, as a strong instance of the old rule that the court is to inform itself of the meaning of English words, though unusual, and peculiar to a particular country, without any averment as to the local use of those terms; see also *Anon.* (1616), Hob. 126 ("idonor" meaning "perjured"); compare *Pridham* v. *Tucker* (1609), Yelv. 153, "'Thou art a healer of felony,' where it was adjudged *pro querente*, for healer of felony is a word known in the county of Devon to be a concealer or hider of felony, as in the county of York to say to one, 'Thou hast strained a mare' will bear action, for it is vulgarly taken to steal a mare." But the case of *Angle* v. *Alexander* (1830), 7 Bing. 119, 123, Ex. Ch., in the analogous case of slander, decided that a distinct averment, that particular English words had acquired some sense different from their natural sense, was necessary, and that an innuendo without such averment was insufficient (*ibid.*, *per* PARKE, B.), and now, having regard to the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, an innuendo is sufficient in such cases without a prefatory averment. The plaintiff must prove the innuendo.

(*a*) Thus, if it were said of an undergraduate of Oxford University or Cambridge University that he was "sent down" or "rusticated," the imputation would be defamatory. If it were said of a member of the London Stock Exchange that he kept a "bucket shop" or had been "hammered," the imputation would be not merely defamatory but actionable *per se*. For illustrations, see note (*s*), p. 649, *ante*, and *supra*. An innuendo is essential in such a case.

(*b*) *Rawlings* v. *Norbury* (1858), 1 F. & F. 341. An innuendo is essential in such a case. If there is no cause of action unless the words are actionable *per se*, an innuendo is required which will give them such a meaning unless they make such a meaning in their natural and primary sense; see *Rawlings* v. *Norbury*, *supra*; *Cox* v. *Cooper* (1863), 9 L. T. 329.

of words (*c*), proverbial expressions (*d*), historical and literary allusions (*e*), and the like. It is necessary or unnecessary so to do, according as ordinary persons at the present day would understand them, without explanation of the surrounding circumstances or extrinsic facts, to be defamatory or actionable *per se*, as the case may be (*f*).

(iii.) Where imputation made indirectly.

1210. An innuendo is generally (*g*) necessary where the imputation is made in an oblique way (*h*), or by way of question (*i*), conjecture (*k*), epithet (*l*), report (*m*), or exclamation (*n*), or where the plaintiff is indirectly described (*o*), or the imputation is made by antithesis (*p*), or in any other than a direct and explicit manner (*q*);

(*c*) An innuendo is essential in such a case as a general rule. It was held, however, in *Homer* v. *Taunton* (1860), 5 H. & N. 661, that no innuendo was required to explain the word "truckmaster," and that though there was no innuendo and no evidence as to the meaning of the expression, it was properly left to the jury to say whether in all the circumstances the jury found that the words were used in a libellous sense. The judgment proceeded upon the ground that the word is composed of two English words intelligible to everybody. The jury having found for the plaintiff, the court supported the verdict. The case is exceptional; see the comments in note (k) to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 321, and the illustrations given in note (*s*), pp. 649, 650, *ante*.

(*d*) Where the allusion has a well-known defamatory meaning so that ordinary persons would understand the words in that sense, no innuendo is necessary; see note (*o*), p. 623, *ante*.

(*e*) See note (*d*), *supra*. But proverbs become part of the language of the people while historical and literary allusions rarely do. The expression "the man Friday" requires an innuendo to explain it as imputing degrading subserviency, and it might be difficult to prove the innuendo; see note (*o*), p. 623, *ante*. It is libellous to write of a solicitor, and it would be actionable *per se* to say of a solicitor in the way of his profession, that he outdoes "Messrs. Quick, Gammon and Snap" (*Woodgate* v. *Ridout* (1865), 4 F. & F. 202). A literary allusion will almost certainly require an innuendo. As to "Ananias," see *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, 288, 289, P. C., where it was said: "The question therefore is whether in all these circumstances it can be said that a jury of reasonable men could not possibly find that the article, although it contains that which had much better not have been published, did not reflect upon the plaintiff's character or even upon his conduct in relation to the newspaper. The jury have so found and . . . it would be exceeding the legitimate function of the court if the verdict were set aside and a new trial ordered. . . . The court would then be taking upon itself the function which the law has committed to the jury, of looking at the alleged libellous matter as a whole, and determining whether it is published of and concerning the plaintiff, and whether it bears the innuendo which the plaintiff seeks to attach to it." See also as to this case note (*m*), pp. 647, 648, *ante*. As to the functions of judge and jury, see further, pp. 652 *et seq.*, *post*.

(*f*) See notes (*s*), pp. 649, 650, *ante*, (*t*)—(*b*), p. 650, *ante*, and (*c*)—(*e*), *supra*.

(*g*) See pp. 646, 648, *ante*.

(*h*) Com. Dig., tit. Action on Case for Defamation, "manner of speaking" (E. 1).

(*i*) *Ibid.*, (E. 2).

(*k*) *Ibid.*, (E. 3), and contrast *ibid.*, (F. 13). As to words conveying a mere suspicion of crime, see p. 638, *ante*.

(*l*) Com. Dig., tit. Action on Case for Defamation (E. 4).

(*m*) *Ibid.*, (E. 5).

(*n*) *Ibid.*, (E. 6).

(*o*) *Ibid.*, (E. 7).

(*p*) *Ibid.*, (E. 8).

(*q*) *E.g.*, a heading such as "Shameful conduct of an attorney" (*Lewis* v. *Clement* (1820), 3 B. & Ald. 702; *sub nom. Clement* v. *Lewis* (1822), 3 Brod. & Bing. 297, Ex. Ch.; compare *Bishop* v. *Latimer* (1861), 4 L. T. 775).

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and an innuendo is sufficient without a prefatory averment to support it (*r*).

Though the words in their natural sense are innocent or even laudatory of the plaintiff, yet if in the circumstances of the particular case the words convey a meaning which is defamatory or actionable *per se*, as where they are ironical, the plaintiff may by an innuendo assign a defamatory sense (*s*). But in such a case it is prudent to allege that the statement was made ironically (*a*).

Ironical words.

Pictorial illustration.

If the statement complained of is of the nature of a pictorial libel, the picture must be described with the circumstances which are relied on to support the innuendo (*b*). For in such a case the picture takes the place of a written statement, which must be fully set forth in the statement of claim.

SUB-SECT. 3.—*Functions of Judge and Jury.*

Duty of judge. Where nothing is alleged to give words an extended sense.

1211. In construing the words complained of, in order to see whether the plaintiff has made out a case to be left to the jury, the judge must, where nothing is alleged to give the words an extended sense, consider the statement as a whole, and interpret the words in their plain and popular meaning. If the words so interpreted are reasonably calculated to defame the plaintiff, he must leave it to the jury to say whether they did, in fact, defame him; if not, he must give judgment for the defendant without leaving the case to the jury (*c*).

Where there is an innuendo.

1212. Where there is an innuendo or something is alleged to give the words a sense which differs from their plain and popular meaning, the judge must consider not merely the statement complained of (*d*), and the context in which it appears or was made, but he must also take into account the manner and occasion of the publication (*e*), the persons to whom it was published (*f*), and all

(*r*) See note (*t*), p. 639, *ante*.

(*s*) *Boydell* v. *Jones* (1838), 4 M. & W. 446 ("honest lawyer"), cited in note (*p*), (iii.), p. 631, *ante*. In that case the declaration used the words "published a certain ironical, false, scandalous, malicious and defamatory libel of and concerning etc. containing therein the ironical, false etc. matter following of and concerning etc. (that is to say etc.)." See also *R.* v. *Brown* (*Dr.*) (1706), 11 Mod. Rep. 86, *per* HOLT, C.J., cited by PARKE, B., in *Boydell* v. *Jones*, *supra*, at p. 449.

(*a*) See the form of declaration in *Boydell* v. *Jones*, *supra*.

(*b*) See note (*g*), p. 606, *ante*. In the case of a pictorial libel an innuendo is always necessary.

(*c*) See notes (*l*)—(*p*), pp. 618, 619, *ante*. In *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, there was no innuendo.

(*d*) *I.e.*, the statement as a whole. See *Nevill* v. *Fine Art and General Insurance Co.*, *supra*, at p. 78. As to considering the whole of a conversation, see p. 645, *ante*.

(*e*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord SELBORNE, L.C., at p. 744, and *per* Lord BLACKBURN, at p. 771; see also *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, P. C., *per* Lord HERSCHELL, L.C., at p. 288, and note (*m*), pp. 647, 648, *ante*, and note (*e*), p. 651, *ante*.

(*f*) "The manner of the publication and the things relative to which the words are published, and which the person publishing knew or ought to have known would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated

other facts which are properly in evidence as affecting the meaning of the statement in the circumstances of the particular case.

If the judge, interpreting the statement in the light of the circumstances of the particular case, is satisfied that the words are capable of the meaning ascribed to them by the innuendo, he must leave it to the jury to say whether the statement in fact conveyed the meaning ascribed to it (*g*). If he is not so satisfied, it is his duty not to leave the question raised by the innuendo to the jury.

But the judge, in determining whether the words are capable of

to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and such persons knowing those circumstances, as to convey a meaning very different from that which would be understood from the same words used under [*sic*] different circumstances" (*Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 771). As to the words "the person publishing knew or ought to have known," the defendant cannot escape liability merely because he did not intend to defame the plaintiff or anyone else, if in fact he did defame the plaintiff (*Hulton (E.) & Co.* v. *Jones*, [1910] A. C. 20).

(*g*) It is not the law that the question of libel or no libel must always and necessarily be left to a jury as to words not in themselves (*i.e.*, in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence of facts calculated to lead reasonable men to understand them in a libellous sense (*Capital and Counties Bank* v. *Henty*, *supra*, at p. 743). As to the principal cases dealing with the respective provinces of judge and jury on the question of libel or no libel, when the alleged libellous meaning is not to be collected according to ordinary rules of construction from the mere words used, see the following cases cited by Lord SELBORNE, L.C., in *Capital and Counties Bank* v. *Henty*, *supra*, at p. 743:—*Woolnoth* v. *Meadows* (1804), 5 East, 463; *Wood* v. *Brown* (1815), 6 Taunt. 169; *Wright* v. *Clements* (1820), 3 B. & Ald. 503; *Goldstein* v. *Foss* (1827), 6 B. & C. 154; *Hearne* v. *Stowell* (1841), 12 Ad. & El. 719; *Capel* v. *Jones* (1847), 4 C. B. 259, and the following passage from the judgment of WILDE, C.J., in *Sturt* v. *Blagg* (1847), 10 Q. B. 906, cited by Lord SELBORNE, L.C., in *Capital and Counties Bank* v. *Henty*, *supra*, at p. 744:—"It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." See also the following additional authorities considered by Lord BLACKBURN in *Capital and Counties Bank* v. *Henty*, *supra*, at pp. 769 *et seq.*:—*R.* v. *Shipley* (1784), 4 Doug. (K. B.) 73; *Parmiter* v. *Coupland* (1840), 6 M. & W. 105, 108; *Hart* v. *Wall* (1877), 2 C. P. D. 146; *Fisher* v. *Clement* (1830), 10 B. & C. 472; and *Mulligan* v. *Cole* (1875), L. R. 10 Q. B. 549. See also *Capital and Counties Bank* v. *Henty* (1882), 7 App Cas. 741, *passim*. The following passage from the judgment of BRETT, L.J., in S. C. (1880), 5 C. P. D. 514, C. A., at p. 541—"It seems to me unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the documents"—was quoted with approval in *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, by Lord HALSBURY, L.C., at p. 73. The following cases may also be considered:—*Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, P. C.; *Hunt* v. *Goodlake* (1873), 43 L. J. (C. P.) 54; *Cox* v. *Lee* (1869), L. R. 4 Exch. 284; *Baylis* v. *Lawrence* (1840), 11 Ad. & El. 920; *O'Donoghue* v. *Hussey* (1871), 5 I. R. C. L. 124, Ex. Ch.; *Stockdale* v. *Tarte* (1836), 4 Ad. & El. 1016; *Street* v. *Licensed Victuallers' Society* (1874), 22 W. R. 553; *O'Brien* v. *Salisbury* (*Marquis*) (1889), 54 J. P. 215, to the effect that it would be a misdirection for the judge to tell the jury that the question for them is not what was the sense reasonably conveyed but the defendant's intention. As to the intention of the defendant on the issue of libel or no libel, see *Hulton* (*E.*) & *Co.* v. *Jones*, [1910] A. C. 20. As to words capable of two meanings, see *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156, P. C.; *Churchill* v. *Gedney* (1889), 53 J. P. 471, note (*p*), p. 638, *ante*.

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the meaning assigned, ought not to take into account mere conjectures which a person to whom the statement is published might possibly though unreasonably form (*h*).

Where words in their natural meaning are not defamatory or actionable *per se*.

1213. Where the words in their natural meaning are not defamatory or actionable *per se* (as the case may require), the plaintiff must at the trial satisfy the judge of the existence of circumstances which lead to the conclusion that the words might reasonably convey the meaning assigned by the innuendo to persons to whom they were published, and if the plaintiff fails to do so, there is no case to go to the jury, and judgment should be entered for the defendant.

Where defendant is entitled to judgment.

If in such a case the judge leaves the decision of whether or not the words did convey the meaning assigned to persons to whom they were published, the Court of Appeal will give judgment for the defendant. In the Court of Appeal the burden is not on the defendant to show that the words were incapable of the meaning assigned; it is sufficient for him to show that the plaintiff did not discharge the burden which was on the plaintiff (*i*).

Defendant's right to have question left to jury.

1214. The defendant is always entitled to have the question of libel or no libel, slander or no slander, left to the jury, and if he can get either the judge or the jury to be in his favour he succeeds; whereas the plaintiff, or the prosecutor, in criminal proceedings for libel, cannot succeed unless he gets both the judge and the jury to decide in his favour (*k*).

Duty of judge where there is a case to go to jury.

1215. The proper course for the judge to adopt in civil or criminal proceedings for libel, where there is a case to go to the jury, is to define what is a libel in point of law, and leave it to the jury to pronounce their opinion as a matter of fact whether the particular publication falls within that definition or not (*l*). The judge may as a matter of advice express his own opinion as to the nature of the particular publication (*m*), but he is not bound to

(*h*) See *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord SELBORNE, L.C., at p. 744; *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, *per* Lord HALSBURY, L.C., at pp. 73, 76. In the latter case there was no innuendo. "If it is said that because it is suggested that it may be libellous it must go the jury, I entirely differ from that view. The words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining" (*ibid.*, at p. 76). As to Scottish law, whereby an issue must be directed when the words are reasonably capable of being understood in a libellous sense so that there is a question for the jury, see *Ritchie & Co.* v. *Sexton* (1891), 64 L. T. 210, H. L.

(*i*) See *Capital and Counties Bank* v. *Henty, supra*, at pp. 776, 782; *Mulligan* v. *Cole* (1875), L. R. 10 Q. B. 549; *Frost* v. *London Joint Stock Bank* (1906), 22 T. L. R. 760, C. A. As to motions by a plaintiff for a new trial, see *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284, P. C., *per* Lord HERSCHELL, L.C., at p. 288.

(*k*) *Capital and Counties Bank* v. *Henty, supra, per* Lord BLACKBURN, at p. 776, dealing with the effect of the Libel Act, 1792 (32 Geo. 3, c. 60).

(*l*) *Parmiter* v. *Coupland* (1840), 6 M. & W. 105, 108, 109.

(*m*) *Ibid.*, at p. 108; *Darby* v. *Ouseley* (1856), 1 H. & N. 1. In *Dakhyl* v. *Labouchere* (1907) [1908] 2 K. B. 325, n., H. L., the judge's expression of opinion amounted to a misdirection. There the defendant justified the

do so as a matter of law (*n*), and it would be wrong for the judge to direct the jury positively that they must find that a particular publication is a libel or a slander (*o*).

Part III.—Publication.

SECT. 1.—*In Libel Actions.*

SUB-SECT 1.—*In General.*

Libel. (i.) In prosecutions.

1216. No action or prosecution for a libel will lie unless there has been a publication (*p*), and a person who publishes a libel, though he had no part in composing or contriving it, may be liable to an action or criminal proceedings (*q*). To support an

expression "quack of the rankest species." The judge told the jury, and in substance directed them, that the word "quack" meant a pretender to skill which the pretender did not possess. But the House of Lords held that there are other meanings of the word "quack," such as a person who, however skilled, lends himself to a medical imposture, and that the jury were the persons to affix the true meaning of the words and say whether or not they fitted the plaintiff. The Libel Act, 1792 (32 Geo. 3, c. 60), which is declaratory of the common law, enacts that on the trial of an indictment or information for a libel, the jury may give a general verdict upon the whole matter in issue, provided that the court or judge shall, according to their or his discretion, give their or his opinion to the jury on the matter in issue, as in other criminal cases; see, further, p. 742, *post*. In criminal cases it is the duty of the judge to define the crime, and the jury are to find whether the party has committed the offence (*Parmiter* v. *Coupland* (1840), 6 M. & W. 105, *per* PARKE, B., at p. 107; see also *R.* v. *Lambert and Perry* (1810), 2 Camp. 398, 400).

(*n*) *Parmiter* v. *Coupland*, *supra*; *Baylis* v. *Lawrence* (1840), 11 Ad. & El. 920, where it was also said that the rule is the same in criminal proceedings for libel. In *Baylis* v. *Lawrence*, *supra*, at p. 922, the judge (Lord ABINGER, C.B.) said to the jury: "I own I find a difficulty in saying whether it is a libel or not. Gentlemen, can you assist me?" and the court held that there had been no misdirection. See further as to the Libel Act, 1792 (32 Geo. 3, c. 60), note (*m*), p. 654, *ante*, and *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 775.

(*o*) *Parmiter* v. *Coupland*, *supra*, *per* ALDERSON, B., at pp. 108, 109. This and the cases cited in notes (*l*), (*m*), p. 654, *ante*, and note (*n*), *supra*, were cases of libel, but the same principles apply to actions of slander.

(*p*) The point seems to have been regarded as still doubtful when *R.* v. *Burdett* (1820), 4 B. & Ald. 95, was decided; but the cases there considered show that proof of publication was essential to the case of a prosecutor or a plaintiff; see *Lamb's Case* (1610), 9 Co. Rep. 59 b; *Entick* v. *Carrington* (1765), 19 State Tr. 1030; *Edwards* v. *Wooton* (1602), 12 Co. Rep. 35. In *R.* v. *Stockdale* (1789), 22 State Tr. 237, EYRE, C.B., at p. 300, in delivering the opinion of the twelve judges, stated expressly that "the crime consists in publishing a libel."

(*q*) The statement of Sir E. COKE in *Lamb's Case* (1610), 9 Co. Rep. 59 b, cited and discussed during the argument in *R.* v. *Burdett* (1820), 4 B. & Ald. 95, at p. 100, "that every man who shall be convicted of a libel either ought to be a contriver of a libel or a malicious publisher of it knowing it to be a libel," is too unfavourable to the defendant, if it was intended to mean—but it was, it seems, not intended to mean—that the contrivance without the publication would be an offence, and too favourable to him, if it was intended to mean that proof of knowledge on the part of a defendant, who is the publisher but not the writer, is necessary to render him liable. *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L. R. 4

SECT. 1. In Libel Actions.

action for libel the publication must be to a third person. In criminal proceedings it is sufficent if the publication be to the person defamed (*r*).

(ii.) In actions.

1217. The plaintiff in an action of libel must allege (*s*) and prove that the defendant published, or caused to be published, of and

Q. B. 262, was determined on the question of privilege in favour of the defendants, not on the question of publication. Even a porter who delivers parcels containing libels is at least civilly liable as the publisher unless he can show that he did not know, and had no reason to know, that the parcels contained, or were likely to contain, libels (*Day* v. *Bream* (1837), 2 Mood. & R. 54). See also *Vizetelly* v. *Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170, C. A.; *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354, C. A., *per* Lord ESHER, M.R., at pp. 357, and see p. 661, *post*. As to the *primâ facie* criminal liability of persons who sell libels at their book-shop, see *R.* v. *Cuthell* (1799), Erskine's Speeches, Vol. V., p. 213; *R.* v. *Almon* (1770), 5 Burr. 2686; and *R.* v. *Dodd* (1724), 2 Sess. Cas. (K. B.) 33, which were cited in *R.* v. *Gutch, Fisher and Alexander* (1829), Mood. & M. 433, 435, 436. In *R.* v. *Walter* (1799), 3 Esp. 21, in a criminal information for libel, Lord KENYON, C.J., said that it was old and received law for above a century that the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants or agents for misconduct in conducting his newspaper, though he has nothing to do with the publication, and the whole is conducted by his servants or agents. But as to newspapers, see the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), and the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60); and as to the criminal liability of principals for the publication of libels without their authority, consent, or knowledge, see now the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7, and note (*j*), p. 663, and pp. 743 *et seq.*, *post*. The sale of back copy of a libel is a distinct publication and a criminal offence (*R.* v. *Carlisle* (1819), 1 Chit. 451).

(*r*) See p. 606, *ante*. In *R.* v. *Wegener* (1817), 2 Stark. 245, it was held that the indictment for a libel sent to the prosecutor alone ought to have alleged an intent to provoke a breach of the peace and not an intent to injure the prosecutor in his profession; but in *R.* v. *Adams* (1888), 22 Q. B. D. 66, C. C. R., a case in which there was no allegation of the words of the libel being calculated to provoke a breach of the peace or of such an intent, the court held the indictment good, as the libel "under the circumstances might reasonably or probably tend to provoke a breach of the peace on her part or on the part of those connected with her," and that the jury must be taken to have so found. See also, to the like effect, *R.* v. *Brooke* (1856), 7 Cox, C. C. 251.

(*s*) No technical form of words is required, if the allegation may be collected from the statement of claim (*Baldwin* v. *Elphinston* (1775), 2 Wm. Bl. 1037, Ex. Ch., where the second count alleged that the defendant printed and caused to be printed, but did not explicitly allege that he had published or caused to be published, the libel complained of, the declaration was held sufficient). "Printing a libel may be an innocent act; but unless qualified by circumstances shall *primâ facie* be understood to be a publishing. It must be delivered to a compositor or other subordinate workmen. Printing in a newspaper (as laid in the declaration) admits of no doubt upon the face of it" (*ibid.*). In *Watts* v. *Fraser* (1837), 7 Ad. & El. 223, Lord DENMAN, C.J., at p. 233, delivering the judgment of the court, commented on the above passage, and said that it does not follow as of course, from a work being printed, that the party sending it forth employed a compositor and declined to act on *Baldwin* v. *Elphinston*, *supra*. It would seem that *primâ facie* a printer does not do the whole of the work himself, though in certain cases he may be able to prove (and the burden should be on him) that he did so. Where a defendant was charged with having "composed, printed, and published" a libel and there was no evidence of printing, but it was proved that he delivered the libel in his own handwriting to the printer, a verdict was found and recorded "Guilty, except as to printing the libel" (*R.* v. *Williams* (1811), 2 Camp. 646); see also *R.* v. *Hunt* (1811), 2 Camp. 583, where Lord ELLENBOROUGH, C.J., said: "It is

concerning the plaintiff (*t*) the libel complained of, to some person other than the plaintiff (*a*) or the wife (*b*) or husband of the defendant (*c*).

Who is and who is not a third party

1218. There is sufficient publication to a third person, if there be publication to a stranger, or to the wife of the plaintiff (*d*), or to the husband of the plaintiff (*e*), or to a clerk or servant of the plaintiff or of the defendant (*f*), or indeed to any person other than the plaintiff or the wife or husband of the defendant (*g*).

enough to prove publication. If an indictment charges that the defendant did and caused to be done a particular act, it is enough to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." As to particulars of publication, see R. S. C., Ord. 19, rr. 4, 6, 7. The plaintiff must deliver in or with his statement of claim particulars of the persons to whom the alleged libel in a letter was published (*Davey* v. *Bentinck*, [1893] 1 Q. B. 185, C. A.). In *Bradbury* v. *Cooper* (1883), 12 Q. B. D. 94, where the alleged slander was alleged in the statement of claim to have been published by a person at the request and by the direction of the defendant, the plaintiff was ordered to give particulars of the persons to whom, and the place at which, the alleged slander was uttered; and, generally speaking, the plaintiff in an action of slander will be ordered to give such particulars, where it is alleged that the defendant himself published the slander directly, though this had been doubted by GROVE, J., in *Bradbury* v. *Cooper*, *supra*; see *Roselle* v. *Buchanan* (1886), 16 Q. B. D. 656. But neither in actions of libel nor in actions of slander will a plaintiff be ordered to give particulars which he cannot reasonably be expected to give. Thus, in *Wingard* v. *Cox*, [1876] W. N. 106 (referred to by SMITH, J., in *Bradbury* v. *Cooper*, *supra*), DENMAN, J., refused to order the plaintiff to give particulars of the names of persons passing in the street when the alleged slander was uttered; and where it was alleged that a slander was spoken in a public room, the plaintiff was ordered to give the best particulars he could of the place where and the persons present when the alleged slander was uttered (*Williams* v. *Ramsdale* (1887), 36 W. R. 125; see also *Gouraud* v. *Fitzgerald* (1889), 37 W. R. 265, C. A.). The English cases were considered in *Keogh* v. *Incorporated Dental Hospital of Ireland*, [1910] 2 I. R. 166, where it was held that, in an action of libel, the defendant is not entitled to particulars of the name or names of the person or persons to whom, the date or dates on which, and the place or places where, the alleged libel was published, in the absence of special grounds requiring them, and especially in a case where the particulars of publication (if any) must be known to the defendant. The indorsement of the writ in an action of libel must state sufficient particulars to identify the publications in respect of which the action is brought (R. S. C., Ord. 3, r. 9). As to pleading generally, see title PLEADING.

(*t*) As to the words "of and concerning the plaintiff," see *O'Brien* v. *Clement* (1846), 16 M. & W. 159, and note (*c*), p. 641, *ante*.

(*a*) Publication to the plaintiff himself will not impose a civil liability (*Phillips* v. *Jansen* (1798), 2 Esp. 624; *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., *per* Lord ESHER, M.R., at p. 527).

(*b*) *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635. Nor would a communication to the wife of the defendant alone be sufficient in criminal proceedings.

(*c*) This follows from the decision cited in note (*b*), *supra*.

(*d*) *Wenman* v. *Ash* (1853), 13 C. B. 836; see also *Praed* v. *Graham* (1889), 24 Q. B. D. 53, C. A. (where the plaintiff had recovered £500 damages for a libel on him published to his wife, and a new trial on the ground of excessive damages was refused).

(*e*) This follows from the decisions cited in note (*d*), *supra*.

(*f*) See *Pullman* v. *Hill & Co.*, *supra*, and the other cases cited in note (*o*), p. 658, *post*. As to publication to the agent of the plaintiff, see *ibid.*

(*g*) See notes (*a*), (*b*), (*c*), *supra*.

SECT. 1. In Libel Actions.

Publication by spouse of defendant.

1219. The wife (*h*) or husband (*i*) of the defendant may be the agent of the defendant in publishing a libel to a third person, so as to make the defendant a publisher thereof on the issue of publication.

Issues of publication and privilege.

1220. The question of privilege must be kept distinct from the question of publication. Privilege, of course, in no sense negatives publication; it justifies it (*k*).

SUB-SECT. 2.—*What Amounts to Publication.*

What amounts to publication.

1221. A defamatory statement does not become a libel unless it is expressed in writing or some permanent form (*l*). Merely writing a libel is not publication of a libel (*m*). Even the delivery of a libel to a person is not sufficient publication to him, if he does not become aware of the defamatory statement (*n*).

(i.) In civil proceedings.

Publication consists in making known (*o*) the defamatory state-

(*h*) In *Trumball* v. *Gibbons* (an American case (1816), 3, City Hall Recorder), cited from Odgers on Libel and Slander, 4th ed., p. 153, in *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635, 637, the delivery of certain pamphlets by the defendant to his wife was held not to be a publication to her; but her delivery of the pamphlets to third persons was held to be a publication by the defendant, as the wife acted as the agent of the defendant, to those persons to whom she delivered them.

(*i*) This follows from the authorities cited in note (*h*), *supra*.

(*k*) See *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., and the other cases cited in note (*o*), *infra*.

(*l*) See note (*g*), p. 606, *ante*.

(*m*) But the writer knows what he has written, and if he wishes not to publish it must do all he can to keep it to himself; see the passage quoted from the judgment of Lord ESHER in *Pullman* v. *Hill & Co.*, *supra*, at p. 527, cited in note (*o*), *infra*, and note (*q*), pp. 655, 656, *ante*.

(*n*) See note (*o*), *infra*, note (*r*), p. 649, *ante*, and note (*a*), p. 666, *post*.

(*o*) In *Pullman* v. *Hill & Co.*, *supra*, Lord ESHER, at p. 527, said: "What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written there is no publication of it; for you cannot publish a libel of a man to himself. . . . If the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication" (meaning, by the writer of the letter). "If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, I have shewn it to you and to no one else. I cannot, therefore, feel any doubt, that, if the writer of a letter shews it" (as to the effect of mere delivery, see p. 664, *post*) "to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the type-writer." LOPES, L.J., in *Pullman* v. *Hill & Co.*, *supra*, at p. 529, defined publication as the communication of the defamatory matter to a third person. In *Pullman* v. *Hill & Co.*, *supra*, the letter complained of as reflecting on the plaintiffs, two of the members of a firm, was dictated by the managing director of the defendants to a clerk who took down the words in shorthand and then type-wrote them. The letter having been signed by the managing director was then press-copied by an office boy and sent by post in an envelope, addressed to the firm and not to the plaintiffs in their individual capacity. The defendants did not know that there were any partners in the firm besides the plaintiffs. The letter was

ment after it has been reduced into some permanent form. If it is made known to a third person, there is sufficient publication to support an action. If the statement is sent straight to the person of whom it is made, and is communicated to him alone, such publication will not support an action, though it will sustain an indictment, because it provokes or has a tendency to provoke a breach of the peace (*p*).

opened by a clerk of the firm in the ordinary course of business and was read by two other clerks. The Court of Appeal held that there was publication both to the type-writer and office boy of the defendants and to the clerks of the plaintiffs, and also that neither occasion was privileged. So, too, where a solicitor acting for his client dictated a letter to his clerk, containing statements defamatory of the plaintiff, which was copied by another clerk into the letter book and then sent to the plaintiff, the Court of Appeal held that it was clear that there was evidence of a publication to the clerks (*Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842, C. A.). It was, however, there held that the occasion was privileged, as the publication, if made direct to the plaintiff by the solicitor, would have been privileged, and the publication to his clerks was necessary and usual in the discharge of his duty and was made in the interest of the client (*Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., distinguished, and *Baker* v. *Carrick*, [1894] 1 Q. B. 838, C. A., followed on the question of privilege). There is also publication of a libel where the letter containing it is addressed to the person libelled and is opened by his clerk, who would to the sender's knowledge be a likely person to open it (*Gomersall* v. *Davies* (1898), 14 T. L. R. 430, C. A.; compare *Delacroix* v. *Thevenot* (1817), 2 Stark. 63; compare *Keogh* v. *Incorporated Dental Hospital of Ireland*, [1910] 2 I. R. 577). Where the defendant sent the letter complained of to the plaintiff at his office, that being the only address of the plaintiff known to the defendant, and it was opened in the absence of the plaintiff on a week-end holiday by the plaintiff's partner, as was usual in such circumstances, and read by him and a clerk, two questions were put to the jury:—(1) "Was the letter likely according to the ordinary course of business to be opened by a clerk?" (2) "Might it, according to the defendant's knowledge, be possible for the letter to be opened by a partner or clerk of the plaintiff?" The jury answered (1) in the affirmative, and (2) in the negative. The Court of Appeal held that on those findings publication was negatived and judgment must be entered for the defendant (*Sharp* v. *Skues* (1909), 25 T. L. R. 336, C. A.). There is sufficient publication by the defendant if he transmits a libellous letter to his correspondent abroad (*Ward* v. *Smith* (1830), 6 Bing. 749); compare *Wyatt* v. *Gore* (1816), Holt (N. P.), 299 (delivery of pamphlet by a governor of a distant province to his attorney-general; and see *Thoene* v. *Lockwood & Co., Ltd.* (1911), *Times*, 11th April). It is a publication of a libel to read it to a third person (*Forrester* v. *Tyrrell* (1893), 57 J. P. 532, C. A., where the defendant received an anonymous letter whilst at a meeting and read it to those present). As to publication to an agent of the plaintiff, see *Brunswick* (*Duke*) v. *Harmer* (1849), 14 Q. B. 185. The only publication in that case not statute-barred was the publication to the plaintiff's agent, and this was held to be sufficient. It was there said, *per* COLERIDGE, J., at p. 189, that "the defendant who on the application of a stranger delivers to him the writing which libels a third person publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person." Compare, however, *Smith* v. *Wood* (1813), 3 Camp. 323 (which was not referred to in *Brunswick* (*Duke*) v. *Harmer*, *supra*); and as to the effect of procurement of publication by the plaintiff, see *King* v. *Waring* (1803), 5 Esp. 13; *Weatherston* v. *Hawkins* (1786), 1 Term Rep. 110, cited in Starkie, Law of Slander and Libel, p. 381, which can be explained on the ground that the occasion was privileged. Privilege, it has been said, assumes publication.

(*p*) In *Edwards* v. *Wooton* (1602), 12 Co. Rep. 35, it was held that no action on the case would lie against one who sends a libel written in a letter sealed and directed to the party libelled without any other publication; but such offence is indictable; compare *R.* v. *Wegener* (1817), 2 Stark. 245. In *Phillips* v. *Jansen* (1798), 2 Esp. 624, it was held that to sustain an action for a libel in a private letter, it must be proved to have been addressed to a third person,

SECT. 1. In Libel Actions.

Responsibility of the writer of a libel for its publication.

1222. But though writing is not in itself publication, the writer of a libel must be taken to understand what he has written, and he ought to do all he can to prevent it being made known to a third person (*q*). If, therefore, a libel is published which is proved to be in the handwriting of the defendant (*r*), there is a case for the jury whether the defendant caused it to be published, though no direction to publish it be proved (*s*).

Publication by mistake.

1223. Although as a general rule even the writer of a libel is not liable civilly if he addresses it to the plaintiff himself, yet if he addresses it to the plaintiff knowing or having reason to know that it is likely to be opened and read before it reaches the hands of the plaintiff, and it is so opened and read, the defendant is liable as the publisher (*t*).

A person who knows or has reason to know that a document in his possession contains, or is likely to contain, a libel is liable as the publisher if, intending to send it by post to the person libelled, he by mistake puts it in the wrong envelope and thus communicates it to a third person (*a*).

not to the party himself. But as to when it is addressed to a person whose clerk to the knowledge of the sender is likely to open it, see note (*o*), p. 658, *ante*, and note (*p*), p. 665, *post*.

(*q*) See *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., *per* Lord ESHER, M.R., at p. 527, and note (*o*), p. 658, *ante*.

(*r*) A libellous paper, in the handwriting of the defendant, found in the house of the editor of a newspaper, in which the libel complained of appeared, is admissible against the defendant, though several parts have been erased and omitted in the newspaper, if the passages erased do not qualify the libel and the matter as published in the newspaper is still libellous (*Tarpley* v. *Blabey* (1836), 2 Bing. (N. C.) 437).

(*s*) *R.* v. *Lovett* (1839), 9 C. & P. 462; and see *Burdett* v. *Abbot* (1817), 5 Dow, 165, 201, H. L., affirming S. C. (1811), 14 East, 1; (1812) 4 Taunt 401, Ex. Ch.; *Bond* v. *Douglas* (1836), 7 C. & P. 626. Where the plaintiff to prove publication tendered secondary evidence, and the defendant produced a document as the original, it was held that the judge was bound at that stage to hear evidence on both sides and to decide whether the document offered was the original, and that, if it was, secondary evidence was inadmissible (*Boyle* v. *Wiseman* (1855), 11 Exch. 360). As to evidence of the libel where a defendant has destroyed the original, see *Rainy* v. *Bravo* (1872), L. R. 4 P. C. 287. As to what amounts to sufficient identification of printed copies, see *Fryer* v. *Gathercole* (1849), 4 Exch. 262; *Johnson* v. *Hudson* (1836), 1 Har. & W. 680. When the defendant pleads that the plaintiff published the libel, letters, not otherwise evidence, written by the plaintiff containing the same peculiarities of spelling as occur in the libel complained of are admissible as evidence that the libel complained of was written by the plaintiff (*Brookes* v. *Tichborne* (1850), 5 Exch. 929).

(*t*) *Gomersall* v. *Davies* (1898), 14 T. L. R. 430, C. A.; compare *Delacroix* v. *Thevenot* (1817), 2 Stark. 63. As to putting the word "private" on letters, see *Pullman* v. *Hill & Co.*, *supra*, *per* LOPES, L.J., at p. 529: "Moreover, the letter was directed to the plaintiffs' firm" (instead of to the plaintiffs in their individual capacity) "and was opened by one of their clerks. The sender might have written 'Private' outside it, in order to prevent it being opened by a clerk. The defendants placed the letter out of their own control, and took no means to prevent its being opened by the plaintiffs' clerks"; and see note (*o*), p. 658, *ante*.

(*a*) See *Fox* v. *Broderick* (1864), 14 I. C. L. R. 453; and on principle he is at least civilly liable if, although he did not intend to communicate the libel to the plaintiff or to anyone else, he transmits it, instead of a different document,

1224. If a letter is sent through the post it is *primâ facie* proof, until the contrary be proved, that the person to whom it is addressed received it in due course (*b*).

Transmission by post.

1225. A person publishes a libel who transmits it to the plaintiff or anyone else through the post on a postcard (*c*) or by telegraph (*d*); for this is presumed to involve communication to third persons before the libel reaches the hands of the addressee.

Transmission by postcard or telegram.

Duty of person who has libel in his possession.

1226. A person, even though he be not the maker of a libel, who knows or ought to know that a document in his possession contains or is likely to contain a libel, must do all he can to prevent it being communicated to a third person. If he fails to do so, and in consequence the libel is communicated to a third person, he is liable as the publisher (*e*).

to a third person, and by his mistake thus communicates the libel to a third person. As to criminal prosecutions, see *R.* v. *Paine* (1696), 5 Mod. Rep. 163. There P. wrote the libel at the dictation of another. He afterwards kept it in his study, and subsequently by mistake delivered it to B. instead of another paper. B. transmitted a copy of it to the Mayor of Bristol. P., afterwards being examined by the mayor, confessed that he wrote the libel, but said that he neither composed nor published it, but only delivered it instead of another paper to B. P.'s servant, however, proved that P. sent him to the study for a writing and that as he did not bring the paper sent for, P. fetched it himself, and being in the room only with Dr. H. the libel was repeated, but he could not tell by whom, but he remembered the first verse. The court said: "It is true the delivering it by mistake is no publication, and if there was no other evidence against him but his own confession the whole must be taken and not so much of it as would serve to convict him. But when he sent his servant to his study for a paper but fetched another, it is not material whether it was read by Dr. H. or not; for if that was the libel and read by either, it is a publication."

(*b*) *Warren* v. *Warren* (1834), 1 Cr. M. & R. 250. The production of a letter with the seal broken and with the postmark on it is strong (*ibid.*, *per* PARKE, B.), or at least *primâ facie* (*ibid.*, *per* ALDERSON, B.), evidence that it was received by the addressee (*ibid.*). If a letter containing a libel has itself the postmark on it, this is *primâ facie* evidence of it having been published (*Shipley* v. *Todhunter* (1836), 7 C. & P. 680).

(*c*) *Robinson* v. *Jones* (1879), 4 L. R. Ir. 391 (where it was held to be an actionable publication, and that the privilege which might, in like circumstances, have covered a sealed letter was no defence).

(*d*) In *Whitfield* v. *South Eastern Rail. Co.* (1858), E. B. & E. 115, where it was decided on demurrer that a corporation aggregate might be liable for causing the publication of a libel, the publication alleged was by telegraph; and in *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393, where it was held that the transmission unnecessarily by a telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoided the privilege, it was assumed that a transmission by telegram involves publication to third persons before it reaches the addressee. Where, however, transmission by telegram is the usual and reasonable course to adopt in the circumstances of the case, the privilege is not avoided (*Edmondson* v. *Birch & Co., Ltd., and Horner*, [1907] 1 K. B. 371, C. A.).

(*e*) The statements in the text are based upon *Vizetelly* v. *Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170, C. A. (circulating library), and *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354, C. A., *per* Lord ESHER, M.R., at p. 357 (vendor of newspapers); see also *Day* v. *Bream* (1837), 2 Mood. & R. 54 (porter), and as to booksellers, the cases cited in note (*q*), pp. 655, 656, *ante*. In *Emmens* v. *Pottle*, *supra*, the jury found (1) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2) that it was not by negligence on the defendants' part that they did not know there

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A person who parts with the possession of a document which contains a libel is presumed to know or to have reason to know that it contains or is likely to contain a libel, unless and until the contrary is proved. The burden is on the disseminator of a libel to prove that it was not due to any negligence on his part that he did not know that the document contained or was likely to contain a libel (*f*).

Civil liability for publication by general agent or servant.

1227. A master is civilly (*g*) liable for the act of publication by his servant, although he may have had no actual authority, express

was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. The judge at the trial on these findings, ordered judgment to be entered for the defendants, and the Court of Appeal dismissed the appeal of the plaintiff. Lord ESHER, M.R., said: "I agree that the defendants are *primâ facie* liable. . . . But the defendants did not compose the libel on the plaintiff; they did not write it, or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. . . . But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. . . . Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more, that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care, the case is reduced to this—that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain the libel." The above passage was quoted by A. L. SMITH, L.J., in *Vizetelly* v. *Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170, C. A., at pp. 176, 177; *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354, C. A., was followed by *Ridgway* v. *Smith & Son* (1890), 6 T. L. R. 275, *Mallon* v. *Smith & Son* (1893), 9 T. L. R. 621, and *Martin* v. *British Museum (Trustees)* (1894), 10 T. L. R. 338, as stated in the judgment of ROMER, L.J., in *Vizetelly* v. *Mudie's Select Library, Ltd.*, *supra*, at p. 180. The result of the cases was thus summed up by ROMER, L.J. (*ibid.*): "I think that as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken what I may call a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and if he succeeds in showing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him; (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and (3) that when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *primâ facie* a publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury." As to putting the word "Private" on a letter and thus controlling the mode of dealing with it, see note (*t*), p. 662, *ante*.

(*f*) See note (*e*), *supra*.

(*g*) But as to the criminal liability of a defendant for the publication of a libel published without his authority, consent, or knowledge, and not owing to want of due care or caution on his part, see the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7, and note (*j*), p. 663, and p. 743, *post*.

or implied, to write or publish a libel, and although the servant writes and publishes statements defamatory of the plaintiff which he knows to be untrue, if he does so in the course or scope of an employment which is authorised (*h*); and this doctrine is as applicable to incorporated companies as to individuals (*i*).

Proprietor of newspaper.

1228. Thus, the proprietor of a newspaper is answerable civilly (*j*) for the acts of his servants or agents in conducting the paper, though he has nothing to do with the publication and the whole is conducted by his servants or agents.

(*h*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, 427, 428, P. C.

(*i*) A limited company is liable for slander uttered by its servant in the course of his employment and for the benefit of his employers (*Finburgh* v. *Moss' Empires, Ltd.*, [1908] S. C. 928, following *Citizens' Life Assurance Co.* v. *Brown*, *supra*. As to corporations, see *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209, where the House of Lords held that the averments disclosed no ground of action against the defenders (the Glasgow Corporation). The principle of liability was in that case stated by Lord LOREBURN, L.C., at p. 214: "If it was within the scope of his authority to make a statement on behalf of his principals for their benefit, then the principals are liable for utterances in the course of making that statement." As to the liability of corporations and companies for libel, see also p. 617, *ante*, and note (*q*), p. 739, *post*. As to the agency of the defendant's wife, see note (*h*), p. 650, *ante*. For a case where it was held that proof of a libel being in the handwriting of the defendant's daughter, who wrote letters for her father in common cases, was not evidence of publication by the defendant to go to the jury, see *Harding* v. *Greening* (1817), 8 Taunt. 42.

(*j*) *R.* v. *Walter* (1799), 3 Esp. 21, *per* Lord KENYON, C.J., who said "criminally" as well as civilly; but see *infra*. As to the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 15 (entry or extract from register of newspaper proprietors), see pp. 665, 666, *post*, and note (*t*), p. 745, *post*: By the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7 (commonly called Lord Campbell's Act), whenever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent for the defendant to prove that such publication was made without his authority, consent, or knowledge, and that the publication did not arise from want of due care or caution on his part. As to the common law, see note (*q*), pp. 655, 656, *ante*. An authority from the proprietor of a newspaper to the editor to publish what is libellous, in criminal cases, is not, as it formerly was, a presumption of law, but is now a question of fact. Before the Libel Act, 1843 (6 & 7 Vict. c. 96), the only question of fact was whether the defendant authorised the publication of the paper; now, in criminal cases, it is whether the defendant authorised the publication of the libel. The production of the paper which contains the libel, coupled with the proof that the defendant is the proprietor, is *primâ facie* evidence that he caused the publication, and the onus is on him to prove the negative; but when he has proved that the literary department was entrusted entirely to an editor, the jury ought to be told that a person who employs another to do a lawful act is taken to authorise him to do it in a lawful and not in an unlawful manner. In some cases the mere appointment of an editor without supervision or control may involve an authority to publish libels, as if the paper was a calumnious paper; but merely giving a general authority to an editor to conduct a paper is not *per se* evidence that the proprietor authorised or consented to the publication of a libel within the meaning of the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7 (*R.* v. *Holbrook* (1877), 3 Q. B. D. 60, (1878), 4 Q. B. D. 42, 50, 51, 60, 61, where on the first and second applications by the defendant for a new trial, which were granted, MELLOR, J., dissented from the judgments of the court (COCKBURN, C.J., and LUSH, J.)); see also *R.* v. *Allison* (1888), 16 Cox, C. C. 559, C. C. R. As to

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Printers. Editors.

The printer who sends forth a libel printed by him is liable as the publisher thereof; and, if the printer and the editor of a magazine are sued for a libellous article contained in it, they are both liable for a libellous illustration contained in the magazine, though it was not printed by the printer, provided that the illustration is referred to in the letterpress part of the libellous article (*k*).

Though a libel printed by a printer be not circulated, the printer is liable as the publisher for the publication to his compositors and other workmen (*l*).

Publication by a particular agent.

1229. The defendant is liable as the publisher of a libel if he requests, procures, or contrives the publication thereof to a third person; and, if a defendant requests another to publish defamatory matter, a statement of which he gives to him for that purpose, whether in full or in outline, and the agent publishes that matter adhering to the sense and substance of it, although the language is to some extent his own, the defendant is liable as the publisher (*m*).

Publication at the request of another. Repetition.

1230. The person who publishes a libel cannot defend himself by showing that he committed what is an unlawful act at the request or by the order of another person. Thus, it is no answer to an action of libel that the defendant had the libellous statement from another and upon publication disclosed the author's name (*n*), even though he believed it to be true (*o*).

No publication unless third person understands it as a libel.

1231. The mere delivery to a third person of a document which contains a statement defamatory of the plaintiff in its plain and

charges against persons responsible for the publication of a newspaper, see further p. 746, *post*.

(*k*) *Watts* v. *Fraser* (1835), 7 C. & P. 369.

(*l*) See *Baldwin* v. *Elphinston* (1775), 2 Wm. Bl. 1037, Ex. Ch., criticised in *Watts* v. *Fraser* (1837), 7 Ad. & El. 223, 233, and see note (*s*), p. 656, *ante*.

(*m*) *Parkes* v. *Prescott* (1869), L. R. 4 Exch. 169, Ex. Ch., *per* MONTAGUE SMITH, KEATING, and HANNEN, JJ. (BYLES and MELLOR, JJ., dissenting), in which case *Adams* v. *Kelly* (1824), Ry. & M. 157, and *R.* v. *Cooper* (1846), 8 Q. B. 533, were considered. Compare *R.* v. *Hall* (1721), 1 Str. 416.

(*n*) *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act (*ibid.*, *per* BEST, C.J., at p. 405). As to slander, the doctrine in *Northampton's (Earl) Case* (1612), 12 Co. Rep. 132, is now no longer law. The doctrine is thus stated in the note to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 328, 329: "So it is holden to be no justification to an action of slander to say, that such an one told the slander to the defendant. But if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former." It is no answer now to an action of slander for the defendant to show that he named his informant and believed the tale to be true, unless he can show a defence on some other ground; see *M'Pherson* v. *Daniels* (1829), 10 B. & C. 263; *Ward* v. *Weeks* (1830), 7 Bing. 211; and *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, *per* BLACKBURN, J., at pp. 400, 401, and *per* LUSH, J., at p. 403 (quoted in note (*h*), p. 668, *post*), and the other cases cited in the note of the late Sir Edward Vaughan Williams to *Craft* v. *Boite*, *supra*, at p. 330. As to joint publication of libel, see note (*a*), p. 616, *ante*. As to the liability of the original utterer of a slander which has been repeated, see pp. 668, 669 *et seq.*, *post*.

(*o*) *Tidman* v. *Ainslie* (1854), 10 Exch. 63; see also *Botterill* v. *Whytehead* (1879), 41 L. T. 588. If the occasion be privileged the question of belief in the truth of the statement is material on the issue of express malice, but the belief does not create the privilege.

popular meaning is, if there is no further evidence, proof of the publication to the third person of a libel on the plaintiff. But if the statement complained of is not read by or to the third person, there is no publication to him of the libel complained of; and, if the words require an innuendo to give them a meaning defamatory of the plaintiff, it is for the plaintiff to prove the innuendo (*p*).

Burden of proof.

1232. If publication is contested by the defendant and there is any (*q*) evidence of publication by him, it must be left to the jury to decide whether there was in fact publication of the libel by him (*r*).

Function of jury.

1233. A defendant in an action for a libel contained in a newspaper was formerly, in a bill filed in any court for discovery, and is now in the action of libel itself, compellable to make discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper or of any matters relative to the printing and publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damage alleged to have been sustained by reason of any libel contained in such newspaper respecting such person. Such discovery may not be made use of as evidence or otherwise in any proceeding against the defendant, save only in the action in which the discovery is made (*s*).

Discovery of name of printer, publisher or proprietor of newspaper.

A certified copy of an entry in or extract from the register of

Copies of entries from register of newspapers.

(*p*) See the beginning of the passage quoted from the judgment in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., at p. 527, in note (*o*), p. 658, *ante*, where Lord ESHER said that publication is "making known." Where a letter was delivered folded up but unsealed to a third person, who without reading it or allowing any other person to read it delivered it to the plaintiff himself as he had been directed, Lord ELLENBOROUGH held that this did not amount to a publication which would support an action, although it would have sustained an indictment, as a publication to the party himself tends to a breach of the peace (*Clutterbuck* v. *Chaffers* (1816), 1 Stark. 471). It seems not to be sufficient in Scotland to allege publication to an amanuensis or a telegraph clerk without further particulars, on the ground, apparently, that, according to Scottish law, words alleged to be defamatory cannot be regarded as published to an amanuensis or a telegraph clerk, unless they conveyed to him some meaning defamatory of the plaintiff (*Evans & Sons* v. *Stein & Co.* (1904), 7 F. (Ct. of Sess.) 65). As to publication to a type-writer, office boy and clerks, see *supra*, note (*o*), p. 658, *ante*. As to publication to compositors and others employed by a printer, see note (*s*), p. 656, *ante*. The criticism by Lord DENMAN, C.J., in *Baldwin* v. *Elphinston* (1775), 2 Wm. Bl. 1037, Ex. Ch. (see note (*s*), p. 656, *ante*), was as to the need of a printer to require assistance in all cases, not as to whether the compositor and other subordinate workmen employed would understand it.

(*q*) *Harding* v. *Greening* (1817), 8 Taunt. 42, 44 (where the plaintiff was non-suited).

(*r*) *Ibid.* Compare *R.* v. *Johnson* (*Hon. R.*) (1805), 7 East, 65, 68, 70; for examples, see *R.* v. *Lovett* (1839), 9 C. & P. 462; *Baldwin* v. *Elphinston* (1775), 2 Wm. Bl. 1037, Ex. Ch.; *Bond* v. *Douglas* (1836), 7 C. & P. 626; *Delacroix* v. *Thevenot* (1817), 2 Stark. 63. As to directing the jury in criminal cases, see *R.* v. *Holbrook* (1877), 3 Q. B. D. 60, referred in note (*j*), p. 663, *ante*; *R.* v. *Holbrook* (1878), 4 Q. B. D. 42.

(*s*) Stat. (1836) 6 & 7 Will. 4, c. 76, s. 19, re-enacted by the Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1, as modified by the practice under the Judicature Acts. As to interrogatories in actions of libel and slander, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 51, 99 *et seq.*, 110.

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newspaper proprietors is conclusive evidence of the contents of the register, criminal or civil, and is *primâ facie* evidence of all matters and things thereby appearing (*t*).

SECT. 2.—*In Slander Actions.*

Slander. What is publication.

1234. A person publishes a slander of the plaintiff who speaks words slanderous of the plaintiff to or in the presence of a third person who hears them and understands (*a*) them in a sense slanderous of the plaintiff.

Publication by repetition.

1235. If in publishing the slander such a person is merely repeating what he has heard, there is nevertheless a publication by him of that which he makes known to the third person (*b*). In such a case also it is clear that there has been a distinct publication by the original speaker of the slander to him who repeated it.

Extent of liability of person responsible on issue of publication.

But though the original speaker is responsible for the publication by him to the person who repeated the slander on the issue of publication, he is not as a general rule responsible for its repetition (*c*).

He is, however, responsible in certain exceptional cases (*d*) for the

(*t*) See titles EVIDENCE, Vol. XIII., p. 474; PRESS AND PRINTING; Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 159. As to the meaning of "newspaper" and "proprietor," see notes (*m*) and (*p*), p. 744, *post;* as to the duty of the printers and publishers to make yearly returns, see Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 9; as to the right (not the duty) of a party to a transfer whereby there is a change of proprietorship to make a return at any time, see *ibid.*, s. 11; and see further titles COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 154; PRESS AND PRINTING. The statutory provisions as to registration of newspapers do not apply to any newspaper belonging to a joint stock company incorporated under the Companies Acts (Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 18).

(*a*) Slander consists in the apprehension of the hearers (*Fleetwood* v. *Curley*, (1619), Hob. 267, 268); see also note (*r*), p. 649, *ante.*

(*b*) See note (*n*), p. 664, *ante.*

(*c*) The general rule that the original utterer is *primâ facie* not responsible for its repetition was recognised in *Ward* v. *Weeks* (1830), 7 Bing. 211 (approved in *Clarke* v. *Morgan* (1877), 38 L. T. 354 and referred to by LINDLEY, L.J., in *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, C.A.), and *Parkins* v. *Scott* (1862), 1 H. & C. 153. In *Bree* v. *Marescaux* (1881), 7 Q. B. D. 434, C. A., BRAMWELL, L.J., said, at p. 437, that there was ample authority to show that a man is not liable for damage occasioned by a repetition of a slander. The statement, however, means that *primâ facie* he would not be responsible. As to the exceptions from the general rule, see p. 667, *post*, notes (*d*), *infra*, and (*f*) and (*g*), p. 667, *post.*

(*d*) The four exceptional cases are those which are enumerated by LOPES, L.J., in *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, 232, C. A.; see pp. 667, 668, *post*, and the cases cited in the notes thereto. There A., the defendant, falsely imputed unchastity to C., the plaintiff, an unmarried woman, engaged to be married to D., by words spoken by A. in the presence of B., the mother of the plaintiff. B. repeated them to C., the plaintiff, who repeated them to D.; D. broke off the engagement. Loss of marriage is special damage. An imputation of unchastity to a woman was not then (as it is now) actionable *per se*, in the sense that no special damage need be alleged or proved to make the defamatory spoken words actionable. It was held that the action could not be maintained because A. did not authorise B. to repeat the slander to D., or intend that it should be repeated to D., nor was the repetition of the words the natural result of their original utterance, nor was B. under a moral duty to repeat the slander to C., and C. under a moral duty to repeat the slander to D. In that case, as C. was the plaintiff and knew what she was saying to D., it

repetition if the slander is a defamatory statement actionable *per se*, or, though not such a statement, is a defamatory statement which causes, as a natural result of the repetition, special damage to the plaintiff. The exceptional cases (*e*) are (1) where the original speaker authorised the repetition to the third person (*f*), or (2) where the original speaker intended that the person to whom he uttered the slander should repeat it to the third person (*f*), or (3) where the repetition of the slander to the third person was the natural result of the original publication to him who repeated it (*g*), or (4) where he to whom the original publication

seems difficult to understand why anyone should be liable to C. for the publication by C. of a statement defamatory of herself, even if she was under a moral obligation to repeat the statement, unless a defendant is in law liable for the publication by the plaintiff of a slander on the plaintiff when the plaintiff is under a moral obligation to publish it. LOPES, L.J., in that case, was of opinion that if there had been a moral obligation on B. to communicate the slander to her daughter C., and on the daughter C. to communicate it to D., the defendant would have been liable. It was said, however, by LOPES, L.J., that the words complained of were untrue, and that B. must have known that they were untrue and that there could not be any obligation either on B. or C. to repeat them to D. In *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C.A., BRAMWELL, L.J., said, at p. 244: "I wish to remark that a person may honestly make on a particular occasion a defamatory statement without believing it to be true, because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it." The fact, however, that a rumour is believed by a person to be untrue is in most cases strong *primâ facie* evidence of express malice on the part of such a person who repeats it on an occasion otherwise privileged. In *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, C.A., LINDLEY, L.J., at p. 232, referring to the contention of counsel that classes (2) and (3) (see the text, *infra*) were exceptions to the rule in *Parkins* v. *Scott* (1862), 1 H. & C. 153, to the effect that in the case of an unauthorised repetition of a slander it is not the person who utters the slander, but the person who repeats it, that is liable, held that there was no evidence to support that view.

(*e*) See note (*d*), p. 666, *ante*.

(*f*) The first and second exceptions referred to by LOPES, L.J., in *Speight* v. *Gosnay*, *supra*, seem to be founded on the following passage from Odgers on Libel and Slander, 2nd ed., p. 168, which was quoted with approval by HUDDLESTON, B., in *Whitney* v. *Moignard* (1890), 24 Q. B. D. 630, at p. 631: "Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so, here the defendant is liable for all the consequences of A.'s repetition of the slander, for A. thus becomes the agent of the defendant." In *Whitney* v. *Moignard*, *supra*, it was held that a paragraph in a statement of claim, in an action for an alleged libel published in a newspaper, stating that the defendant knew that the words published would be and the same in fact were repeated and published in other editions of the same newspaper was properly pleaded and ought not to be struck out. So, too, in *Bradbury* v. *Cooper* (1883), 12 Q. B. D. 94, it was assumed that a statement of claim which alleged that T. "at the request and by the direction of the defendant falsely and maliciously spoke and published of and concerning the plaintiff" certain slanderous words there set out disclosed a good cause of action.

(*g*) See the *dictum* of LITTLEDALE, J., in *R.* v. *Moore* (1832), 3 B. & Ad. 184, at p. 188, cited with approval in *Whitney* v. *Moignard*, *supra*, *per* HUDDLESTON, B., at p. 631, to the effect that, if the experience of mankind must lead anyone to expect the result of an action, he who does the act will be responsible for that result. It is sufficient that the result be the natural and probable result; and it is not essential that it should be the natural and necessary or the natural and legal result. See *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, *per* Lord WENSLEYDALE, at p. 600, where the rules laid down by Lord ELLENBOROUGH, C.J., in *Vicars* v. *Wilcocks* (1806), 8 East, 1; 2 Smith, L.C.,

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was made was under a moral duty to repeat the slander to the third person (*h*).

Explanation of classification of cases where person originally liable is responsible for repetition.

1236. The above statement is framed in accordance with a judicial classification (*i*) of the exceptional cases in which a person will be held liable for the consequences of a repetition of a slander which he originated. The first, second, and fourth classes appear, however, to be instances of the third class which is based on a principle of law not confined to actions of libel and slander. On that principle a person is responsible for the repetition of a slander, whether actionable *per se* or otherwise, originated by him if the repetition was the natural consequence of his original utterance, provided that, where the slander is one where special damage is of the gist of the action, he will not be liable unless the special damage is the natural result of the repetition, and therefore the natural result of the original utterance of which the repetition was the natural consequence.

Liability for such repetition confined to burden on

1237. The liability above discussed is to be understood as confined to the burden on the plaintiff to establish the responsibility of the original utterer on the issue of publication. The original utterer

11th ed., p. 521, were criticised as being too restricted. The statement in *Ward* v. *Weeks* (1830), 7 Bing. 211, *per* TINDAL, C.J., at p. 215, that "every man must be taken to be answerable for the necessary consequences of his own wrongful acts," is too narrow in the present state of the law if it excludes probable results. See *Société Française des Asphaltes* v. *Farrell* (1885), Cab. & El. 563 (where it was held that the wrongful refusal of a third party to fulfil a contract may give a right to special damage for slander if such refusal be the probable consequence of the utterance of the slander), and *Speake* v. *Hughes*, [1904] 1 K. B. 138, C. A. (where the plaintiff failed because it did not appear "in point of law" to be a natural consequence of the words spoken, or one which the defendant could reasonably be taken to have contemplated when he spoke them, that the plaintiff's employers should dismiss him). See also *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, C. A., *per* LINDLEY, L.J., at p. 232; and see p. 730, *post*.

(*h*) *Derry* v. *Handley* (1867), 16 L. T. 263, referred to by LOPES, L.J., in *Speight* v. *Gosnay*, *supra*. In such a case there is a distinct publication by the person who repeats the slander being under a moral duty to do so. He would, however, be able to avail himself of the defence of privilege, if he were sued. The statement of LOPES, L.J., is confined to the case of moral duty; but the same principle applies to a legal, social, or moral duty, or indeed to the case where the person who repeats the slander has a sufficient interest in making the communication to the person to whom he makes it to make the repetition privileged so far as he is concerned. As to privilege, see pp. 677 *et seq.*, *post*. The liability of a person who repeats a slander has been well expressed as follows: "It is no justification to a person, in giving currency to that which is injurious to the character of another, for him to say that he heard the statement made by another person. If he justifies at all, he must show that he made the communication under circumstances that gave it a privileged character, that he was justified in making the communication, or that the words themselves, when he spoke the words, were true. It is not enough for him to say that he heard it from some other person" (*Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, *per* LUSH, J., at p. 403, and see *ibid.*, *per* BLACKBURN, J., at pp. 400, 401, approving *M'Pherson* v. *Daniels* (1829), 10 B. & C. 263, *per* LITTLEDALE, J., at pp. 272, 273). See also as to the liability of one who publishes a libel or slander which he did not himself contrive, as distinguished from the liability of the original publisher on the issue of publication, p. 661, *ante*, and the notes to *Craft* v. *Boite* (1699), 1 Wms. Saund. 310.

(*i*) See p. 667, *ante*.

plaintiff to establish original responsibility on issue of publication.

may, though responsible on the issue of publication, nevertheless be entitled to judgment if he establishes a plea of justification or that the original utterance was privileged. On principle it seems plain that if the original utterance was not privileged, and the original utterer is responsible for the repetition on the issue of publication, the original utterer cannot escape liability for the repetition on the ground that the repetition was a privileged communication. Indeed, the fact that the repetition could be successfully defended by the person who repeated the slander, on the ground that he was under a duty to repeat what he heard to the person to whom he repeated it, is a ground for holding the original utterer to be responsible for the repetition on the issue of publication. Conversely, the person who repeats an untrue statement which is defamatory of the plaintiff cannot escape liability, if sued for the repetition, by showing that the original utterance to him was privileged, if he was under no duty to repeat the slander to the person to whom he repeated it, though he would be entitled to judgment on the ground of privilege if he was under a duty to repeat the slander to the person to whom he repeated it, even if the original statement to him was not privileged (*j*).

Part IV.—Defences.

SECT. 1.—*Justification.*

Justification.

1238. No action for libel or slander will lie unless the defendant has falsely published of the plaintiff a statement which is defamatory of the plaintiff. The plaintiff must allege the publication, and prove it, if the publication is denied. The plaintiff must set out the statement, and if the words are not libellous or slanderous of the plaintiff in their natural and primary sense, he must, by an innuendo, assign a libellous or slanderous meaning, and unless the defendant admits the innuendo the plaintiff must prove it (*k*). The plaintiff must also allege that the statement is false, but since the law presumes that a person is of good repute unless and until the contrary is alleged and proved, the burden is on the defendant of alleging affirmatively (*l*) and proving that the defamatory statement which

Defence must be pleaded affirmatively.

(*j*) As to the liability of the person who repeats a slander, see note (*h*), p. 668, *ante*. The words in the text, "if he was under a duty," are to be understood as covering all cases of interest or duty which are included in the defence of privilege. As to privilege, see pp. 677 *et seq.*, *post*.

(*k*) As to innuendoes, see pp. 645 *et seq.*, *ante*.

(*l*) See *Belt* v. *Lawes* (1882), 51 L. J. (Q. B.) 359. As to pleading justification before 1852 and after 1852 up to the time of the Judicature Acts, see the notes of Serjeant Williams and the late Sir E. Vaughan Williams to *Craft* v. *Boite* (1669), 1 Wms. Saund. 310, 327 *et seq.*, and the cases there cited. See also Bullen and Leake, Precedents in Pleading, 3rd (1868) ed., p. 723. As to pleading fair comment, see *Penrhyn* v. *Licensed Victuallers' Mirror* (1890), 7 T. L. R. 1, where the defendants pleaded thus:—"(1) (2) They deny that they published the said words falsely or maliciously or with any of the meanings in the statement of claim alleged or with any defamatory meaning. (3) The said words without the alleged meanings are not defamatory of the plaintiff. (4) In so far as they consist of allegations

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the defendant published is true. The defence of truth is only required on the assumption that the defendant has published a defamatory statement. It may be pleaded as the sole defence, or it may be pleaded alternatively to the whole or part; but it is a separate defence, and must not be treated as part of the issue of publication. The allegation in a defence of the truth of the statement complained of is called a defence of justification.

Defence must be pleaded separately.

Defence of justification confesses and avoids.

1239. The defence of justification confesses the publication of the statement justified or so much of the statement as is justified, and asserts that it is true in substance and in fact. It is not necessary for the defendant to justify, and it is not permissible for him to justify, that of which the plaintiff does not complain. It follows that the defendant may not set out a version of the statement which differs materially from the statement set forth in the statement of claim and justify that version. He must for the purpose of justification accept the plaintiff's version of the statement, or a statement which is in substance identical with the plaintiff's version (*m*).

of fact, the said words are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which are a matter of public interest." The Divisional Court said that para. (2) must be amended by striking out the words "falsely and maliciously" and inserting the words "as alleged," and para. (3) must be amended by inserting the words "if defamatory do not refer to the plaintiff," and that para. (4) must remain, but particulars must be given. As to the plea of fair comment, see, further, *Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, 247, C. A., and note (*a*), p. 700, *post*. As to discovery and interrogatories, see, generally, title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 99 *et seq*. As to discovery of documents, see also *Kent Coal Concessions, Ltd.* v. *Duguid*, [1910] A. C. 452; affirming [1910] 1 K. B. 904, C. A. As to interrogatories, see also the cases cited during argument before the full court in *Maass* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543, C. A., and those referred to in note (*l*), pp. 712, 713, *post*.

(*m*) "The law is plain that, if you wish to dispute the sense given to the words in the libel, you must do so by the plea of not guilty, and if you wish to justify you must confess and avoid" (*Brembridge* v. *Latimer* (1864), 12 W. R. 878, *per* BYLES, J., at p. 879). "That is a clear and concise statement of the law as it was, and though the forms of pleading have been altered the substance of the rule is still the same" (*Rassam* v. *Budge*, [1893] 1 Q. B. 571, *per* Lord COLERIDGE, C.J. (during argument), at p. 574). In the latter case the defendant pleaded to the statement of claim, setting out defamatory words alleged to have been spoken by the defendant of the plaintiff, that he "did say the following words," and proceeded to set out his own version of what he said, which differed materially from the words set out in the statement of claim, and then alleged that the words spoken by him were true in substance and in fact, and were spoken on a privileged occasion. The defence was struck out as embarrassing and tending to prejudice the fair trial of the action. In *Brembridge* v. *Latimer*, *supra*, the declaration set out part of a newspaper article accusing the plaintiff of base and ungrateful conduct. The defendant pleaded that words in the article charging bribery were omitted from the declaration, and set out and justified the whole article. It was held that those pleas were rightly struck out as being calculated to prejudice, embarrass, and delay the fair trial. This decision was approved in *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, *per* BLACKBURN, J., at p. 402, because, a portion of the newspaper being set forth in the declaration with an innuendo, the defendant endeavoured to show that if the whole article was taken, the plaintiff would have had a different cause of action, and he sought, by his plea, to set out the whole article, and so to justify it as true in fact. That was irrelevant to the question at issue, whether he had published the libel charged in the declaration.

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The defendant may justify the statement alleged by the plaintiff to have been published in the meaning assigned to it by the plaintiff by an innuendo; for in that case the defendant is justifying that of which the plaintiff expressly complains. Further, whether there be an innuendo or not, the defendant may justify the statement alleged by the plaintiff in the natural and primary sense of the words set forth in the statement of claim; for, if the plaintiff has pleaded an innuendo and fails to establish it, he may fall back on the natural and primary meaning of the words; and if he has pleaded no innuendo, he must rely on their primary and natural meaning.

Defendant must not justify words in a sense other than the natural sense, or the secondary sense assigned by plaintiff.

The defendant, therefore, may justify the statement set forth in the statement of claim either in the sense expressly or in the sense impliedly complained of, or in both senses (*n*). But he may not assign a meaning to the plaintiff's version of the statement which differs from the natural and primary meaning of the words and from the meaning specially assigned by the plaintiff, and justify the statement set forth in the statement of claim in that sense; for that would be justifying a meaning of which the plaintiff does not expressly or impliedly complain (*o*).

1240. Further, the defendant may not justify a part only of a libel or slander, unless he can show clearly that the statements are severable (*p*). Where the charge complained of is not severable in

Defendant must justify the whole unless complaint clearly severable.

(*n*) This is confession and avoidance within the meaning of the rule referred to in note (*m*), p. 670, *ante*. Commenting on the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) s. 61 (the substance of which is still law), BLACKBURN, J., in *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, at p. 402, said that the legislature thereby enacted that a declaration containing one count for libel or slander with an innuendo that the words were used in a particular meaning should be taken as if there were two counts, one with the innuendo and one without the innuendo, if the plaintiff proved either it was sufficient, and that it followed that a defendant might plead a justification as to the words with the meaning in the innuendo, and also as to them without the meaning.

(*o*) That would not be confession of the plaintiff's case, but the confession of a case of complaint made for the plaintiff by the defendant and the avoidance of the complaint so invented by the defendant contrary to the rule; see notes (*m*), p. 670, *ante*, and (*n*), *supra*. Under the present system of pleading the publication may be traversed, also the alleged meaning of the words, or the plea that the words have a defamatory meaning; but the defence of justification is then an alternative defence which for the purpose of that defence confesses and avoids. As to pleading, generally, see title PLEADING.

(*p*) There is a string of authorities to this effect (*Rassam* v. *Budge*, [1893] 1 Q. B. 571, *per* A. L. SMITH, L.J., at p. 576). Thus, where the defendant published that the plaintiff, a proctor, had been suspended three times, *per quod* his neighbours were led to think he had been guilty of extortion, a plea that he had been suspended once for extortion was held bad (*Clarkson* v. *Lawson* (1829), 6 Bing. 266, distinguishing *Edwards* v. *Bell* (1824), 1 Bing. 403). Subsequently the defendant put in a plea to one of the said suspensions that the plaintiff had been once suspended by Sir J. Nicholl, and it was held that the libellous matter was thus divisible and the plea an answer as to part (*Clarkson* v. *Lawson* (1830), 6 Bing. 587). Compare *Clarke* v. *Taylor* (1836), 2 Bing. (N. C.) 654 (justification of a portion of the statement which contained distinct charges); and contrast *Roberts* v. *Brown* (1834), 10 Bing. 519. In *Ingram* v. *Lawson* (1838), 5 Bing. (N. C.) 66, the justification, though pleaded to the whole action, was insufficient. Where a count alleged that the plaintiff was an apothecary and charged the defendant with having said "he" (the plaintiff) "has given my child too much mercury

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its nature, the defendant must justify to the full extent of the charge. Thus, upon a charge of murder, it would be no defence to allege that manslaughter had been committed (*q*), or, upon a charge of crime with aggravating circumstances, to allege the commission of the bare crime, if the additional circumstances would be libellous (*r*).

Defendant justifying as to part only must make the severance.

1241. Assuming that the part is severable from the whole, the defendant must make the separation, so that the court and the plaintiff may see with certainty what portion the defendant means to justify (*s*). If the part not justified is defamatory, the defendant is liable in damages for that which is left uncovered by the justification (*t*).

Justification not necessarily bad in law if it does not cover every epithet.

1242. But a justification of the truth of the substantial imputation in a libel is not necessarily insufficient where it does not extend to every epithet or term of general abuse which may be found in the description or statement of such imputation (*u*); and unless the

and poisoned it," a plea that the plaintiff did give the child too much mercury was held bad (*Edsall* v. *Russell* (1842), 4 Man. & G. 1090). "The defendant does not sever one distinct portion from another, and profess to answer such portion, as in *Clarkson* v. *Lawson* (1830), 6 Bing. 587; but he abstracts certain words found in the third count, and only professes to answer the charge conveyed by those words, the administering of an excessive quantity of mercury, but not such an excessive quantity as poisoned the child. The plea is bad, therefore, as neither confessing nor avoiding the alleged slander" (*Edsall* v. *Russell*, *supra*, at p. 1100). As to an insufficient justification of an allegation of want of professional experience, see *Botterill* v. *Whytehead* (1879), 41 L. T. 588. As to justification of part of the statement, see also p. 674, *post*. As to the mitigation of the strict rule in modern practice, see *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183, C. A., *per* Lord ESHER, M.R., at p. 186, quoted in note (*l*), p. 676, *post*.

(*q*) *Clarkson* v. *Lawson* (1830), 6 Bing. 587, *per* TINDAL, C.J., at p. 593.

(*r*) *Helsham* v. *Blackwood* (1851), 11 C. B. 111. Thus a charge of killing an antagonist in a duel under circumstances revolting to a man of honour is not justified by a defence alleging simply killing in a duel (*ibid.*). Nor is a charge of quitting a town under circumstances showing an intent to defraud creditors sufficiently answered by a defence of quitting which is consistent with an absence of intent to defraud (*O'Brien* v. *Bryant* (1846), 16 M. & W. 168). But a complaint that a railway company printed and published that the plaintiff was charged at petty sessions with having travelled on a railway without first paying his fare and was convicted in a penalty and costs, "meaning thereby that the plaintiff had attempted to defraud the company," was sufficiently answered by pleading that the plaintiff was charged and convicted as in the declaration mentioned without expressly justifying the innuendo, the only offence of which the court had cognisance being for travelling without previously paying the fare "with intent to avoid payment thereof" (*Biggs* v. *Great Eastern Rail. Co.* (1868), 18 L. T. 482).

(*s*) *Stiles* v. *Nokes* (1806), 7 East, 493, *per* LE BLANC, J., at p. 507, approved in *Clarkson* v. *Lawson*, *supra*, *per* TINDAL, C.J., at p. 593. The words in the text "and the plaintiff" are added. The modern practice is chiefly concerned to see that the plaintiff shall know the meaning and the extent of the defence that he may not be taken by surprise. As to treating a general plea as if it applied to each part of the claim where the defendant fails to prove the whole to be true, see *Zierenberg* v. *Labouchere*, *supra*, and note (*l*), p. 676, *post*.

(*t*) *Clarke* v. *Taylor* (1836), 2 Bing. (N. C.) 654, *per* TINDAL, C.J., at p. 665. Where the part omitted from the justification is ambiguous, the court will not construe it, if the plaintiff has not put a construction on it, and will refuse to enter a verdict for the plaintiff on the part not justified (*ibid.*).

(*u*) *Morrison* v. *Harmer* (1837), 3 Bing. (N. C.) 759, 767.

discrepancy between the statement complained of and the matter justified is so great that the defence of justification ought to be struck out, the question for the jury is whether the defendant's account is substantially correct (*a*).

Subject-matter to be considered.

1243. The libel must be understood with reference to the subject-matter, and a justification which covers the libel considered in reference to its subject-matter is sufficient (*b*).

The test whether defence and particulars are sufficient.

Plaintiff must know case against him.

1244. The modern practice as to pleading (*c*) a justification is that the defendant who justifies either an isolated or a general charge must make perfectly clear what he is justifying and what case the plaintiff has to meet. If the libel complained of makes only an isolated charge against the plaintiff, clearly and precisely, so that the plaintiff would know, if the defendant avers simply that the statement complained of is true, what charge he has to meet and the particulars of the charge, the defendant who thus simply avers thereby furnishes sufficient particulars. If, however, particulars of the justification are required to prevent the plaintiff being taken by surprise, they must be given (*d*).

Justification of a general charge.

1245. When a general charge is made against a man, the defendant must state specifically the facts on which he relies as supporting the charge which he justifies, in order that the plaintiff may know what facts he has to meet and have an opportunity of denying them (*e*).

(*a*) See *Alexander* v. *North Eastern Rail. Co.* (1865), 6 B. & S. 340 ; compare *Gwynn* v. *South-Eastern Rail. Co.* (1868), 18 L. T. 738.

(*b*) Thus, where a declaration alleged that the plaintiff was cashier to a person to whom the defendant wrote, saying of the plaintiff, "I conceive there is nothing too base for him to be guilty of," a plea that the plaintiff signed and delivered to the defendant an I. O. U. and afterwards falsely and fraudulently denied his signature was held sufficient justification, the plea averring that the libel was written and published solely in reference to that transaction (*Tighe* v. *Cooper* (1857), 7 E. & B. 639). But the rule in the text must not be taken to sanction a plea of justification to the words in a sense which is neither the primary sense nor the secondary sense assigned to the words by the plaintiff; see p. 671, *ante*.

(*c*) As to pleading generally, see title PLEADING.

(*d*) See R. S. C., Ord. 19, r. 15.

(*e*) *Zierenberg* v. *Labouchere*, [1893] 1 Q. B. 183, C. A. As to the history of the practice, see *ibid.*, *per* Lord ESHER, M.R., at p. 186 ; notes to *Craft* v. *Boite* (1669), 1 Wms. Saund, 310, and Bullen and Leake's Precedents of Pleading, 3rd ed. The following cases are still important, as the substance of the practice has not changed :—*J'Anson* v. *Stuart* (1787), 1 Term Rep. 748, *per* ASHHURST, J., at p. 752 (a passage quoted with approval in *Zierenberg* v. *Labouchere*, *supra*), where it was said, "When he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge ; then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them, for the plaintiff cannot come to the trial prepared to justify his whole life"; *Hickinbotham* v. *Leach* (1842), 10 M. & W. 361, *per* PARKE, B., at p. 363, and the statement of ALDERSON, B., during the argument (*ibid.*, at p. 363) that the plea ought to state the charge with the same precision as an indictment; *Newman* v. *Bailey* (1776), 2 Chit. 665 ; *Holmes* v. *Catesby* (1809), 1 Taunt. 543; *Jones* v. *Stevens* (1822), 11 Price, 235. In *Gourley* v. *Plimsoll* (1873), L. R. 8 C. P. 362, the court expressed the opinion that the more convenient course was that a plea of justification in general form should be allowed with full particulars of the matters intended to be relied on in justification. See also *Jones* v. *Bewicke* (1869), L. R. 5 C. P. 32, and *Odger* v. *Mortimer*

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A plaintiff cannot come to trial prepared to justify his whole life (*f*).

Particulars must be relevant.

The particulars must be relevant to the issues. If they are irrelevant, or vague, or embarrassing, they will be struck out (*g*).

Embarrassing defence.

A defence, which leaves it in doubt what the defendant justifies and what he does not, will be struck out as embarrassing (*h*).

(undated) (unreported), referred to by BOVILL, C.J., in *Gourley* v. *Plimsoll* (1873), L. R. 8 C. P. 362, where *Behrens* v. *Allen* (1862), 8 Jur. (N. S.) 118, *O'Brien* v. *Clement* (1846), 16 M. & W. 159, and *Gregory* v. *Brunswick* (*Duke*) (1843), 6 Man. & G. 205, were cited for the plaintiff. The substance of the practice is that the plaintiff is entitled to know what charge is made against him and the facts, as distinct from the evidence, which are alleged by the defendant as supporting the charge. See R. S. C., Ord. 19, rr. 4, 6, 7, 15. In *Zierenberg* v. *Labouchere*, [1893] 1 Q. B. 183, C. A., the Court of Appeal held that the justification for want of sufficient particulars was not a well-pleaded defence, and that until there was such a defence there could be no right of discovery in the absence of some special relation between the parties, such, for instance, as that of principal and agent, or other special circumstances. As to the modern practice as to particulars, see also *Hennessy* v. *Wright* (1888), 57 L. J. (Q. B.) 594, C. A.; *Markham* v. *Wernher, Beit & Co.* (1902), 18 T. L. R. 763, H. L.; *Devereux* v. *Clarke & Co.*, [1891] 2 Q. B. 582, C. A. (where plaintiff complained that defendants, in reviewing his book, said that plaintiff was by his own confession a liar, and the defendants, who justified, were ordered to specify in their particulars the passages on which they intended to rely). As other examples of insufficiency, see *Hickinbotham* v. *Leach* (1842), 10 M. & W. 361; *Holmes* v. *Catesby* (1809), 1 Taunt. 543; *Bruton* v. *Downes* (1859), 1 F. & F. 668; *Edmonds* v. *Walter* (1820), 2 Chit. 291. As to the distinction between a plea of justification and a plea of fair comment, see *Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, C. A. (where the particulars asked for were refused), and note (*a*), p. 700, *post*. Where the defendant pleads "justification" and "fair comment," the latter question does not arise if the former plea be proved (*Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., H. L.; and see *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A., and *Walker* (*Peter*) *& Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, 251, 252, C. A.). The rule that a defamatory statement cannot be justified when the same person has alleged the facts and commented on them, unless both the facts are true and the comments thereon are fair, does not apply where one person alleges the facts and another comments on them (*Mangena* v. *Wright*, [1909] 2 K. B. 958, *per* PHILLIMORE, J., at p. 975).

(*f*) See *J'Anson* v. *Stuart* (1787), 1 Term Rep. 748, 752).

(*g*) As to striking out particulars, see *Markham* v. *Wernher, Beit & Co.*, *supra* (where the House of Lords held that the defendant was bound to support his justification by facts stated distinctly and with the same particularity as in a criminal charge). Compare *Hickinbotham* v. *Leach*, *supra*, *per* ALDERSON, B., at p. 363, cited in note (*e*), p. 673, *ante*. As to pleading justification to the words "convicted felon" and "felon editor," see *Leyman* v. *Latimer* (1878), 3 Ex. D. 352, C. A. (justification held to be bad). Where the defendant pleaded a justification as to all of the libel except the heading "horse stealer," setting out the several circumstances of suspicion related in the libel, but the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea, it was held that the statement of circumstances of suspicion to excuse part of the libel was not a sufficient justification (*Mountney* v. *Watson* (1831), 2 B. & Ad. 673).

(*h*) *Fleming* v. *Dollar* (1889), 23 Q. B. D. 388, where the defendant admitted the publication of the words but denied the innuendoes, and pleaded that to the extent of the facts thereinafter pleaded the words were true in substance and in fact. The defence then set out a number of facts, and finally contained an admission that the words were not wholly justified by the said facts and paid 40*s.* into court in satisfaction of the plaintiff's claim. The defence was struck out not only as contrary to R. S. C., Ord. 22, r. 1, but also as being embarrassing on the ground that the defendant by his pleading admitted that he had gone

Justifying statements which purport to be rumours, reports and the like.

1246. If the defendant made a statement, whether in writing or by word of mouth, which is defamatory of the plaintiff, it is no justification, or not sufficient justification, that the statement purported to be made on the relation of another, and that it had, in fact, been related to the defendant by that other, even though the defendant disclosed the name of his informant at the time or subsequently at the earliest opportunity. The defendant who justifies the statement must allege and prove that the statement which was made to him, and which he published, was true in substance and in fact (*i*).

Proof of justification.

1247. The burden is on the defendant of satisfying the jury that the statement which is justified, or so much, if it be divisible, as is separately justified, is true in substance and in fact. If the statement complained of imputes the commission by the plaintiff of a criminal offence, the defendant, to succeed on his plea of justification, must prove the commission of the offence charged as strictly as if the plaintiff were being prosecuted for the offence (*k*). In other

too far, but did not mention in what respect or to what extent he had gone too far (*Fleming* v. *Dollar* (1889), 23 Q. B. D. 388, 393). The right to plead a justification to part of a divisible libel was there recognised (*ibid.*, *per* Lord COLERIDGE, C.J., at p. 392, citing in support of that proposition *Mountney* v. *Watson* (1831), 2 B. & Ad. 673; *M'Gregor* v. *Gregory* (1843), 11 M. & W. 287; and criticising the *dicta* in *R.* v. *Newman* (1853), 1 E. & B. 558). For an instance of a justification as to part which was held bad, see *Smith* v. *Parker* (1844), 13 M. & W. 459; and see note (*p*), p. 671, *ante*.

(*i*) See note (*n*), p. 664, *ante*, and note (*h*), p. 668, *ante*. As to mitigation of damages, see pp. 724 *et seq.*, *post*. As to the defence of privilege for fair and accurate reports, see pp. 694 *et seq.*, *post*. As to pleading and particulars, see *Hennessy* v. *Wright* (1888), 57 L. J. (Q. B.) 594, C. A. (referred to note (*m*), p. 676, *post*).

(*k*) *Chalmers* v. *Shackell* (1834), 6 C. & P. 475 (forgery); *Willmett* v. *Harmer* (1839), 8 C. & P. 695; *Roberts* v. *Richards* (1862), 3 F. & F. 507 (charge of theft by servant in giving away master's bread); as to strictness of pleading, compare *Hickinbotham* v. *Leach* (1842), 10 M. & W. 361, *per* ALDERSON, B., p. 363 (where the charge complained of was duffing). See also *Markham* v. *Wernher, Beit & Co.* (1902), 18 T. L. R. 763, H. L. (referred to note (*g*), p. 674, *ante*), where the particulars of justification were struck out. But where the plaintiff charged, as a libel upon him, a notice, published by a railway company, which stated that he had been convicted by justices of an offence against the defendant's bye-laws and fined with an alternative of three weeks' imprisonment, and the defendant justified and the alternative in the conviction was really fourteen days, it was held that it was a question for the jury whether the statement charged as libellous was or was not substantially true and that the inaccuracy did not as a matter of law make the statement necessarily libellous, that the conviction was described with substantial accuracy and truth in the statement complained of and in the plea was held good (*Alexander* v. *North Eastern Rail. Co.* (1865), 6 B. & S. 340); and see *Gwynn* v. *South-Eastern Rail. Co.* (1868), 18 L. T. 738 (alternative to a small fine three days' imprisonment, described as an alternative of imprisonment with hard labour). It was further alleged in *Alexander* v. *North Eastern Rail. Co.*, *supra*, that it was not necessary to plead that the conviction was still subsisting, *Cuddington* v. *Wilkins* (1616), Hob. 81, being distinguished on the ground that a pardon had been granted, and COCKBURN, C.J., in *Alexander* v. *North Eastern Rail. Co.*, *supra*, at p. 344, stating that if the conviction had been quashed it should have been pleaded. As to fair and accurate reports, see pp. 694 *et seq.*, *post*. As to admitting evidence, though no particulars of justification have been given, where plaintiffs have never applied for particulars, see *Hewson* v. *Cleeve*, [1904] 2 I. R. 536, C. A.

SECT. 1. Justification.

cases the proof required is, perhaps, less strict (*l*); but the defendant must satisfy the jury that the statement justified is substantially true, though the proof does not establish every little detail. If the statement complained of is that the plaintiff has been guilty of habitual misconduct, the defendant does not discharge the burden on him by proving one isolated instance of such misconduct.

Where general plea may be applied to each part of the claim.

1248. Although in strictness a defendant who pleads generally a justification of the whole libel is bound to prove the whole to be true or fail altogether, yet, where the statements in the claim can be treated as separate libels, the court may treat the general plea as if it applied to each part of the claim (*m*).

Costs.

1249. Where in an action for libel pleas of justification and privilege are set up and the defendant fails as to the plea of justification, and judgment is given for him on the plea of privilege, the plaintiff is not entitled to the costs of witnesses whose evidence does not relate exclusively to the plea of justification (*n*).

(*l*) As to proving every material particular, see *Weaver* v. *Lloyd* (1824), 2 B. & C. 678; *Cory* v. *Bond* (1860), 2 F. & F. 241. But in an action by a solicitor for libel a plea justifying a charge of having disclosed confidential communications may be supported by proof of the disclosure of communications made to him by his clients which are not so strictly privileged as to prevent his examination as a witness (*Moore* v. *Terrell* (1833), 4 B. & Ad. 870). In *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183, C. A., the modern practice was thus stated by Lord ESHER, M.R., at p. 186: "Strictly speaking, the defendant, having pleaded generally a justification of the whole libel, would be bound to prove the whole to be true, and if he failed in doing so, it might be said that his plea of justification failed altogether. That would have been the old practice; but that seems to be too strict a view of the rights of the parties to take at the present time, and I think we ought to treat the case as if the statements in the claim were statements of separate libels and the general plea of justification as if it applied to each part of the claim." As to the effect of pleading a justification on the question of express malice and damages, see note (*k*), p. 717, *post*, and p. 723, *post*. As to giving evidence in mitigation of damages, see pp. 724 *et seq.*, *post*.

(*m*) See as to this the statement of the modern practice by Lord ESHER, M.R., in *Zierenberg* v. *Labouchere*, *supra*, at p. 186, quoted in note (*l*), *supra*. Compare *Honess* v. *Stubbs* (1860), 7 C. B. (N. S.) 555, as to refusing leave to plead one general plea to a declaration containing several counts for distinct libels. In the case put by Lord ESHER, M.R. (see note (*l*), *supra*), the plaintiff is not embarrassed by the form of the plea. He is warned to come to trial prepared to meet a justification of all the libels in just the same way as if the defence had pleaded separate justifications to each part. The defendant is obliged to give particulars. See also *Hennessy* v. *Wright* (1888), 57 L. J. (Q. B.), 594, C. A., *per* BOWEN, L.J., at p. 596, where it was said that objections to pleading have always, from time immemorial, been cured, when the objection is to the generality of the pleading, by delivery of particulars. In that case two grounds of defence were put together in one plea though founded on separate and distinct facts, and the defendant was ordered to inform the plaintiff whether he intended to prove that the report there referred to was a correct report, and also that the charges made were true in fact, or whether he only intended to prove that the report was a correct report.

(*n*) *Brown* v. *Houston*, [1901] 2 K. B. 855, C. A., in which *Harrison* v. *Bush* (1855), 5 E. & B. 344, was considered. As to costs generally, see titles PRACTICE AND PROCEDURE; SOLICITORS. As to discovery and interrogatories, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 99 *et seq.*

1250. In actions of slander of title it is essential, to give a cause of action, that the statement should be false (*o*), and on principle the burden of proof is on the plaintiff (*p*).

Slander of title.

SECT. 2.—*Absolute Privilege.*

SUB-SECT. 1.—*Nature.*

Protection according to occasion.

1251. Although the statement complained of be defamatory of the plaintiff and untrue, yet, if the occasion of its publication be privileged, the statement is absolutely or conditionally protected according as the occasion of the publication is an occasion of "absolute privilege" or an occasion of "qualified privilege" (*q*).

Nature of absolute privilege.

1252. If a statement is published of the plaintiff on an occasion which is absolutely privileged, the communication also is absolutely privileged.

A right of the public.

So far as absolute privilege is the privilege of the individual at all, it is a privilege to be exempt from all inquiry as to malice. He is not liable to have his conduct inquired into to see whether it is malicious or not. But in truth it is rather a right of the public, which the courts will protect in the interests of the public (*r*).

Inherent power of court to dismiss action.

Although since the Judicature Acts the defendant has to plead and prove the facts on which the defence of privilege is based, yet the court has an inherent power of dismissing an action even before defence on the ground that it is frivolous and vexatious; and it is not necessary for the exercise of that power that the statement of claim should be on the face of it demurrable. It may be exercised if, upon facts which are brought before the court (either upon the face of the statement of claim or otherwise), or of which the court may take judicial cognisance, the action is clearly shown to be frivolous and vexatious (*s*).

(*o*) *Pater* v. *Baker* (1847), 3 C. B. 831, *per* MAULE, J., at p. 868. *Rowe* v. *Roach* (1813), 1 M. & S. 304, if it is a decision to the contrary, is not good law. There, objection having been taken that there was no allegation that the publication was false, Lord ELLENBOROUGH, C.J., said (*ibid.*, at p. 309) that the allegation that it was malicious, injurious, and unlawful was sufficient. As to slander of title generally, see title TORT.

(*p*) *Pater* v. *Baker*, *supra*; *Rowe* v. *Roach*, *supra*. See the statement of MAULE, J., in *Pater* v. *Baker*, *supra*, at p. 868, concluding "and therefore falsehood is given in evidence under not guilty, since the new rules." There is, or should be, no difficulty in a man proving his title. The law does not presume that A. has a good title when he complains that B. said that A. had not a good title. But the law does presume, till the contrary is shown, that a man is not hateful, contemptible, nor ridiculous.

(*q*) See p. 608, *ante*, and *ibid.*, note (*c*), p. 609, *ante*. As to qualified or conditional privilege, see, further, pp. 685 *et seq.*, *post*.

(*r*) See the passage from the judgment of CHANNELL, J., in *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, 587, quoted with approval in *Burr* v. *Smith*, [1909] 2 K. B. 306, 311, C. A.; see also *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A., *per* BRETT, M.R., at p. 604 *per* FRY, L.J., at pp. 606, 607; *Scott* v. *Stansfield* (1868), L. R. 3 Exch., 220, *per* KELLY, C.B., at p. 223.

(*s*) See *Burr* v. *Smith*, [1909] 2 K. B. 306, 313, C. A.; *Law* v. *Lewellyn*, [1906] 1 K. B. 487, C. A. A statement of claim fairly drawn may sufficiently raise a question of law, and on the latter being decided against the plaintiff the court may strike out the statement of claim under R. S. C., Ord. 25, r. 4, as disclosing no reasonable cause of action (*Hodson* v. *Pare*, [1899] 1 Q. B. 455, C. A., referred to in note (*g*), p. 680, *post*). In *Scott* v. *Stansfield*

SECT. 2. Absolute Privilege.

(i.) Administration of justice.

SUB-SECT. 2.—*Subject-matter* (*t*).

(i.) *Administration of Justice.*

1253. More than a hundred years ago Lord Mansfield said that neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office (*a*). The authorities are clear, uniform, and conclusive that no action lies, whether against judges, counsel, witnesses, or parties, for words spoken in the ordinary course of any proceeding before any court or tribunal recognised by law (*b*). It is manifest that the administration of justice would be paralysed if those who are engaged (*c*) in it were to

(1868), L. R. 3 Exch. 220, decided before the Judicature Acts, the court held on demurrer that the replication to the plea was bad, and that the action was not maintainable. In *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch., affirmed (1875), L. R. 7 H. L. 744, referred to in note (*j*), p. 681, *post*, the plea was "not guilty" and issue thereon; at the trial, to prove the issue, counsel for the plaintiff made certain statements which were admitted by counsel for the defendant, and which showed that the statements complained of were made by the defendant, a military man, in the course of an inquiry in relation to the conduct of the plaintiff, a military man, and with reference to the subject of that inquiry: BLACKBURN, J., refused to accept evidence proposed to be given to show that in making the statements the defendant was acting *malâ fide* and with actual malice, and without reasonable or probable cause, and with a knowledge that the statements were false, on the ground that the proposed evidence was immaterial and irrelevant, and that the action would not lie, even though the plaintiff should prove that the defendant acted *malâ fide* and with actual malice and without reasonable or probable cause, and with a knowledge that the statements were false, and directed the jury to find for the defendant. The jury having found for the defendant, the Court of Exchequer Chamber, on a bill of exceptions to the ruling, disallowed the exceptions, and held that the defendant was entitled to judgment.

(*t*) The following division of the subject-matter under three heads (see the text, *infra*, and pp. 683 *et seq. post*) is suggested in the passage from the considered judgment of the Exchequer Chamber in *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, 268, quoted by FRY, L.J., in *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A., at p. 606, as a *dictum* of the highest value declaratory of the common law: "Whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or in equity, or in county courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either House of Parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged and cannot be inquired into in an action at law for defamation."

(*a*) *R.* v. *Skinner* (1772), Lofft, 55, quoted with approval in *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, 606, C. A.: "If the words spoken are opprobrious or irrelevant to the case, the court may take notice of them as a contempt and examine on information. If anything of *mala mens* is found upon such inquiry, it will be punished accordingly" (*ibid.*).

(*b*) The statement in the text is a passage from the judgment of the Exchequer Chamber in *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, 263, Ex. Ch., quoted in *Munster* v. *Lamb*, *supra*, at p. 606. For other *dicta* declaratory of the common law quoted in *Munster* v. *Lamb*, *supra*, see notes (*t*) and (*a*), *supra*.

(*c*) But an observation defamatory of the plaintiff by the chief clerk, after the statement of evidence given before the Lord Mayor, was held not to be protected; it was not made in the course of any judicial proceeding by any one whose duty called upon him to make it; it was uttered by a person who, for this purpose, must be considered as an entire stranger; it is the same as if made by any bystander in the court (*Delegal* v. *Highley* (1837), 3 Bing. (N. C.)

be liable to actions of libel or slander upon the imputation that they had acted maliciously and not *bonâ fide* (*d*).

The doctrine is not confined to the administration of justice in the superior courts (*e*). It has been applied in its fullest extent to

950, *per* TINDAL, C.J., at p. 961). As to persons engaged in the administration of justice, see the decisions referred to in notes (*t*) and (*a*), p. 678, *ante*. See also the following cases:—Witnesses: The chief cases are *Revis* v. *Smith* (1856), 18 C. B. 126, and *Henderson* v. *Broomhead* (1859), 4 H. & N. 569, Ex. Ch., and the general conclusion is that all witnesses speaking with reference to the matter before the court—whether what they say is relevant or irrelevant, whether what they say is malicious or not—are exempt from liability to any action in respect of *vivâ voce* or affidavit evidence (*Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A., *per* BRETT, M.R., at p. 601). As to statements made by witnesses (or parties), see also *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A.; *Astley* v. *Younge* (1759), 2 Burr. 807 (statement in affidavit); *Henderson* v. *Broomhead*, *supra* (statement in affidavit); *Kennedy* v. *Hilliard* (1859), 10 I. C. L. R. 195 (where the statement was irrelevant and was expunged from the affidavit as scandalous); *Trotman* v. *Dunn* (1815), 4 Camp. 211; *M'Laughlin* v. *Doey* (1893), 32 L. R. Ir. 518; *Doyle* v. *O'Doherty* (1842), Car. & M. 418; *Gompas* v. *White* (1889), 54 J. P. 22 (affidavits in interlocutory proceedings); *Wilson* v. *Collins* (1832), 5 C. & P. 373 (direction as to an officious communication by a person not on oath at a ward inquest: statement not in discharge of official duty; verdict for the plaintiff). As to the absolute privilege of witnesses before select committees of the House of Commons, see *Goffin* v. *Donnelly* (1881), 6 Q. B. D. 307, and *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch., and note (*j*), p. 681, *post*. Advocates:—The most important decision is *Munster* v. *Lamb*, *supra*, where the Court of Appeal, dissenting from *Kendillon* v. *Maltby* (1842), Car. & M. 402, and following the analogy of *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220 (where it was held that all judges inferior as well as superior are privileged for words spoken in the course of a judicial proceeding), held that the same principle applied to an advocate: "For more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public" (*Munster* v. *Lamb*, *supra*, *per* BRETT, M.R., at p. 603). In *Munster* v. *Lamb*, *supra*, the Court of Appeal upheld the nonsuit directed by WATKIN WILLIAMS, J., in an action against a solicitor in respect of words used by him as advocate for a client before a court holding a judicial inquiry. "For the purpose of my judgment, said BRETT, M.R., *ibid.*, at p. 599, "I shall assume that the words were uttered by the solicitor maliciously . . . not with the object of doing something useful towards the defence of his client; . . . that the words were uttered without justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and . . . that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been." See also *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 232; *Needham* v. *Dowling* (1845), 15 L. J. (C. P.) 9; *Mackay* v. *Ford* (1860), 5 H. & N. 792. But statements by advocates after the trial are upon a different footing (*Flint* v. *Pike* (1825), 6 Dow. & Ry. (K. B.) 528).

(*d*) *Dawkins* v. *Paulet* (*Lord*) (1869), L. R. 5 Q. B. 94, *per* MELLOR, J., at p. 116.

(*e*) *Ibid.* In *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A. (where it was held that no action lies against a judge of the Supreme Court of a colony in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice), Lord ESHER, M.R., *ibid.*, at p. 671 (having quoted the passage from the judgment of CROMPTON, J., in *Fray* v. *Blackburn* (1863), 3 B. & S. 576, at p. 578, where he said, "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly," and having

SECT. 2. Absolute Privilege.

Application to all courts.

county courts (*f*). It applies not only to all kinds of courts of justice (*g*), but to other tribunals recognised by law acting judicially (*h*). It has not, however, been extended further than to

referred to the reasons for the rule stated by KELLY, C.B., in *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220, and having criticised adversely the statement of COCKBURN, C.J., in *Thomas* v. *Churton* (1862), 2 B. & S. 475, at p. 479, where he said, "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he is not liable to an action" as a statement to which the Chief Justice could not and would not have given effect had the question come before him), stated the law on the subject thus:—"To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the superior courts and other judges consists in the extent of their respective jurisdiction." As to an order beyond the jurisdiction of the county court made under a mistake of the law and not of the facts, see *Houlden* v. *Smith* (1850), 14 Q. B. 841, cited in the argument in *Scott* v. *Stansfield*, *supra*. In *Scott* v. *Stansfield*, *supra*, the defendant in an action of slander pleaded that he was a county court judge, and that the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the present plaintiff was defendant, and it was held on demurrer that a replication was bad which stated that the words were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not *bonâ fide* in the discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him; and it was further held that the action was not maintainable.

(*f*) *Scott* v. *Stansfield*, *supra*, in which case CHANNELL, B., at p. 225, said that if a county court judge be guilty of misconduct in the exercise of his office, the Lord Chancellor may, if he think expedient, remove him from such office, but that no action would lie against him for anything done by him in his judicial capacity.

(*g*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., *per* Lord ESHER, M.R., at p. 442; and see the cases cited in the preceding notes (*b*)—(*e*), pp. 678, 679, *ante*. Thus the doctrine applies to coroners' courts (*Thomas* v. *Churton* (1862), 2 B. & S. 475), and magistrates' courts (*Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A., where the statement of claim was struck out). In *Law* v. *Llewellyn*, *supra*, it was held that a magistrate, when sitting in the course of his judicial duties, is a judge within the rule laid down in *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A. See also *Hodson* v. *Pare*, [1899] 1 Q. B. 455, C. A. (where it was held that a justice of the peace, to whom an application is made under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), on a petition for an order for the reception and detention of a lunatic, is acting judicially, and consequently defamatory statements made in the course of the proceedings are not actionable. The Court of Appeal struck out the statement of claim which raised the question to be decided (which was whether the statement was made in the course of a judicial or merely an administrative proceeding), upon the ground that the justice of the peace was exercising a judicial function, and that therefore the case came within R. S. C., Ord. 25, r. 4, as not disclosing a reasonable cause of action, since the facts stated disclosed the defence of absolute privilege. Compare *Lilley* v. *Roney* (1892), 61 L. J. (Q. B.) 727; *Gompas* v. *White* (1889), 6 T. L. R. 20. Observations of a magistrate, while sitting in the course of his judicial duties, in reference to the withdrawal of a charge are not actionable, and it makes no difference whether such observations are made before or after the leave to withdraw has been given (*Law* v. *Llewellyn*, *supra*, at p. 493).

(*h*) See note (*g*), *supra*. As to the words "recognised by law," see the passages from *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, 263, Ex. Ch

courts of justice and tribunals acting in a manner similar to that in which such courts act (*i*).

But only to tribunals acting judicially.

Thus the doctrine has been applied to a military court of inquiry, where the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it (*j*). But a meeting of the London County Council

and note (*j*), *infra; Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., *per* Lord ESHER, M.R., at p. 442; and *Barratt* v. *Kearns*, [1905] 1 K. B. 504, C. A., *per* COLLINS, M.R., at p. 510, where it was held that the description applies to an ecclesiastical inquiry authorised by statute before commissioners whose duty it was to hear evidence and report on the matter referred to them, and that in respect of a statement made by a witness in the course of such proceedings there is an absolute immunity from liability to an action, and consequently the defendant cannot be interrogated as to the statements which he made. In *Barratt* v. *Kearns, supra*, the evidence before the commissioners was not taken on oath, which was also the case in *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch.; affirmed (1875), L. R. 7 H. L. 744. In *Barratt* v. *Kearns, supra*, it was contended that it was essential to take the evidence on oath under the Pluralities Acts, but the omission to do so was held not to be a mistake which vitiated the whole proceedings or altered the character of the tribunal (*ibid., per* COZENS-HARDY, L.J., at p. 511).

(*i*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson, supra*.

(*j*) Thus it was held by the Exchequer Chamber in *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch., that a court of inquiry instituted by the commander-in-chief, under the articles of war, to inquire into a complaint made by an officer of the army, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, was, nevertheless, a court duly and legally constituted and recognised in the Articles of War and the Mutiny Acts; and that statements, whether oral or written, made by an officer summoned to attend before such court to give evidence were absolutely privileged, even if made *malâ fide* and with actual malice and without reasonable and probable cause; and that such statements were part of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, were received and held by him on behalf of the Sovereign, and on grounds of public policy could not be produced in evidence. The decision of the Exchequer Chamber was affirmed in the House of Lords, *Dawkins* v. *Rokeby* (*Lord*) (1875), L. R. 7 H. L. 744. In the House of Lords it was contended for the plaintiff appellant that the inquiry was not to be considered in the light of a judicial inquiry, and that the evidence was not evidence given by a witness on oath. As to that argument, Lord CAIRNS, L.C., said, at p. 754: "My Lords, that is quite true; but at the same time . . . it was an inquiry connected with the discipline of the army . . . warranted by the Queen's regulations and orders for the army . . . called for . . . in pursuance of those regulations; and the defendant in the action was called at that inquiry as a witness, as a person who was required to make statements relevant to the inquiry . . . and it was in the course of that inquiry that those statements were made. . . . Now . . . adopting the expressions of the learned judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *vivâ voce* and those which were made in writing, were relative to that inquiry. Under [*sic*] those circumstances . . . I submit . . . that the conclusion of the learned judges is, in all respects, one which we ought to adopt, and that your Lordships will hold that statements made under these particular circumstances are statements which cannot become the

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for granting music and dancing licences is not a tribunal acting judicially within the doctrine; and, therefore, a county councillor making a defamatory statement at such a meeting, with regard to a person applying for a licence, is not entitled to absolute immunity from an action in respect of such a statement; he is only entitled to the ordinary qualified privilege applicable to a communication made on an occasion of qualified privilege, which is avoided if the plaintiff establishes that the defendant, in making the communication, was actuated by express malice (*k*).

Application to all proceedings.

1254. The privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings (*l*).

foundation of an action at law" (Lords CHELMSFORD, HATHERLEY, PENZANCE, O'HAGAN and SELBORNE concurred). See also *Jekyll* v. *Moore* (1806), 2 Bos. & P. (N. R.) 341. Absolute immunity attaches also to statements forming part of the evidence given by the defendant as a witness before a select committee of the House of Commons (*Goffin* v. *Donnelly* (1881), 6 Q. B. D. 307, where *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A. (immunity of witness), and *Dawkins* v. *Rokeby* (*Lord*) (1873), 8 Q. B. 255, Ex. Ch., were relied on, and it was pointed out that it had been decided, in the latter case, that statements made before a military court of inquiry which could not administer an oath were as much privileged as evidence given in a court of justice, and that the case before the court was an *a fortiori* case, it being admitted that the select committee has power to enforce attendance by committal for contempt, and to examine on oath).

(*k*) *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A. (where it was held that the county council was there acting in discharge of consultative and administrative, and not judicial, functions). As to the decisions of the Jockey Club, see *Hope* v. *I'Anson and Weatherby* (1901), 18 T. L. R. 201, C. A. (where the question was as to whether the communication was privileged within the law relating to qualified privilege). In *Proctor* v. *Webster* (1885), 16 Q. B. D. 112 (where *Lake* v. *King* (1668), 1 Wms. Saund. 137 (petition to committee appointed by House of Commons), and *Hare and Meller's Case* (1576), 3 Leon. 138 (petition to the Sovereign in the nature of a petition in equity), were distinguished as cases of absolute privilege within the rule applicable to judicial proceedings), the court sustained a verdict for the plaintiff in respect of a libel charging the plaintiff, a public officer, removable by the Privy Council, with irregularities in his office which was contained in a letter sent by the defendant to the Privy Council, on the ground that there was no pretence for saying that the Privy Council on that occasion exercised judicial functions, and that the occasion was one of qualified privilege only, which was avoided on proof of express malice on the part of the defendant. As to express malice, see pp. 711 *et seq. post.*

(*l*) See *Watson* v. *M'Ewan*, *Watson* v. *Jones*, [1905] A. C. 480 (where it was held that the public policy which renders the protection of witnesses necessary for the administration of justice necessarily involves that which is a step towards, and is part of, the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove, and that consequently statements made by a witness to a litigant or his solicitor in preparing his proof are absolutely privileged); *Lilley* v. *Roney* (1892), 61 L. J. (Q. B.) 727 (letter to the Law Society and affidavit of complaint against a solicitor); *Pedley and May* v. *Morris* (1891), 61 L. J. (Q. B.) 21 (written objections lodged on taxation of bill of costs); *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, *per* CHANNELL, J., adopted and affirmed in *Burr* v. *Smith*, [1909] 2 K. B. 306, C. A. (report of official receiver under the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (2), Sched. I.). In the last-mentioned case an officer appointed by the Board of Trade under the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 27, had in the performance of his duties prepared for and delivered to that Board a report on matters within *ibid.*, s. 29 (2), for the purpose of its being laid by the Board before Parliament as part of its annual

(ii.) *Proceedings in Parliament and Reports thereof.*

(ii.) Proceedings in Parliament.

1255. Words spoken by a member of Parliament in Parliament are absolutely privileged, and the court has no jurisdiction to entertain an action in respect of them (*m*). When Parliament is sitting and statements are made in either House, the member making them is not amenable to the civil or criminal law, though the statements be false to his knowledge; and a conspiracy to make such statements would not make the members guilty of it amenable to the criminal law (*n*); but this privilege does not extend to a statement published by a member outside the House, though it is a reproduction of what was said in the House (*o*), and made in consequence of the appearance of an incorrect publication in the newspapers.

Parliamentary Papers Act, 1840.

1256. Persons, however, who publish under the direct authority of either House of Parliament have the statutory protection of a summary stay of proceedings, civil or criminal, in respect of reports, papers, votes, or proceedings of either House; while those who, although not acting under the direct authority of either House, publish a correct copy of such reports, papers, votes, or proceedings, have a somewhat similar statutory protection. Further, those who publish an abstract or extract only are placed in the position of having to plead the statute, and to aver and prove that their publication was *bonâ fide* and without malice (*p*).

report as directed by the Companies Winding up Act, 1890 (53 & 54 Vict. c. 63), s. 29 (2), and it was held that an action of libel would not lie in respect of statements contained in that report. The position of the inspector-general and official receivers in making these reports is similar to that of a master in the Chancery Division in reporting on a case to the judge (*Burr* v. *Smith* [1909], 2 K. B. 306, C. A., per FARWELL, L.J., at p. 316).

(*m*) *Dillon* v. *Balfour* (1887), 20 L. R. Ir. 600; and see title PARLIAMENT.

(*n*) *Ex parte Wason* (1869), L. R. 4 Q. B. 573, 576.

(*o*) *R.* v. *Creevey* (1813), 1 M. & S. 273; *R.* v. *Abingdon* (*Lord*) (1794), 1 Esp. 226; and see *R.* v. *Salisbury* (1798), 1 Ld. Raym. 341.

(*p*) The above is in substance the effect of the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), ss. 1—3, as laid down by PHILLIMORE, J., in *Mangena* v. *Wright*, [1909] 2 K. B. 958 (following *Mangena* v. *Lloyd* (*Edward*), *Ltd.* (1908), 98 L. T. 640 (*per* DARLING, J.), reversed on the facts, 99 L. T. 824, C. A.), and referring to *Houghton* v. *Plimsoll* (1874), *Times*, 2nd April, where AMPHLETT, B., appears to have directed the jury that the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 3, applied to the publication of an extract from a parliamentary paper in an ordinary serial magazine). PHILLIMORE, J., in *Mangena* v. *Wright*, *supra*, said that there was a little difficulty in the use of the word "printing" instead of "publishing" in the first part of the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 3, but that it was not enough to take away the protection given by that provision; see also *Houghton* v. *Plimsoll*, *supra*, approved by DARLING, J., in *Mangena* v. *Lloyd* (*Edward*), *Ltd.*, *supra*). He was also of opinion that the preamble of the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), probably refers only to *ibid.*, s. 1. As to pleading and proving, *ibid.*, s. 3, see *Mangena* v. *Wright*, *supra*, and the summary in the text, *supra*. The Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), was passed in consequence of the decision in *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1, and attention is directed to the preamble and the sections of that statute.

In *Stockdale* v. *Hansard* (1840), 11 Ad. & El. 297, it was held, under the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 1, that the court will stay proceedings in an action, upon a certificate by the Speaker (properly verified) that the publication mentioned in the declaration (reciting a description of it

SECT. 2.

Absolute Privilege.

(iii.) Affairs of State.

(iii.) *Affairs of State.*

1257. From reasons of the highest policy and convenience, ministers of the Crown cannot be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals (*q*). So, too, an action will not lie against a military or naval officer, at the suit of a military or naval servant of the Crown, in respect of a report published or any act done in the course of his duty as such officer, even if the report be made or the act done maliciously and without reasonable or probable cause (*r*). Where, however, the civil rights of a person in military service are affected by the judgment of a military tribunal acting in excess of its jurisdiction, the civil courts ought to interfere to protect those civil rights, but not where the only matter involved is the military status of the applicant (*s*).

Official communications on State matters.

1258. An official communication relating to State matters made by one officer of State to another in the course of his official duty is absolutely privileged, and cannot be made the subject of an action for libel against the official who made it; and the judge at the trial would be bound to refuse to allow any inquiry as to the malice of the official to proceed, whether any objection were taken by the parties concerned or not (*t*).

as there given) and in respect of which the action is brought, was published by order and under the authority of the House of Commons, the declaration being verified by affidavit and appearing to be for the publication of an alleged libel, the description of which corresponds with that in the Speaker's certificate, and that it is not necessary that the certificate should further describe the action or declaration. "Whether it was necessary to verify the declaration we need not decide; for that has been done. The Speaker must have satisfied himself as to the nature of the proceedings" (*Stockdale* v. *Hansard* (1840), 11 Ad. & El. 297, 300).

(*q*) *Dawkins* v. *Paulet* (*Lord*) (1869), L. R. 5 Q. B. 94, *per* MELLOR, J., at p. 117; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A., *per* FRY, L.J., at p. 606.

(*r*) *Dawkins* v. *Paulet* (*Lord*), *supra* (libel action), *per* MELLOR and LUSH, JJ., COCKBURN, C.J., dissenting; see also *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493, 503, 544, 549, 550, Ex. Ch. (action by naval officer for malicious prosecution); *Dawkins* v. *Rokeby* (*Lord*) (1860), 4 F. & F. 806, 841; *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, 271, 272, Ex. Ch.; *Grant* v. *Gould* (1792), 2 Hy. Bl. 69, 100, 101; *Barwis* v. *Keppel* (1766), 2 Wils. 314. *Dickson* v. *Wilton* (*Earl*) (1859), 1 F. & F. 419, and *Dickson* v. *Combermere* (*Viscount*) (1863), 3 F. & F. 527, were criticised by LUSH, J., in *Dawkins* v. *Paulet* (*Lord*), *supra*, at p. 122. *Dickson* v. *Wilton* (*Earl*), *supra*, was distinguished in *Dawkins* v. *Rokeby* (*Lord*), *supra*, at p. 272; *Warden* v. *Bailey* (1811), 4 Taunt. 67, was there explained as an instance of an act done without any colour of law, as if an officer had ordered a soldier to be imprisoned in a debtors' prison for non-payment of an alleged debt. As to *Warden* v. *Bailey*, *supra*, and *Bailey* v. *Warden* (1815), 4 M. & S. 400, see the dissenting judgment of COCKBURN, C.J., in *Dawkins* v. *Paulet* (*Lord*), *supra*. As to *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch.; affirmed (1875), L. R. 7 H. L. 744, see note (*j*), p. 681, *ante*. See also *Home* v. *Bentinck* (*Lord*) (1820), 2 Brod. & Bing. 130, Ex. Ch.; *Oliver* v. *Bentinck* (*Lord*) (1811), 3 Taunt. 456; *Jekyll* v. *Moore* (1806), 2 Bos. & P. (N. R.) 341; *Lake* v. *King* (1668), 1 Wms. Saund. 137, 138, n. (b).

(*s*) *Re Mansergh* (1861), 1 B. & S. 400; compare *Woods* v. *Lyttelton* (1909), *Times*, 16th—18th June.

(*t*) *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q. B. 189, 191, C. A. (where the action was dismissed as vexatious). See also the passage from Fraser, Law of Libel and Slander, there approved as an accurate summary of the law. As to discovery, see *Hennessy* v. *Wright* (1888),

SECT. 3.—*Qualified Privilege.*

SUB-SECT. 1.—*Introductory.*

Defence of qualified privilege.

1259. If a defamatory statement is published of the plaintiff on an occasion which is privileged not in an absolute but in a qualified sense, the defendant may set up a defence of qualified privilege (*a*).

Burden of proof (i.) of privilege;

1260. It is for the defendant to establish that the occasion was so privileged. If he does so, the burden of showing actual or express malice rests upon the plaintiff (*b*); and if this is shown, communications made, even on a privileged occasion, can no longer be regarded as privileged communications.

(ii.) of malice.

If the defendant does not satisfy the judge that the occasion was privileged the plaintiff is not called upon to prove actual malice, because in such a case the law implies malice from the falsity of the statement (*c*).

Duties of judge and jury.

1261. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only for the judge, not the jury. If there are questions of fact upon which this depends, they must be left to the jury; but when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion (*d*).

21 Q. B. D. 509 (privileged documents). As to the qualified privilege of foreign officials, see *Hart* v. *Gumpach* (1879), L. R. 4 P. C. 439.

(*a*) The defendant should (since the Judicature Acts) set out the facts which he alleges constitute the privileged occasion; see, further, title PLEADING. The term "qualified privilege" is almost invariably used to distinguish this kind of privilege from absolute privilege, as to which see pp. 677 *et seq.*, *ante*. The term conditional privilege is, however, convenient as emphasising the fact that the defence of privilege which is not absolute is conditional only, and liable to be displaced if the plaintiff establishes that the communication was actuated by express or actual malice.

(*b*) *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54, C. A., *per* Lord ESHER, M.R., at p. 58. See also *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A.; *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., *per* LOPES, L.J., at p. 529. In *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, Lord BLACKBURN, at p. 787, put the matter thus: "A publication calculated to convey an actionable imputation is *primâ facie* a libel, the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved, or I should prefer to say that he is not answerable, so long as he is acting in compliance with that duty or exercising that right; and the burthen of proof is on those who allege that he was not so acting." The alternative preferred by Lord BLACKBURN was criticised by Lord ESHER, M.R., in *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A., at p. 169: "The real question for the jury is whether the plaintiff was acting maliciously. Malice is a state of mind. The question for the jury is not whether the defendant was acting in compliance with that duty etc."

(*c*) *Bona fides* is a *primâ facie* presumption in all cases of qualified privilege (*Jenoure* v. *Delmege*, [1891] A. C. 73, 79, P. C.); see also *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A., and the cases cited in note (*b*), *supra*.

(*d*) *Hebditch* v. *MacIlwaine*, *supra*, *per* Lord ESHER, M.R., at p. 58. As to the danger of confusing publication with privilege, and the danger

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Absence of malice.

1262. It is clear that the absence of malice does not make the occasion privileged (*e*). If a defendant takes a course which is not justifiable in point of law, though it proceeds from error of judgment only, not of intention, still it is he and not the plaintiff who must suffer for the error (*f*). Thus the question whether a defendant acted under a sense of duty, though important on the question of malice, is not relevant to the question whether the occasion was or was not privileged (*g*). A communication is not made on a privileged occasion merely because the person who makes it does so in the honest but mistaken belief that the person to whom the statement is made has an interest or duty to receive it, if in fact he has none (*h*).

SUB-SECT. 2.—*What is a Privileged Occasion?*

Definition. Correspondence of duty or interest.

1263. An occasion is privileged where the person who makes a communication has an interest or a duty (legal, moral or social, of perfect or imperfect obligation) to make it to the person to whom

of confusing privileged occasion with privileged communication in the sense of treating every communication made on a privileged occasion as privileged, see *Pullman* v. *Hill & Co*, [1891] 1 Q. B. 524, C. A., *per* LOPES, L.J., at p. 529. On the latter point, see also note (*i*), p. 687, *post*, and *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68, *per* Lord HALSBURY, L.C., at pp. 75, 76: "The question whether or not this was a privileged communication . . . (I will now take the point [distinction] earnestly pressed on your Lordships) has not been determined by the jury. That would, but for what I am about to say, give the appellant only a right to ask for a new trial, which though he has not asked for it, is no doubt within your Lordships' competence to give him." As to the effect of abstaining from asking the judge at the trial to direct the jury in a particular manner or to leave a particular question to the jury, see *ibid.*, at p. 76). As to the functions of judge and jury, see also *Bromage* v. *Prosser* (1825), 4 B. & C. 247, explained in *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, 247, C. A.; *Darby* v. *Ouseley* (1856), 1 H. & N. 1; *Kine* v. *Sewell* (1838), 3 M. & W. 297; *Gilpin* v. *Fowler* (1854), 9 Exch. 615, Ex. Ch.; *Cooke* v. *Wildes*, (1855), 5 E. & B. 328; *Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 392; *Jackson* v. *Hopperton* (1864), 16 C. B. (N. S.) 829; *Stace* v. *Griffith* (1869), L. R. 2 P. C. 420; *Kimber* v. *Press Association*, [1893] 1 Q. B. 65, C. A.; *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A.; *Collins* v. *Cooper* (1903), 19 T. L. R. 118, C. A. As to what is sufficient evidence of malice to be left to the jury, see p. 715, *post*, and the cases there cited.

(*e*) See *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54, C. A., criticising *Scarll* v. *Dixon* (1864), 4 F. & F. 250, and other cases, and disapproving *Tompson* v. *Dashwood* (1883), 11 Q. B. D. 43. The "*semble*" in the head-note to *Harrison* v. *Bush* (1855), 5 E. & B. 344, if justified by the report, is inconsistent with *Hebditch* v. *MacIlwaine*, *supra*, *per* Lord ESHER, M.R., at p. 61.

(*f*) *Coxhead* v. *Richards* (1846), 2 C. B. 569, *per* TINDAL, C.J., at p. 595.

(*g*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A., *per* LINDLEY, L.J., at p. 349.

(*h*) *Ibid.*, where LINDLEY, L.J., criticised and explained the remarks of JESSEL, M.R., in *Waller* v. *Loch* (1881), 7 Q. B. D. 619, 621, C. A. (who is reported to have said that if the defendant *bonâ fide* thought that he was discharging a moral or social duty he would be protected), as a passage in which JESSEL, M.R., was not distinguishing a privileged occasion from malice, and stated that the observation, if intended to apply to privileged occasions, was not in accordance with other authorities. See also the criticism of LINDLEY, L.J., in *Stuart* v. *Bell*, *supra*, at p. 349, of passages in the judgments of *Pattison* v. *Jones* (1828), 8 B. & C. 578, as having reference to malice and not to privileged occasion. LINDLEY, L.J., in *Stuart* v. *Bell*, *supra*, at p. 349, further stated that the head-note in *Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 392, goes farther than the judgments warrant.

he does make it, and the person to whom he does make it has a corresponding interest or duty to receive it (*i*).

(*i*) The above definition is founded on the following authorities:—In *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181 (complaint by tenant as to conduct of plaintiff, a person sent by the landlord's agent to do repairs), PARKE, B., in his judgment (*ibid.*, at p. 193), defined a statement made on a privileged occasion as a statement made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In *Harrison* v. *Bush* (1855), 5 E. & B. 344, at pp. 348, 349, the following canon was adopted by the court subject to an explanation of the word "duty," and it is the basis of the present law: "A communication *bonâ fide* made upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without the privilege, would be slanderous and actionable. 'Duty' . . . cannot be confined to legal duties . . . but must include moral and social duties of imperfect obligation" (*ibid.*, at p. 349). In *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., Lord ESHER, M.R., at p. 528, said: "An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged." LOPES, L.J. (*ibid.*, at p. 529), pointed out that a confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication is privileged. As to the distinction between privileged occasion and privileged communication, see note (*h*), pp. 685, 686, *ante*. In *Wright* v. *Woodgate* (1835), 2 Cr. M. & R. 573, PARKE, B., at p. 577, said: "The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact." There is another line of decisions in which the definition is put somewhat differently. In *Davies* v. *Snead* (1870), L. R. 5 Q. B. 608, BLACKBURN, J., at p. 611, approved the judgments of TINDAL, C.J., and ERLE, J., in *Coxhead* v. *Richards* (1846), 2 C. B. 569 (from which COLTMAN and CRESSWELL, JJ., dissented, and which were followed in *Blackham* v. *Pugh* (1846), 2 C. B. 611, and by WILLES, J., in *Amann* v. *Damm* (1860), 8 C. B. (N. S.) 597), and stated that the result of them is that, where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them, it is a privileged communication (*i.e.*, a communication protected by the occasion). See also *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A. (LINDLEY and KAY, L.JJ.), where the cases last mentioned, *Toogood* v. *Spyring*, *supra*, at pp. 181, 193, and *Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 392, 418, were referred to, and where LOPES, L.J., dissented on the ground that on the facts the defendant had no interest in making the statement, and no legal, moral, or social duty to make it. In *Stuart* v. *Bell*, *supra*, LINDLEY, L.J., at p. 346, said that the reason for holding any occasion privileged is the common convenience or the welfare of society, and that it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not. In *Andrews* v. *Nott Bower*, [1895] 1 Q. B. 888, C. A., the statement of LINDLEY, L.J., in *Stuart* v. *Bell*, *supra*, was applied to the publication, in pursuance of an order of magistrates, by the defendant, a head constable (who was bound to obey the lawful orders of any meeting of justices), of copies of his report to the magistrates as to grounds of objections to the renewal of licences, to persons having business at the sessions, before the sessions were held, as being convenient and almost necessary for the transaction of the business of the sessions. See also *Waller* v. *Loch* (1881), 7 Q. B. D. 719, C. A. (statement by secretary of Charity Organisation Society), where BRETT, L.J., expressed a preference for the definition by BLACKBURN, J., in *Davies* v. *Snead*, *supra*, because it says nothing about "duty." The real difficulty is in defining what kind of social or moral duty, or what amount of

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An ordinary example of the general rule is the case where a former master gives a character of his late servant to a person who contemplates engaging the servant. The former has a duty of imperfect obligation to make the communication, and the recipient has an interest in receiving it (*k*).

Illustration: character of servant.

Difficulty of defining what kind of moral or social duty, or what amount of interest creates a privileged occasion.

1264. It has been said that the reason for holding any occasion privileged is the common convenience or the welfare of society, and that no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not (*l*). Judges have felt great difficulty in defining what kind of social or moral duty or what amount of interest will make the occasion privileged (*m*), but there is a tendency

interest, will make the occasion privileged (*Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 392, *per* ERLE, C.J., at p. 418). As to interpreting the word "interest" "liberally," see further note (*d*), p. 692, *post*.

(*k*) *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., *per* Lord ESHER, M.R., at p. 528. The following cases relating to servants may be referred to:—*Weatherston* v. *Hawkins* (1786), 1 Term Rep. 110; *Child* v. *Affleck* (1829), 9 B. & C. 403, referred to in *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, 193, n. (a); *Harris* v. *Thompson* (1853), 13 C. B. 333 (where director of A. company and B. company stated at board meeting of B. company that plaintiff had been dismissed from post of secretary in A. company, and moved a resolution to dismiss him from post of auditor of B. company); *Edmondson* v. *Stephenson* (1766), Buller, Law of Nisi Prius, 8, *per* Lord MANSFIELD; 1 Wms. Saund. 141; *Padmore* v. *Lawrence* (1840), 11 Ad. & El. 380; *Gardner* v. *Slade* (1849), 13 Q. B. 796 (duty of master to correct previous good character); *Somerville* v. *Hawkins* (1851), 10 C. B. 583 (duty and interest of master to prevent his servants associating with dismissed servant suspected by master of theft); *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; *Manby* v. *Witt* (1856), 18 C. B. 544 (presence of third persons); *Dixon* v. *Parsons* (1858), 1 F. & F. 24 (statement to person who had formerly given plaintiff a character); *Amann* v. *Damm* (1860), 8 C. B. (N. S.) 597 (defendant's communication to his customer as to defendant's suspicion that the clerk of the customer had stolen meat from defendant's shop); *R.* v. *Perry* (1883), 15 Cox, C. C. 169 (letters by master's wife to servant accusing her of theft); *Mead* v. *Hughes* (1891), 7 T. L. R. 291, *per* MATHEW, J. (statement by one servant as to character of another in answer to inquiries of mistress); *Aberdein* v. *Macleay* (1893), 9 T. L. R. 539, *per* CAVE, J. (statement by mistress to person *in loco parentis* of servant); *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189, C. A. (joint interest: circular by railway company to its servants as to grounds of dismissal of servant held privileged). In the above cases the occasion was held privileged. In the following cases it was assumed that the occasion was privileged, as the cases turned upon the privilege of the communication:—*Rogers* v. *Clifton* (1803), 3 Bos. & P. 587; *Pattison* v. *Jones* (1828), 8 B. & C. 578 (volunteering statements), considered in *Stuart* v. *Bell*, [1891] 2 Q. B. 341, 349, C. A.; *Kelly* v. *Partington* (1833), 4 B. & Ad. 700; *Fountain* v. *Boodle* (1842), 3 Q. B. 5; *Fryer* v. *Kinnersley* (1863), 15 C. B. (N. S.) 422. As to the general law of master and servant, see title MASTER AND SERVANT.

(*l*) *Stuart* v. *Bell*, *supra*, *per* LINDLEY, L.J., at p. 346, applied in *Andrews* v. *Nott Bower*, [1895] 1 Q. B. 888, C. A. *Stuart* v. *Bell*, *supra*, is typical of the second line of cases referred to in note (*i*), p. 687, *ante*, which exhibit the more modern tendency to apply the rule liberally, having regard to the general welfare of society. Contrast the two lines of cases in note (*i*), p. 687, *ante*, and see *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q. B. D. 400, 412, C. A.; and the *dictum* of Lord TENTERDEN, C.J., there quoted with approval, and approved by COCKBURN, C.J., in *Cox* v. *Feeney* (1863), 4 F. & F. 13, and by PHILLIMORE, J., in *Mangena* v. *Wright*, [1909] 2 K. B. 958, at pp. 971, 972.

(*m*) See *Whiteley* v. *Adams*, *supra*, *per* ERLE, C.J., at p. 418; approved in *Stuart* v. *Bell*, [1891] 2 Q. B. 341, 348, C. A. As to interpreting the

to widen the application of the rule, or at least to interpret it with an eye to the general convenience and welfare of society. In the absence of authoritative definitions as to what kind of social or moral duty or what amount of interest will make the occasion privileged, even a recent decision, in which the court has held that a particular set of facts made the occasion of a communication privileged, is not always a safe guide as to what the court would hold to be the result in law of a different set of facts; but having regard to the trend of the modern decisions in the direction of a more extended application or interpretation of the rule, the earlier cases are of less practical use than the more modern (*n*).

word "interest" "liberally," see *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, *per* PARKE, B., at pp. 193, 194, and note (*d*), p. 692, *post*, and *Child* v. *Affleck* (1829), 9 B. & C. 403, referred to in the note to *Toogood* v. *Spyring*, *supra*, at p. 193.

(*n*) The following are important modern authorities, cited in chronological order, on the subject of privilege:—*Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A. (communications between incumbent and curate as to ecclesiastical matters; observations as to what is and is not express malice); *Hamon* v. *Falle* (1879), 4 App. Cas. 247, P. C. (statement by proposed insurers of ship to insured); *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, H. L., *per* Lord BLACKBURN, at p. 787 (nature of qualified privilege considered); *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189, C. A. (joint interest); *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A. (LINDLEY and KAY, L.JJ., LOPES, L.J. dissenting) (social or moral duty); *Jenoure* v. *Delmege*, [1891] A. C. 73, P. C. (fact that statement is volunteered does not, if the occasion was privileged, throw on defendant the burden of proving *bona fides* affirmatively); *Pittard* v. *Oliver*, [1891] 1 Q. B. 474, C. A. (presence of reporters at meeting of poor law guardians not sufficient to take away privilege of occasion), (distinguishing *Purcell* v. *Sowler* (1877), 2 C. P. D. 215, C. A.); *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A. (distinguished in *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842, C. A. (solicitor and clerk), and *Edmondson* v. *Birch & Co., Ltd. and Horner*, [1907] 1 K. B. 371, C. A.); *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A. (qualified privilege of statement of county councillors at meeting for granting music and dancing licences): where a body of persons are engaged in a duty imposed on them of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public, the occasion is privileged (*ibid.*, at p. 443); as to what constitutes malice on such an occasion, see *ibid.*; *Searles* v. *Scarlett*, [1892] 2 Q. B. 56, C. A. (publication of a mere copy of what is contained in a register of judgments kept in pursuance of an Act of Parliament, which by law the public are entitled to inspect, is, in the absence of actual malice, privileged), explaining and following *Fleming* v. *Newton* (1848), 1 H. L. Cas. 363, and *Annaly* (*Baron*) v. *Trade Auxiliary Co.* (1890), 26 L. R. Ir. 11, 394, C. A. (action in respect of publication in *Stubbs' Weekly Gazette*), and disapproving *Williams* v. *Smith* (1888), 22 Q. B. D. 134; see *Cosgrave* v. *Trade Auxiliary Co.* (1874), 8 I. R. C. L. 349; as to the extent and limits of privilege in the case of trade protection societies, see *Macintosh* v. *Dun*, [1908] A. C. 390, 400, P. C.; *Getting* v. *Foss* (1827), 3 C. & P. 160; as to "general interests of society," see *ibid.*, and *Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 392, *per* ERLE, C.J., at p. 418. *Searles* v. *Scarlett*, *supra*, was approved by the Court of Appeal in *Jones* (*John*) *& Sons* v. *Financial Times* (1909), 25 T. L. R. 677, C. A. (publication by newspapers of receivership orders privileged); *Kimber* v. *Press Association, Ltd.*, [1893] 1 Q. B. 65, C. A. (reports in the nature of "privileged" communications); *Baker* v. *Carrick*, [1894] 1 Q. B. 838, C. A. (letters by solicitor in course of duty to his client written to auctioneers to protect client's interest privileged, in absence of malice, where occasion would have been privileged had letter been written by the client), approving *Blackham* v. *Pugh* (1846), 2 C. B. 611

SECT. 3. **Qualified Privilege.**

1265. The following exception or qualification has been admitted in order to preserve the spirit of the general rule limiting the

Qualification of, or exceptions to, general definition.

(notice by creditor of plaintiff to auctioneer not to pay proceeds of sale to plaintiff, alleging act of bankruptcy by plaintiff); *Browne* v. *Dunn* (1893), 6 R. 67, H. L. (letter by solicitor to client leading up to retainer); *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54, C. A. (disapproving *Tompson* v. *Dashwood* (1883), 11 Q. B. D. 43); *Andrews* v. *Nott Bower*, [1895] 1 Q. B. 888, C. A., see note (*i*), p. 687, *ante*; *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A., *per* Lord ESHER, M.R. (criticising *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 787) (occasion privileged; finding of jury as to excess insufficient; no evidence of malice for jury); *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A. (see note (*h*), p. 693, *post*); *Collins* v. *Cooper* (1902), 19 T. L. R. 118, C. A. (material statements made by persons interested in detection of crime; occasion privileged; whether communication is privileged depends on whether defendant honestly believed what he said, not on whether his belief was reasonable or not); *Campbell* v. *Cochrane* (1906), 8 F. (Ct. of Sess.) 205 (statements in reply to threat of action and relevant thereto); *Watson* v. *M'Ewan*, *Watson* v. *Jones*, [1905] A. C. 480, referred to in *Campbell* v. *Cochrane*, *supra*, was a case of absolute privilege; *Keith* v. *Lauder* (1905), 8 F. (Ct. of Sess.) 356 (report by a member of association of fishing-boat owners for insertion by the secretary in the "defaulters' register" of alleged misconduct of an engineer); *Hope* v. *Leng* (*Sir W.*) *& Co.* (*Sheffield Telegraph*), *Ltd.* (1907), 23 T. L. R. 243, C. A. (reports of judicial proceedings); *Furniss* v. *Cambridge Daily News*, *Ltd.* (1907), 23 T. L. R. 705, C. A. (reports of judicial proceedings); *Mapey* v. *Baker* (1909), 73 J. P. 289, C. A. (speech by member of board of guardians at board meeting as to collection of poor rate in parish within his union privileged); *Mangena* v. *Wright*, [1909] 2 K. B. 958, see note (*p*), p. 683, *ante* (where it was also held that a communication by a public servant of a matter within his own province concerning a person taking a public part, the matter being one of public interest, as to which the public are entitled to information, may be privileged on the part of the public servant, and if sent to a newspaper and published therein may be the subject of privilege in the proprietor, as that is the ordinary channel of communication to the public (*Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q. B. D. 400, 412, C. A., followed)); *Elkington* v. *London Association for Protection of Trade* (1911), 27 T. L. R. 329, C. A. (defendants ordered to give further particulars to test question whether an inquiry was made by a member of defendants' association).

(2) The following cases, mostly of earlier date than the preceding, may also be consulted on the subject of privilege.

(i.) (a) As to interest generally:—*Shipley* v. *Todhunter* (1836), 7 C. & P. 680 (mutual: angry expressions not necessarily malicious); *Wilson* v. *Robinson* (1845), 7 Q. B. 68 (joint); *M'Dougall* v. *Claridge* (1808), 1 Camp. 267 (mutual), *Simmonds* v. *Dunne* (1871), 5 I. R. C. L. 358 (interest must be real and legitimate: succinct definition of privilege by FITZGERALD, B.).

(i.) (b) As to interest of the recipient:—*Blagg* v. *Sturt* (1846), 10 Q. B. 899 (letter to Secretary of State having no direct authority in respect of subject-matter, and not being competent tribunal to receive the application, not privileged); compare *Harrison* v. *Bush* (1855), 5 E. & B. 344 (where the Secretary of State was the proper person to whom to apply). As to cases where the communication was not made to proper persons, see *Simpson* v. *Downs* (1867), 16 L. T. 391 (to newspaper instead of to town council); compare *Lawless* v *Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262.

(ii.) As to self-vindication:—*Coward* v. *Wellington* (1836), 7 C. & P. 531; *Laughton* v. *Sodor and Man* (*Bishop*) (1872), L. R. 4 P. C. 495 (charge of bishop to clergy: bishop there justified in defending himself by sending such charge to the newspaper).

(iii.) As to statements volunteered:—*Todd* v. *Hawkins* (1837), 2 Mood. & R. 20 (advice by relative as to matters of family interest privileged). Frequently there may be a moral or social or legal duty or a sufficient interest to protect a statement volunteered. See, for example, *Todd* v. *Hawkins*, *supra*, and the judgment of ERLE, C.J., in *Whiteley* v. *Adams* (1863), 15 C. B. (N. S.) 392, at p. 418;

persons to whom a communication on a privileged occasion may be published, and yet remain protected by the occasion:—Where there is a duty (*o*), whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing (*p*). Those reasonable means may include the introduction of third persons, when that is reasonable and in the ordinary course of business (*q*). The use of the ordinary and reasonable means of giving effect to the privilege does not destroy it (*a*). Thus, it would be impossible in the case of the business communications of large mercantile firms and limited companies to suppose that communications could as a matter of business be written by and pass through the hand of one partner or person only (*b*). If a business communication is made on a privileged occasion, the privilege covers all incidents of the transmission of that communication which are in accordance with the reasonable and usual course of business (*c*).

Reasonable introduction of third persons into the occasion.

Bennet v. *Deacon* (1846), 2 C. B. 628; the judgment of LINDLEY L.J., in *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A., and *Jenoure* v. *Delmege*, [1891] A. C. 73, P. C. As to the danger of voluntary statements, see *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181; *Dickeson* v. *Hilliard* (1874), L. R. 9 Exch. 79.

(iv.) As to statements made in investigating crime:—*Force* v. *Warren* (1864), 15 C. B. (N. S.) 806 (what statements by a person suspecting another of theft are or are not privileged); compare *Harrison* v. *Fraser* (1881), 29 W. R. 652. "For the sake of public justice, charges and communications, which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime" (*Padmore* v. *Lawrence* (1840), 11 Ad. & El. 380, *per* COLERIDGE, J., at p. 382). On this statement Dr. Blake Odgers, in his work on Libel and Slander, 3rd. ed., p. 245, based the following statement, which was approved by COLLINS, M.R., in *Collins* v. *Cooper* (1902), 19 T. L. R. 118, C. A., at p. 119: "All material statements made by the persons interested in the detection of a crime, during their investigations and material thereto, are privileged." For a recent case where the Court of Appeal held that a statement by the defendant to the plaintiff's master that there had been a theft and that suspicion had fallen on the plaintiff was a statement made on a privileged occasion, and that in the absence of evidence of malice the defendant was not liable, see *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A.

(3) As to other illustrations, see the cases cited in the notes to pp. 687, 688, *ante*, and to pp. 692, 693, 711 *et seq.*, *post*.

The immunity given by statute to certain fair and accurate reports exhibits the same tendency.

(*o*) The principle is equally applicable to the cases of (1) common interests, (2) interest to make and duty to receive the statement, and (3) duty to make and interest to receive the statement.

(*p*) *Edmondson* v. *Birch & Co., Ltd. and Horner*, [1907] 1 K. B. 371, C. A., *per* COLLINS, M.R., at p. 380.

(*q*) *Ibid.*

(*a*) *Ibid.*

(*b*) *Ibid.*, *per* COZENS-HARDY, L.J., at p. 371.

(*c*) *Ibid.*, *per* FLETCHER MOULTON, L.J., at p. 382. In *Edmondson* v. *Birch & Co., Ltd., and Horner*, *supra* (in which *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., was distinguished, and *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842, C. A., and *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262, were followed), the communication by telegram was carried out in the only way available, and, as a matter of business, the course followed in making the communication was the reasonable and usual course to adopt in the circumstances. *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, C. A., related to a communication by a company to a firm which involved a serious charge against the plaintiffs.

SECT. 3. Qualified Privilege.

Slander.

Presence of third persons.

Express malice.

1266. In actions of slander the presence of a third person on a privileged occasion does not avoid the privilege as a matter of law, though it may be evidence of express malice (*d*). Where an opportunity is sought by the defendant for making a defamatory statement before third persons which might have been made in private, it would generally afford strong evidence of a malicious intention (*d*). But where the presence of a third person, on an occasion otherwise privileged, is reasonably necessary for the protection of the interests of the defendant, and the third person is not unfairly selected, the presence of the third person, though introduced by the defendant, is no evidence of express malice (*e*).

and the communication was by a letter dictated by the defendants' managing director to a clerk, and the Court of Appeal held that under the circumstances it was not necessary nor in the ordinary course of business for the director to have availed himself of the clerk for the purpose of making the communication. In *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842, C. A., it was held that if a solicitor is instructed to write a defamatory letter on a privileged occasion on behalf of a client, he must do this business, as he does other business in the office, in the ordinary way, which involves having the communication taken down or copied by a clerk, and copied into the letter book, and Lord ESHER, M.R. (*ibid.*, at p. 845), said that that was distinguishable from the case of a merchant writing a libel out of the course of his ordinary business, who, if he has the letter copied by a clerk, does so at his peril. In *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262, it was held that a company, in making known to its shareholders matter proper for them to know, may employ a printer to print the report in the usual course; and, if a company may do so, others may do so, provided that the means adopted are necessary, having regard to the facts of the particular case and the exigencies of business (*ibid.*, and see *per* HANNEN, J., *ibid.*, at pp. 269, 270). As to transmitting libellous matter unnecessarily by telegram, see *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393; compare *Edmondson* v. *Birch & Co., Ltd., and Horner*, [1907] 1 K. B. 371, 381, C. A. As to the occasion being privileged though the transmission is by postcards where the name of the plaintiff is not disclosed, see *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A., and note (*h*), p. 693, *post*.

(*d*) "I am not aware that it was ever deemed essential to the protection of such a communication" (*i.e.*, as to the character of a discharged servant) "that it should be made to some person interested in the enquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the enquiry (and that has been very liberally construed) the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not well be carried on if such restraints were imposed on this and similar communications, and if, on every occasion on which they were made, they were not protected, unless strictly private" (*Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, *per* PARKE, B., at pp. 193, 194). The communications of business are not to be beset with actions of slander (*per* Lord ELLENBOROUGH, C.J., in *Dunman* v. *Bigg* (1808), 1 Camp. 268, n., cited with approval in *Taylor* v. *Hawkins* (1851), 16 Q. B. 308, *per* Lord CAMPBELL, C.J., at p. 322). See also *Pittard* v. *Oliver*, [1891] 1 Q. B. 474, C. A. (where it was held that the occasion was privileged notwithstanding the presence of reporters or persons other than guardians at the meeting of a board of guardians at which the defendant, a member of the board, made the statement complained of); and see the *dicta* of Lord ESHER, M.R., in *Pittard* v. *Oliver*, *supra*, at pp. 477, 478, as to what the position would have been had the defendant called third persons into the meeting, and the criticism of *Purcell* v. *Sowler* (1877), 2 C. P. D. 215, in *Pittard* v. *Oliver*, *supra*, at p. 479.

(*e*) *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; compare *Somerville* v. *Hawkins* (1851), 10 C. B. 583. See also the following cases:—*Toogood* v. *Spyring*, *supra*; *Padmore* v. *Lawrence* (1840), 11 Ad. & El. 380; *Parsons* v. *Surgey*

SECT. 3. Qualified Privilege.

Answers to questions in presence of third persons.

1267. A statement by the defendant to the plaintiff, though uttered in the presence of third persons, is a statement made on a privileged occasion if and in so far as it is an answer to a question put to the defendant by the plaintiff, and the burden is on the plaintiff to satisfy the jury that the statement was made maliciously (*f*). But in so far as the statement in reply is not an answer to the question it is not made on a privileged occasion, and, unless the occasion is otherwise privileged, there is no need for the plaintiff to prove the existence of express malice (*g*).

Words defamatory of plaintiff but not so understood by third persons.

1268. The introduction of third persons on a privileged occasion does not avoid the privilege in the absence of evidence of actual malice if there is no actionable publication to such third persons; and there is no actionable publication of a libel or a slander to persons who do not understand the words to be defamatory of the plaintiff (*h*).

SUB-SECT. 3.—*Privileged Reports.*

(i.) *In General.*

Definition interpreted in light of common convenience and welfare of society.

1269. It has been said that the reason for holding any occasion privileged is the common convenience and the welfare of society, and that no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not (*i*).

(1864), 4 F. & F. 247; *Davies* v. *Snead* (1870), L. R. 5 Q. B. 608; *Jones* v. *Thomas* (1885), 53 L. T. 678; *Pittard* v. *Oliver*, [1891] 1 Q. B. 474, C. A.

(*f*) *Warr* v. *Jolly* (1834), 6 C. & P. 497, considered in *Griffiths* v. *Lewis* (1845), 7 Q. B. 61, 67; compare *Palmer* v. *Hummerston* (1883), Cab. & El. 36.

(*g*) In *Griffiths* v. *Lewis*, *supra*, where the plaintiff asked the defendant "Did you say that my son used two balls to the steelyard?" and the defendant answered "To be sure I did; it has been carried on for years," it was held that the latter part of the reply was not an answer to the question, and that the plaintiff need not prove actual malice. In *Smith* v. *Mathews* (1831), 1 Mood. & R. 151, Lord LYNDHURST, C.B., told the jury that if the reports as to which the plaintiff demanded an inquiry originated with the defendant and had produced the inquiry, his repetition of them was not a privileged communication (see *Griffiths* v. *Lewis*, *supra*, *per* DENMAN, C.J., at p. 67). Lord LYNDHURST did not rule that the occasion of the repetition was not privileged. An answer to an inquiry by a company as to a transfer is privileged (*Hesketh* v. *Brindle* (1888), 4 T. L. R. 199). As to statements which are privileged only as to a portion, see *Warren* v. *Warren* (1834), 1 Cr. M. & R. 250. In *Davies* v. *Snead* (1870), L. R. 5 Q. B. 608, a statement as to the administration of a trust by A. and B., two trustees, made on an occasion privileged as to A., was held to be made on an occasion privileged as to B. also, since the statement concerning A. could not be made without referring also to B.

(*h*) See *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A., where the name of the plaintiff did not appear on the postcard; compare *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393, and *Robinson* v. *Jones* (1879), 4 L. R. Ir. 391. "Undoubtedly, sending a libellous communication by postcard may be evidence of malice, as pointed out by BRETT, J., in *Williamson* v. *Freer*" (*supra*), "if the communication refers and would be taken to refer to a particular individual. I fail, however, to see any evidence of malice arising from the fact that the defendant disclosed to the public that which conveyed no meaning to the public" (*Sadgrove* v. *Hole*, *supra*, *per* COLLINS, L.J., at p. 6).

(*i*) See note (*l*), p. 688, *ante*. Contrast also the definition in *Harrison* v. *Bush*

SECT. 3. **Qualified Privilege.**

In the preceding definition (*j*) of a privileged occasion, however, the correspondence of the duty, or interest, of the individuals who make and receive the communication is emphasised, and the public interest is ignored except in so far as it is protected by the wide interpretation of the word "duty."

Extension of qualified privilege to certain reports.

In the case of certain reports, the law, in the interest of the public rather than in the interest of individuals, gives a qualified protection, loosely called privilege from an analogy in function to the case of privilege strictly so called.

(ii.) *Judicial Proceedings.*

Reports: (i.) Judicial proceedings.

1270. Where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, the publication, without malice, of a fair and accurate report of what takes place before that tribunal, is privileged (*k*).

(a) Common law.

Privilege not confined to reports in newspapers.

Such a publication is in the public interest. It is merely enlarging the area of the court, and communicating to all that which all had the right to know (*l*). So far as the common law is concerned, it makes no distinction in principle between the reports of such proceedings appearing in newspapers and those appearing in private pamphlets (*m*), but in determining whether a report is fair and accurate, a report in a daily newspaper should not be judged by the same strict standard of accuracy as the reports of a professional law reporter (*n*).

Questions for jury.

Burden of proof on defendant that report is fair and accurate.

At common law a fair and accurate report of such proceedings has an immunity corresponding to the qualified immunity of a statement made on an occasion which is a privileged occasion within the preceding definition (*j*). It is for the jury to say whether the report is fair and accurate, and the burden is on the defendant to satisfy the jury that the report is fair and accurate. If, however, the plaintiff substantially proves the case of the defendant in this

(1855), 5 E. & B. 344, with the exceptions to that definition mentioned in the text. In *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54, C. A., that definition was strictly applied.

(*j*) See pp. 686, 687, *ante*.

(*k*) *Kimber* v. *Press Association*, [1893] 1 Q. B. 65, 68, C. A. This case was decided on the common law. As to the words "exercising its jurisdiction," see *Usill* v. *Hales* (1878), 3 C. P. D. 319, 323 (approved in *Kimber* v. *Press Association*, *supra*, where the magistrate declined to entertain the application, a report of which proceedings, found by the jury to be a fair report, was afterwards published by the defendant in a newspaper, and the court held that it was privileged).

(*l*) *Macdougall* v. *Knight* (1889), 14 App. Cas. 194, *per* Lord HALSBURY, L.C., at p. 200.

(*m*) *Milissich* v. *Lloyds* (1877), 46 L. J. (Q. B.) 404, C. A., *per* MELLISH, L.J., at p. 406, and *per* BRETT, J.A., at p. 407. "In both cases a fair report of the trial is all that is necessary, unless there be malice in fact, when the privilege is lost even if the report be published in a newspaper" (*ibid.*, at p. 407). As to the effect of statutory provisions on this subject see pp. 697, 698, 745, *post*.

(*n*) *Hope* v. *Leng (Sir W. C.) & Co. (Sheffield Telegraph), Ltd.* (1907), 23 T. L. R. 243, C. A., *per* COLLINS, M.R., at p. 244. There is, perhaps, a tendency at the present time to take a more liberal view of the immunity of reporters than formerly (*ibid.*, p. 245).

respect, and there is no material omission, the judge is justified in refusing to ask the jury to find what no reasonable man could find (*o*), but though there is no evidence fit for the consideration of the jury, it is now the usual practice for the judge to let the matter go to the jury, so that in the event of the Court of Appeal thinking that there was evidence for the jury, it may not be necessary to send the case down for a new trial (*p*).

Burden of proof of malice on plaintiff.

If the plaintiff fails to establish that such a fair and accurate report was actuated by express malice, the report is regarded in law as a privileged communication (*q*).

Extent of immunity.

1271. The immunity extends to the reports of *ex parte* proceedings before magistrates, because there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion (*r*).

Fairness and accuracy.

Verbatim report not essential.

1272. In considering whether an account of legal proceedings is fair and accurate, the reason of the immunity should be regarded. It is that, as every person cannot be in court, it is for the public benefit that persons should be informed of what has taken place in court substantially as if they had been present (*s*). It is essential that the publication should be a fair and impartial, though it need not be a *verbatim*, report (*t*).

Report of portion of proceedings.

1273. The report of a portion only of the legal proceedings may in many cases detract from the fairness or accuracy of the report and have an effect the reverse of putting the reader in the same position as if he were present himself. Thus it may be misleading to report the opening speech of counsel without the evidence on

(*o*) *Kimber* v. *Press Association*, [1893] 1 Q. B. 65, 71—73, C. A.; and see *Capital and Counties Bank* v. *Henty* (1880), 5 C. P. D. 514, C. A.; affirmed (1882), 7 App. Cas. 741, referred to in *Kimber* v. *Press Association*, *supra*, at p. 74.

(*p*) *Hope* v. *Leng* (*Sir W. C.*) *& Co.* (*Sheffield Telegraph*), *Ltd.* (1907), 23 T. L. R. 243, C. A., *per* COLLINS, M.R., at p. 244.

(*q*) But the fairness of the report will not avail the defendant, if the plaintiff establishes malice (*Stevens* v. *Sampson* (1879), 5 Ex. D. 53, C. A.).

(*r*) See *Kimber* v. *Press Association*, *supra*, *per* Lord ESHER, M.R., at p. 69. There the Court of Appeal approved *Curry* v. *Walter* (1796), 1 Bos. & P. 525; *Lewis* v. *Levy* (1858), E. B. & E. 537; *Usill* v. *Hales* (1878), 3 C. P. D. 319; and explained *Saunders* v. *Mills* (1829), 6 Bing. 213, *per* TINDAL, C.J., at p. 218. As to proceedings before judges in chambers, see *Smith* v. *Scott* (1847), 2 Car. & Kir. 580; as to coroner's courts, see *East* v. *Chapman* (1827), Mood. & M. 46; *Lynam* v. *Gowing* (1880), 6 L. R. Ir. 259; as to committees of House of Lords, see *Kane* v. *Mulvany* (1866), 2 I. R. C. L. 402; as to registrars in bankruptcy, see *Ryalls* v. *Leader* (1866), L. R. 1 Exch. 296; as to magistrates' courts, see *Pinero* v. *Goodlake* (1867), 15 L. T. 676. As to absolute privilege, see pp. 677 *et seq.*, *ante*.

(*s*) *Furniss* v. *Cambridge Daily News*, *Ltd.* (1907), 23 T. L. R. 705, C. A., *per* GORELL BARNES, P., at p. 706. As to omissions, see *Grimwade* v. *Dicks* (1886), 2 T. L. R. 627. As to omitting to intimate the result of proceedings, see *Pope* v. *Outram & Co.*, *Ltd.*, [1909] S. C. 230.

(*t*) See *Hoare* v. *Silverlock* (1850), 9 C. B. 20; *Lewis* v. *Levy* (1858), E. B. & E. 537; *Andrews* v. *Chapman* (1853), 3 Car. & Kir. 286; *Turner* v. *Sullivan* (1862), 6 L. T. 130.

SECT. 3. Qualified Privilege.

which it is founded (*a*), or the evidence of a witness without the cross-examination (*b*).

Report of whole of proceedings not necessary as matter of law.

1274. It is not, however, necessary as a matter of law that the report should be a report of the whole of the proceedings. The publication, without malice, of an accurate report, of what has been said or done in a judicial proceeding in a court of justice, is a privileged publication, although what was said or done would, but for the privilege, be libellous against an individual and actionable at his suit, and this is so although what is published purports to be, and is, a report not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is a fair and accurate report and published without malice (*c*).

(*a*) See *Saunders* v. *Mills* (1829), 6 Bing. 213, 218, 219; *Kane* v. *Mulvany* (1866), 2 I. R. C. L. 402. As to reporting observations of counsel, see also *Turner* v. *Sullivan* (1862), 6 L. T. 130.

(*b*) See the passage from the judgment of Lord HALSBURY, L.C., in *Macdougall* v. *Knight* (1889), 14 App. Cas. 194, quoted in note (*c*), *infra*.

(*c*) The statement in the text is founded on the decision in *Lewis* v. *Levy* (1858), E. B. & E. 537 (approved in *Milissich* v. *Lloyds* (1877), 46 L. J. (Q. B.) 404, C. A., by MELLISH, L.J., and BRETT, J.A.), as interpreted, and followed by the Court of Appeal, in *Macdougall* v. *Knight & Son* (1886), 17 Q. B. D. 636, C. A., and *Macdougall* v. *Knight* (1890), 25 Q. B. D. 1, C. A., *per* Lord ESHER, M.R., at p. 7. In *Macdougall* v. *Knight*, *supra*, the Court of Appeal affirmed their decision in *Macdougall* v. *Knight & Son* (1886), 17 Q. B. D. 636, C. A., which had been affirmed by the House of Lords ((1889), 14 App. Cas 194), not for the reasons given by the Court of Appeal, but because the findings of the jury disposed of all the questions properly raised at the trial, the points raised in the Divisional Court, the Court of Appeal, and the House of Lords not having been properly raised at the trial. There Lord HALSBURY, L.C., dealing with the question of reporting portions of legal proceedings, said, at p. 200: "I am not prepared to admit that the judgment of a learned judge must necessarily be privileged. It is obvious that a partial account of what takes place in a court of justice may be the exact reverse of putting the person to whom publication is made in the same position as if he were present himself. If the evidence of a witness containing matter defamatory to an individual were published, and the cross-examination which showed the witness to be unworthy of belief were suppressed, it would obviously be a partial and inaccurate account of what took place; and if a learned judge's judgment or summing up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, I think the publication of such partial, and in that respect inaccurate, representations of the evidence might be the subject of an action for libel to which the supposed privilege in what was said by a judge would be no answer. Nor do I think there is any presumption one way or the other as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to be so by evidence, and certainly not inferred as a presumption of law." See the criticism of this in *Macdougall* v. *Knight* (1890), 25 Q. B. D. 1, C. A., *per* Lord ESHER, M.R., at p. 9. As to leaving to the jury the question of the fairness and accuracy of a report of the summing up of the judge, see also *Milissich* v. *Lloyds*, *supra*. As to publishing extracts from a register of judgments, see *Searles* v. *Scarlett*, [1892] 2 Q. B. 56, C. A., and the other cases cited in note (*n*), p. 689, *ante*. As to restraining by injunction circulars purporting to give the effect of a judgment, see *Hayward & Co.* v. *Hayward & Sons* (1886), 34 Ch. D. 198. As to publishing the contents of an affidavit filed under the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 6, see *Reis* v. *Perry* (1895), 64 L. J. (Q. B.) 566.

1275. Although the report may be condensed by the reporter, so long as it reproduces the substance of the proceedings (*d*), it may not be expanded nor interspersed with his comments (*e*) nor give a coloured account of the proceedings (*f*).

Comments or to coloured accounts.

1276. The question for the jury is not whether the reporter was negligent or not, but whether the report of the proceedings is fair and accurate (*g*).

Question for jury.

1277. The immunity in strictness attaches only to the report of the actual legal proceedings (*h*), and will not be applied to protect an unsworn defamatory statement made by a bystander, though in open court, forming no part of the legal proceedings (*i*).

Privilege protects report of actual legal proceedings.

1278. The immunity exists for the public benefit, and does not protect reports of an obscene or demoralising character, though the object of the publishers may be a desire to suppress that which they consider immoral (*k*).

Privilege exists for public benefit.

1279. The common law immunity has been supplemented by statutory provisions whereby (*l*) a fair and accurate report in any newspaper (*m*) of proceedings publicly heard before any court

(b) Statutory protection to newspapers.

(*d*) See *Turner* v. *Sullivan* (1862), 6 L. T. 130.

(*e*) See *Andrews* v. *Chapman* (1853), 3 Car. & Kir. 286; *Stiles* v. *Nokes* (1806), 7 East, 493; *Roberts* v. *Brown* (1834), 10 Bing. 519 ("Mr. J. . . . ," (counsel) "commented with cutting severity on the testimony of Mr. O."). As to comments on evidence in relation to the defence of fair comment on a matter of public interest, see *Hedley* v. *Barlow* (1865), 4 F. & F. 224; and *Woodgate* v. *Ridout* (1865), 4 F. & F. 202.

(*f*) *Stiles* v. *Nokes, supra; Delegal* v. *Highley* (1837), 3 Bing. (N. C.) 950, 960, 961; and see *Lewis* v. *Clement* (1820), 3 B. & Ald. 702; *Clement* v. *Lewis* (1822), 7 Moore (C. P.), 200, Ex. Ch. (where the account was prefaced with the heading "Shameful conduct of an Attorney"). Compare *Leon* v. "*Edinburgh Evening News*," *Ltd.*, [1909] S. C. 1014 (where the heading "The Edinburgh Licensing Prosecution, Prisoners Acquitted," was held not libellous, though the word "prisoners" was used).

(*g*) See *Furniss* v. *Cambridge Daily News, Ltd.* (1907), 23 T. L. R. 705, C. A. (where the report followed the abstract of the charge in the charge-sheet which did not correspond with the summons).

(*h*) But as to recording the observations of a litigant made in court and still under the obligation of an oath though out of the witness-box, see the judgment of COLLINS, M.R., in *Hope* v. *Leng* (*Sir W. C.*) *& Co.* (*Sheffield Telegraph*), *Ltd.* (1907), 23 T. L. R. 243, C. A. Compare *Delegal* v. *Highley, supra, per* TINDAL, C.J., at pp. 960, 961 (where the observation of the chief clerk was treated as though it had been made by a mere bystander). As to directing the jury how to judge whether a report of judicial proceedings is fair and accurate, see *Hope* v. *Leng* (*Sir W. C.*) *& Co.* (*Sheffield Telegraph*), *Ltd., supra.* As to mistakes in citing from law reports, see *Blake* v. *Stevens* (1864), 4 F. & F. 232. There seems to be a tendency to apply a less severe standard of accuracy to reporters for the press than to reports of interested persons or the reports of counsel.

(*i*) See *Lynam* v. *Gowing* (1880), 6 L. R. Ir. 259 (where a plea which was in substance to the effect stated in the text was held bad on demurrer). See also *Delegal* v. *Highley, supra, per* TINDAL, C.J., at p. 961.

(*k*) See *Steele* v. *Brannan* (1872), L. R. 7 C. P. 261, following *R.* v. *Hicklin* (1868), L. R. 3 Q. B. 360, and *R.* v. *Carlile* (1819), 3 B. & Ald. 167.

(*l*) See the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 3, and p. 745, *post.*

(*m*) The common law immunity attaching to reports of judicial proceedings, which is not restricted by the Law of Libel Amendment Act, 1888 (51 & 52

SECT. 3. Qualified Privilege.

exercising judicial authority, if published contemporaneously with such proceedings (*n*), is privileged (*o*).

(iii.) *Proceedings in Parliament.*

(ii.) Parliamentary proceedings.

1280. Fair and accurate reports of proceedings in Parliament, although disparaging to the character of individuals, have a common law immunity similar to that given to fair and accurate reports of proceedings in courts of justice (*p*).

(iv.) *Proceedings of Public Meetings.*

(iii.) Statutory protection to:
(a) Fair and accurate reports in newspapers of certain meetings.

1281. Provision has been made by statute for the protection of a fair and accurate report, published in any newspaper (*q*), of the proceedings of a public meeting (*r*), or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or

Vict. c. 64), is not confined to newspaper publications. For the meaning of the word "newspaper," see note (*p*), p. 744, *post*.

(*n*) The event referred to would be practically impossible, if the words are construed literally. There is no reason to suppose that they would be so construed.

(*o*) It is to be noticed that the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), ss. 3, 4 (for the latter provision see the text, *infra*), defining the conditions essential to obtaining the benefit of the Act for publication of reports of judicial proceedings and proceedings at public meetings respectively, are not identical. Neither provision uses the term "absolute privilege"; but *ibid.*, s. 4, relating to reports of public meetings, contains the words "unless it shall be proved that such report or publication was published or made maliciously," which words are not to be found in *ibid.*, s. 3, relating to reports of judicial proceedings, although *ibid.*, s. 3, does contain the word "fair" coupled with the words "and accurate." The report may be accurate as far as it goes, but unfair in its omissions.

(*p*) *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73. As to statutory protection, see p. 683, *ante*.

(*q*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4. For the meaning of the word "newspaper," see note (*p*), p. 744, *post*. The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 2, is repealed by the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 2, and replaced by *ibid.*, s. 4. These Acts were passed to give newspapers a defence which did not exist at common law. See, for example, *Popham* v. *Pickburn* (1862), 7 H. & N. 891; *Davison* v. *Duncan* (1857), 7 E. & B. 229; and the statement of the law in *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, P. C. See, on the other hand, *Mangena* v. *Wright*, [1909] 2 K. B. 958, as to the protection of a proprietor of a newspaper who publishes communications by public servants which are of public interest, the press being the ordinary channel of communication to the public. *Laughton* v. *Sodor and Man (Bishop)* (1872), L. R. 4 P. C. 495, and *O'Donoghue* v. *Hussey* (1871), 5 I. R. C. L. 124, Ex. Ch., were decided on a different principle, namely, that a person attacked through the press may defend himself through the press. As to leaving to the jury the questions whether the matter is or is not of public concern and is or is not for the public benefit, see *Kelly* v. *O'Malley* (1889), 6 T. L. R. 62; see also *Ponsford* v. *"Financial Times," Ltd. and Hart* (1900), 16 T. L. R. 248, *per* MATHEW, J. (what is not a matter of public concern).

(*r*) The term "public meeting" means "any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted (Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4). The report of a sermon in a chapel is not a report of a public meeting within the Act (*Chaloner* v. *Lansdown & Sons* (1894), 10 T. L. R. 290).

local authority formed or constituted under the provisions of any Act of Parliament, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of State, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public (*s*).

(b) The publication of certain official notices and reports.

Such report and such publication are privileged unless it is proved that such report or publication was published or made maliciously, but this protection is not to be available as a defence in any proceedings if it is proved that the defendant has been requested to insert in the newspaper, in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or publication, and has refused or neglected to insert it; nor does the protection extend to authorise the publication of any blasphemous or indecent matter.

The above provision did not limit or abridge any privilege then existing, nor, on the other hand, does it protect the publication of any matter not of any public concern and the publication of which is not for the public benefit (*s*).

SECT. 4.—*Fair Comment.*

SUB-SECT. 1.—*Introductory.*

Fair comment.

1282. Nothing is more important than that fair and full latitude should be allowed to writers upon any public matter, whether it be the conduct of public men or the proceedings in courts of justice or in Parliament, or the publication of a scheme or a literary work. But it has always been left to a jury to say whether the publication has gone beyond the limits of fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts (*t*).

(*s*) See note (*q*), p. 698, *ante*.

(*t*) *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, *per* CROMPTON, J., at p. 778; approved in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, 280, C. A., and in recent decisions of the Court of Appeal and by the House of Lords in *Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., H. L. The head-note in *Merivale* v. *Carson*, *supra*, is somewhat misleading in stating that *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606, was there "dissented from." "As pointed out in *McQuire* v. *Western Morning News Co.*" ([1903] 2 K. B. 100, C. A.), "the law continued to be administered after *Campbell* v. *Spottiswoode*, just as it always had been before, down to and since *Merivale* v. *Carson*" (*supra*). "That case decided nothing inconsistent with the law of libel as thus administered, though each of the learned judges expressed an opinion in favour of the view taken in the *dicta* I have referred to of CROMPTON, J., and BLACKBURN, J., in preference to that of WILLES, J., in *Henwood* v. *Harrison*" (*supra*). "But, as already pointed out in *McQuire* v. *Western Morning News Co.*" (*supra*), "the difference between the two views is, in the language of BOWEN, L.J., in *Merivale* v. *Carson*" (*supra*, at pp. 282, 283), "a difference in the 'metaphysical exposition' of the right and 'is rather

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When the need of the defence does not arise.

The need of the defence of fair comment (*u*) on a matter of public interest (*a*) does not arise if the statement complained of does not

academical than practical'" (*Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A., *per* COLLINS, M.R., at p. 639). Lord ESHER, M.R., in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, 280, C. A., expressed the operation of an unfair state of mind on a defence of fair comment as negativing the so-called comment or criticism being a comment or criticism at all. The case of *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, may be taken for practical purposes as the basis of the modern law on the subject of fair comment. The case decided that when a writer in a newspaper or elsewhere in commenting on public matters makes imputations on the character of the individuals concerned in them, which are false and libellous, as being beyond the limits of fair comment, it is no defence that he *bonâ fide* believed in the truth of those imputations. In that case BLACKBURN, J. (at p. 781), said that he took it to be certain that the publisher or editor of a newspaper has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of State, or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement (*Paris* v. *Levy* (1860), 9 C. B. (N. S.) 342, S. C., *Nisi Prius*, 2 F. & F. 71), and that in such cases everyone has a right to make a fair and proper comment, and so long as it is within that limit, it is no libel. For an attempt to define the limits of fair comment before the date of *Campbell* v. *Spottiswoode*, *supra*, see the passage from *Macleod* v. *Wakley* (1828), 3 C. & P. 311, quoted by BOWEN, L.J., in *Merivale* v. *Carson*, *supra*. For a subsequent statement of the law, see *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73, 93, 96. The early decisions are now rarely referred to.

(*u*) No distinction is here drawn between comment and criticism.

(*a*) The form of defence sanctioned in *Penrhyn* v. "*Licensed Victuallers' Mirror*" (1890), 7 T. L. R. 1 (set out in note (*l*), p. 669, *ante*), has been adversely criticised, but has been usually adopted in pleading fair comment from the date of that decision up to the present time; see *Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, 247, C. A. If it involves two pleas, (1) a plea of justification and (2) a plea of fair comment, the clause is anomalous, as both these pleas are contained in one paragraph. In *Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, C. A., the Court of Appeal held the plea to be a plea of fair comment and not one of justification. There the plaintiff supplied the material on which the defendants commented, so that there was no real issue as to the truth of the facts upon which the comment was based and from which the inferences were drawn. Particulars of the defence were in that case given which in substance stated that the statement of facts in the words complained of were a true statement of matters appearing in documents and particulars supplied by the plaintiff. The plaintiff applied for further particulars, asking for particulars as to whether the defendants alleged that any of the statements made in the documents and particulars sent by the plaintiff were untrue, and if so, which of them, and the Court of Appeal held that the plaintiff was not entitled to these particulars, the defence being one of fair comment only and not of justification. The same form of plea was pleaded in *Walker (Peter) & Son, Ltd.* v. *Hodgson*, *supra*, where the master, on the plaintiff's summons for "particulars of the justification pleaded in para. 8 of the defence" (the plea in question), made an order that the defendant should deliver "particulars under para. 8 of the defence of the materials on which the comment was based, he stating that the defence was one of comment and not of justification." The particulars ordered were given. Later, the master allowed certain interrogatories addressed to the plaintiffs, the whole of which were disallowed by BRAY, J., although he was of opinion that a few were unobjectionable. (For the interrogatories, see *ibid.*, at pp. 243, 244.) It was stated by VAUGHAN WILLIAMS, L.J., (*ibid.*, at p. 247): "There is no plea of justification as such. What the defendant pleads in para. 8 is that 'in so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact. In so far as they consist of comment the same are fair and *bonâ fide* comment upon matters of public interest.' This form of pleading, which I always think very indefinite and embarrassing, has, however, been adopted and sanctioned ever since the

reflect on the plaintiff personally, or, though it does so reflect on him, is, nevertheless, proved by the defendant under a plea of

decision of MATHEW and GRANTHAM, JJ., in *Penrhyn* v. "*Licensed Victuallers' Mirror*" (1890), 7 T. L. R. 1, and must now be accepted as proper pleading. No difficulty, however, arises in the present case, because there was an order for particulars obtained by the plaintiffs in which it was stated that the defendant admitted that the defence was one of fair comment and not of justification, and counsel argued this case upon the basis that there was no plea of justification. Now, according to the ordinary practice, interrogatories to establish the truth of the alleged defamation are not admissible unless justification is set up by the defence." It was held by the Court of Appeal that the defendant was entitled, notwithstanding the absence of a plea of justification, to administer interrogatories with the object of obtaining admission of the truth of the material statements of fact in the speech and particulars alleged to be defamatory. The ground of the decision seems to be not that the truth or untruth was in issue, but that the truth or untruth was material for the jury to consider in determining whether the comment was fair or unfair. In *Lyons* v. *Financial News, Ltd.* (1909), 53 Sol. Jo. 671, C. A., the defendants admitted publication but denied the innuendo, and by para. 9 of the defence pleaded that "in so far as the said words consist of statements of fact, the same in their natural and ordinary signification were true in substance and in fact; in so far as the said words consist of comment, it was fair comment upon a matter of public interest, namely, the said facts." Under that paragraph two heads of particulars were given: (a) particulars to show that the matter complained of was a matter of public interest and the circumstances under which the right to comment arose; (b) particulars of the facts on which the defendants relied as showing that the comment then made upon the prospectus was fair comment. The plaintiffs alleged that the defence was embarrassing, and further that, as many of the statements put forward by the defendants in their defence were absolutely uncovered by the alleged libel, the defendants could not rely on them, as they had no right to make fresh imputations in their particulars. CHANNELL, J., made the following order:—"The defendants to amend the particulars under para. 9 . . . by distinguishing and stating separately in the particulars the statement of facts made in their alleged libel which they justified as true in substance, and which they relied on as being matter on which they were entitled to comment, and by striking out any allegations of fact which do not come under one of those heads." The defendants appealed. The Court of Appeal allowed the appeal and set aside the order of CHANNELL, J. FLETCHER MOULTON, L.J., in that case appears to have treated the defence as a defence of justification. The report says (*ibid.*, at p. 672) that the Lord Justice in giving judgment said: "The defendants justified the whole of the article on which the action was brought." His Lordship referred to *Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, 507, C. A. (the decision in which case was that the defence was not a defence of justification), and said: "In this case the particulars just stated the grounds on which the defendants were going to say that the matter commented upon was a matter of public interest. The second set of particulars were of the facts which were going to be relied upon by the defendants, some of which were expressly stated in the libel, and some of which, though relevant to the matter of the libel, were not expressly stated therein. The defendants told the plaintiff that they were going to rely on all those facts stated in the particulars to justify, or to show that the comment they made was fair. He doubted whether an order could have been made on the defendants requiring them to give such particulars as appeared in their statement of defence, but they had put them forward, and his Lordship was not satisfied that they would embarrass the plaintiff at all. The order appealed from would, therefore, be set aside." BUCKLEY, L.J., concurred. It is believed to be the practice for masters to order such particulars of a defence pleaded in the usual form (when they are not volunteered by the defendant) as may be necessary to enable the plaintiff to know what case he has to meet. Where the comment is comment founded simply on materials supplied by the plaintiff, as in the case of literary criticism or a case like *Digby* v. *Financial News, Ltd.*, *supra*, the need of an order for particulars would rarely arise. If and in so far as the plea is a plea of justification, it would seem on principle that the plaintiff is entitled to particulars of

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justification to be true in its full meaning, in substance, and in fact.

How far defence is available.

1283. The defence is not restricted to comments in newspapers; it is available to anyone (*b*); and it applies to actions both of libel and of slander (*c*).

No absolute right in one to reflect on another by way of comment on a matter of public interest.

1284. Whether the licence protected be called a right or a privilege is a matter of words (*d*). There is no absolute right or privilege in anyone to publish a comment or criticism which reflects on another, although it be stated merely as an expression of opinion on a matter of public interest. If the licence were an absolute licence, the malice of the commentator would be immaterial, just as the court will not inquire into the motives of the defendant who made a statement which is protected by the defence of absolute privilege.

SUB-SECT. 2.—*Essentials of Defence.*

(i.) Comment is an expression of opinion.

1285. In the first place, the matter defended as comment must be comment and not mere assertion of fact.

A statement of fact, though reflecting on another, may be justified, or, though not justified, may be defended on the ground of privilege.

justification. In *Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, C. A., the defendant expressly disclaimed before the master that his plea was one of justification. In *Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, C. A., the facts were supplied by theplaintiff, and the court held the defence was not one of justification. In *Lyons* v. *Financial News, Ltd.* (1909), 53 Sol. Jo. 671, C. A., the court appears to have regarded the plea as a plea of justification as well as a plea of fair comment. If and in so far as the defence of fair comment pleaded in the usual form is a plea of justification, the defendant cannot on principle be allowed to justify the words complained of, except in their ordinary signification or in the meaning assigned to them by the innuendo; nor may he say that he said or wrote something different from the statement complained of, and justify that of which the plaintiff does not complain. As to the distinction between fair comment and justification, see p. 710, *post*.

(*b*) The right, though shared by the public, is the right of every individual who asserts it (*Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A., *per* COLLINS, M.R., at p. 638). See also the cases there cited and the passages from the judgment of BLACKBURN, J., in *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, at p. 781, and *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, P. C., where Lord HERSCHELL, L.C., at p. 190, said that no doubt the public acts of a public man could be made the subject of fair comment or criticism not only by the press, but by all members of the public, but that "the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of a particular act of misconduct."

(*c*) *Walker (Peter) & Son, Ltd.* v. *Hodgson, supra*, was an action of slander where the defence of fair comment was raised.

(*d*) See the judgment of COLLINS, M.R., in *Thomas* v. *Bradbury, Agnew & Co., Ltd., supra*, and the cases there reviewed, namely, *Campbell* v. *Spottiswoode, supra, per* CROMPTON and BLACKBURN, JJ., at pp. 778, 780; approved in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, C. A., in preference to the view of WILLES, J., in *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606, 616, BOWEN, L.J., in *Merivale* v. *Carson, supra*, at p. 283, treating the difference as academical; *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100, C. A.; *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, C. A.

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But the defence of fair comment is concerned with expressions of opinion as distinguished from assertions of fact. It has been said that matter which does not indicate with reasonable clearness that it purports to be a comment, and not statement of fact, cannot be protected by a plea of fair comment (*e*). Comment must not be so mixed up with the facts that the reader cannot distinguish between what is comment and what is not (*f*).

(ii.) Comment must be comment on a matter of public interest.

1286. In the second place, the comment must be comment on a matter of public interest. Whether or not the subject-matter of the comment or criticism is a matter of public interest is a question of law for the judge (*g*). If the judge decides against the defendant on this point, the defence fails just as a defence of privilege fails if the judge holds that the occasion was not privileged (*h*).

Examples of matters of public interest.

1287. It is impossible to give a definition of a matter of public interest. The public acts of public men are certainly matters of public interest on which anyone may comment if he does so fairly and honestly (*i*), such, for example, as a decision of a

(*e*) *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A., *per* FLETCHER MOULTON, L.J., at pp. 319, 320, disapproving *Lefroy* v. *Burnside* (1879), 4 L. R. Ir. 556, and approving *Andrews* v. *Chapman* (1853), 3 Car. & Kir. 286: "The justice of the rule is obvious. If the facts are stated separately, and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him" (*Hunt* v. *Star Newspaper Co., Ltd., supra*, at p. 319). In *Cox* v. *Lee* (1869), L. R. 4 Exch. 284, where the pleas were (1) not guilty, (2) justification, it was held that to charge a man with ingratitude is libellous, and that such a charge may also be libellous, notwithstanding that the facts upon which it is founded are stated and they do not support the charge. As to the distinction between comments and assertions of facts, see note (*b*), p. 702, *ante*.

(*f*) *Davis* v. *Shepstone* (1886), App. Cas. 187, P. C., *per* Lord HERSCHELL, L.C., at p. 190. The form of plea allowed in *Penrhyn* v. "*Licensed Victuallers' Mirror*" (1890), 7 T. L. R. 1, set out in note (*l*), p. 669, *ante*, unless supplemented by particulars, leaves it doubtful in many cases what counsel at the trial may contend to be statements of fact and what matters of opinion. As to this plea, see also note (*a*), p. 700, *ante*.

(*g*) *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A., *per* LOPES, L.J., at pp. 141, 143. In that case Lord ESHER, M.R., agreeing with Lord COLERIDGE, C.J., that it was a matter of public interest, said, at p. 140, that the article complained of related to so large a number of people, of such kind, to a district of such extent, and to matters of such importance as to render it a matter of public interest that the conduct of the employers should be criticised. The burden of satisfying the court that the words complained of are a comment, and a comment on a matter of public interest, is on the defendant (*Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, 249, C. A.).

(*h*) See the comparison between the defences of privilege and fair comment in *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A., *per* COLLINS, M.R., at p. 640.

(*i*) See *Kane* v. *Mulvany* (1866), 2 I. R. C. L. 402. As to public men being open to criticism, see *Parmiter* v. *Coupland* (1840), 6 M. & W. 105; but it is not destructive of the defence of fair comment as a matter of law to impute unjust or corrupt motives to public men. The cases cited in the notes (*k*)—(*a*), p. 704,

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magistrate (*k*), the conduct of public worship by a clergyman (*l*), or the speeches of public speakers (*m*). The discharge by a deputy returning officer of his statutory duties (*n*), a place of public entertainment (*o*), the housing of workmen (*p*), the management of a college (*q*), proposals submitted to the Admiralty (*r*), proceedings in a court of justice (*s*) or Parliament (*t*), the administration of the poor laws and the conduct of the medical officer (*u*), and the custody of papers of public interest (*v*), are examples of matters of public interest. The contents of a newspaper are a subject of public interest, but not its circulation (*a*).

A book or article which has been published (*b*), a picture which

post, are only cited as examples of what are matters of public interest. The cases before *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, are of little value as authorities on the point of fair comment. Any matter which would come within the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4, which excludes from the protection of fair and accurate reports of public meetings the reports of matters not of public concern, would be a matter of public interest, and if commented on fairly and honestly would come within the defence of fair comment also. As to what is not a matter of public concern, see note (*q*), p. 698, *ante*.

(*k*) *Hibbins* v. *Lee* (1864), 4 F. & F. 243.

(*l*) *Kelly* v. *Tinling* (1865), L. R. 1 Q. B. 699. Compare and, as to criticising sermons, see *Gathercole* v. *Miall* (1846), 15 M. & W. 319 (referred to in *Lake* v. *King* (1668), 1 Wms. Saund. 137, 144, n. (b), where PARKE, B., expressed a doubt as to the right). But a dispute between a churchwarden and an incumbent as to what the incumbent allows to be done in his church during divine service and the uses to which he allows the vestry-room to be put, which had been the subject of correspondence between them, was held in *Kelly* v. *Tinling*, *supra*, to be a matter of public interest. There the correspondence had been published without the plaintiff's permission in the defendant's newspaper, with comments on the plaintiff's conduct. "The maintenance of decency and propriety in conducting public worship and of the sanctity of the sacred edifice and all connected with it is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this" (*ibid.*, *per* COCKBURN, C.J.).

(*m*) *Odger* v. *Mortimer* (1873), 28 L. T. 472.

(*n*) *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A.

(*o*) *Dibdin* v. *Swan and Bostock* (1793), 1 Esp. 28.

(*p*) *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A.

(*q*) *Cox* v. *Feeney* (1863), 4 F. & F. 13.

(*r*) *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606, discussed in *Merivale* v. *Carson* (1877), 20 Q. B. D. 275, C. A.

(*s*) *Hedley* v. *Barlow* (1865), 4 F. & F. 224; *Kane* v. *Mulvany* (1866), 2 I. R. C. L. 402; *Woodgate* v. *Ridout* (1865), 4 F. & F. 202; *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. 615. The reports of the proceedings, if fair and accurate, are the subject of another defence (see pp. 694 *et seq.*, *ante*) which does not extend to comments.

(*t*) *Kane* v. *Mulvany*, *supra*; *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; *Campbell* v. *Spottiswoode*, *supra*, *per* CROMPTON, J., at p. 778. As to petitions to Parliament, see *Dunne* v. *Anderson* (1825), 3 Bing. 88.

(*u*) *Purcell* v. *Sowler* (1877), 2 C. P. D. 215, C. A.

(*v*) *Turnbull* v. *Bird* (1861), 2 F. & F. 508.

(*a*) *Latimer* v. *Western Morning News Co.* (1877), 25 L. T. 44.

(*b*) See *Campbell* v. *Spottiswoode*, *supra*, approved in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, C. A. As to criticism being so dishonest as not to be criticism at all, see the *dicta* in *Merivale* v. *Carson*, *supra*. See also the discussion as to irrelevant criticism in *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100, C. A. As to literary criticism, see the judgment of

has been publicly exhibited (*c*), a play which has been performed in public (*d*), and the like, are matters of public interest (*e*).

A principle underlying many of the cases is that a person who challenges public criticism cannot be heard to complain if the criticism which he has challenged is fair and honest (*f*).

(iii.) The comment must be fair.

1288. Lastly, the comment must be fair.

The defence of fair comment or criticism fails if the comment or criticism is not fair.

It must not misstate facts.

The comment must not misstate facts, because a comment cannot be fair which is built upon facts not truly stated, and if a defendant cannot show that his comments contain no misstatements of fact he cannot prove a defence of fair comment (*g*). If a

COLLINS, M.R., in *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A. As to placards by way of advertisement, see *Paris* v. *Levy* (1860), 9 C. B. (N. S.) 342, S. C. at Nisi Prius 2, F. & F. 71, referred to in *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769. As to what is not a libel on an author, see the earlier cases of *Carr* v. *Hood* (1808), 1 Camp. 355, n., and *Soane* v. *Knight* (1827), Mood. & M. 74; as to what is such a libel, see *Fraser* v. *Berkeley* (1836), 7 C. & P. 621; and compare the *dicta* in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, C. A.

(*c*) *Thompson* v. *Shackell* (1828), Mood. & M. 187, where BEST, C.J., at p. 188, said: "I myself have acted on the doctrine of my lord ELLENBOROUGH in the case referred to" [*Carr* v. *Hood* (1808), 1 Camp. 355, n.], "though I do not go quite so far as he did in that case, because I think no personal ridicule of the author is justifiable" [but see pp. 708 *et seq.* as to personal attacks], "but if this be really an honest criticism and no more, the defendant is entitled to your verdict." There the picture was described as "a mere daub." As to criticism on the works of an architect, see *Soane* v. *Knight* (1827), Mood. & M. 74; as to an exhibition of flowers, *Green* v. *Chapman* (1837), 4 Bing. (N. C.) 92 (where the words were held not to be within the limits of fair criticism). See the reference to the above and other cases in notes to *Lake* v. *King* (1668), 1 Wms. Saund. 137, 144, n. (b). In *Eastwood* v. *Holmes* (1858), 1 F. & F. 347 (article in newspaper describing leaden figures "reported to have been found in the Thames" and sold as antiquities as being of recent fabrication, and stigmatising the sale as an attempt at extortion), no particular individual was aimed at, and the plaintiff failed. If there is a proper innuendo and it is established, a plaintiff may recover if he is hit by a libel which was aimed only at a class (see note (*e*), p. 641, *ante*). The old cases must be taken not to represent the present law in so far as they lay down that, although comment or criticism on a matter of public interest is otherwise honest and fair, it will as a matter of law cease to be protected because it imputes wicked motives to the plaintiff (see p. 709, *post*).

(*d*) As to plays, see *Merivale* v. *Carson*, *supra*.

(*e*) See *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100, C. A.

(*f*) See *Seymour* v. *Butterworth* (1862), 3 F. & F. 372. Compare the principle underlying *Laughton* v. *Sodor and Man* (*Bishop*) (1872), L. R. 4 P. C. 495. See also the judgment of BLACKBURN, J., in *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, at p. 781, referred to in note (*t*), pp. 699, 700, *ante*, where he regards this principle as explaining the extension of the defence of fair comment beyond comment on the public acts of public men.

(*g*) *Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, C. A., *per* COLLINS, M.R., quoted with approval in *Walker* (*Peter*) *& Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 251. See also the direction of KENNEDY, J., in *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, C. A., quoted in *Walker* (*Peter*) *& Son, Ltd.* v. *Hodgson*, *supra*, at p. 252, where that judge said: "The comment must . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not contain imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation." See also *Hunt* v. *Star Newspaper Co., Ltd.* [1908] 2 K. B. 309, C. A., *per* FLETCHER MOULTON, L.J., at p. 320, where he said: "In order to give room for a plea of fair comment the facts must be truly

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defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. It is therefore a necessary part of the plea of fair comment to show that there has been no misstatement of fact in the statement of the materials upon which the comment was based (*h*). The burden of proof in this respect is on the defendant. He must not only establish that the matter which he defends as comment is comment, and is comment on a matter of public interest (*i*), but also that it is not founded on misstatements of facts in the so-called comment. A personal attack may form part of a fair comment upon given facts truly stated if it is warranted by those facts—in other words, if it is a reasonable inference from those facts.

It must be a reasonable inference from the facts.

Whether the personal attack in any given case can reasonably be inferred from the truly stated facts is a matter of law for the determination of the judge before whom the case is tried, but if he rules that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn (*k*).

Literary criticism.

1289. In the case of literary criticism on the work of the plaintiff, and in some other cases where the plaintiff supplies the material upon which the comment purports to be made, the subject-matter of the comment is agreed (*l*).

stated. If the facts upon which the comment purports to be made do not exist the foundation for the plea fails." See also the judgment of BUCKLEY, L.J., in *Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, C. A., at p. 254, referring to the language used by COCKBURN, C.J., in *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, and to Lord ATKINSON'S judgment in *Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., 329, H. L. In *Digby* v. *Financial News, Ltd.*, [1907] 1 K. B. 502, the plaintiff had asserted the facts on which the defendant commented. See also the judgment of KENNEDY, L.J., in *Peter Walker & Son, Ltd.* v. *Hodgson, supra*, at p. 257. In *Walker (Peter) & Son, Ltd.* v. *Hodgson, supra*, *Hindlip (Lord)* v. *Mudford* (1890), 6 T. L. R. 367, was cited in the arguments. The form of plea was there different. It was admitted in *Walker (Peter) & Son, Ltd.* v. *Hodgson, supra*, that the plea was not intended to be a plea of justification. See the interrogatories which were allowed in the latter case, where the defendant, having pleaded in the usual form, had stated that he did not intend it to be a plea of justification. See also note (*a*), p. 700, *ante*. As to discovery, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 99—101, and, in addition to the cases there cited, *Kent Coal Concessions, Ltd.* v. *Duguid*, [1910] A. C. 452, affirming S. C., [1910] 1 K. B. 904, C. A. (FARWELL and KENNEDY, L.JJ., VAUGHAN WILLIAMS, L.J., dissenting), as to discovery of documents. See also the cases cited in the arguments in *Maass* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543, C. A. (before the full Court of Appeal), and note (*l*), pp. 712, 713, *post*. The action was an action for malicious prosecution, and the judgments did not refer to actions of libel.

(*h*) *Digby* v. *Financial News, Ltd.*, *supra*, *per* COLLINS, M.R., at p. 503.

(*i*) *Walker (Peter) & Son, Ltd.* v. *Hodgson, supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 249.

(*k*) *Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., H. L., *per* Lord ATKINSON, at p. 329, quoted in *Walker (Peter) & Son, Ltd.* v. *Hodgson, supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 250.

(*l*) This is illustrated by *Digby* v. *Financial News, Ltd.*, *supra*, explained by BUCKLEY, L.J., in *Walker (Peter) & Son, Ltd.* v. *Hodgson, supra*; compare *Lyons* v. *Financial News, Ltd.* (1909), 53 Sol. Jo. 671, C. A. As to literary criticisms, see *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A., *per* COLLINS, M.R., at p. 640.

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Malice.

1290. Assuming that the comment is a comment on a matter of public interest and that it is founded on facts which are not misstated, and is a fair comment in the sense that it is a reasonable inference from those facts, it is not easy to explain satisfactorily why the state of the defendant's mind at the time when he made the comment should affect the defence.

It has been said that given the existence of malice it is for the jury to say whether it has warped the judgment of the critic; that comment distorted by malice cannot be fair on the part of the person who makes it; and that therefore evidence of malice actuating the defendant is admissible and should be left to the jury (*m*).

Comparison of defences of qualified privilege and comment.

1291. An analogy is suggested by comparing the defences of qualified privilege and comment. It has been said that in both cases the question raised is really as to the state of mind of the defendant when he published the alleged libel (or slander), the question being in the one case whether he published it in the spirit of malice, in the other case whether he published it in the spirit of unfairness (*n*). A statement made on a qualified privileged occasion from feelings of spite or from some other wrongful and indirect motive is an abuse of the privilege and is not protected though there be no intrinsic evidence of actual malice in the actual words used (*o*). So, too, it may be said that the existence of malice in the mind of a commentator at the time of the publication of the comment suggests that the comment may not really have been made in the exercise of the right of fair comment on a matter of public interest but to gratify personal spite, or, in other words, may have been an abuse of the right, though the words used are not intrinsically unfair. In short, the abuse, whether of the right of comment or of a qualified privileged occasion, arising from a wrong state of mind actuating the publication may avoid the defence of fair comment or privilege, though the language used is not intrinsically unfair in the one case

(*m*) See *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, 642, C. A., where COLLINS, M.R., was of opinion that the judge was right in letting the evidence in that case go to the jury. The head-note in that case is as follows:—"In an action of libel, where the defence is that the writing complained of is fair comment upon a matter of public interest, evidence that the defendant was actuated by malice towards the plaintiff is admissible upon the ground that comment which is actuated" (COLLINS, M.R., used the word "distorted") "by malice cannot be deemed fair on the part of the person who makes it, and, therefore, proof of malice may take a criticism that is *primâ facie* fair outside the limits of fair comment." The head-note does not seem to differ materially from the view stated in the text; but compare the word "actuated" there used with the word "distorted" which occurs in the body of the report. The possibility of a person having a spite against another, and yet bringing a dispassionate judgment to bear upon his literary merits, has been judicially recognised, *per* COLLINS, M.R., in *Thomas* v. *Bradbury, Agnew & Co., Ltd., supra*, at p. 642, and perhaps this recognition might be extended to comments upon the public acts of public men. For the comparison between fair comment and justification, see p. 710, *post*.

(*n*) *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 413, referring to *White & Co.* v. *Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, C. A., quoted by COLLINS, M.R., in *Thomas* v. *Bradbury, Agnew & Co., Ltd., supra*, at p. 642.

(*o*) *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A., *per* BRETT, L.J., at p. 247.

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nor in excess of the occasion in the other. The analogy, however, is far from close. The burden is on the plaintiff, by proving express malice, to rebut the protection *primâ facie* arising if words are spoken or written on a privileged occasion; whereas, on a defence of fair comment, the burden is on the defendant to show that the comment is fair, and in so doing to negative the writing or publication of the comment being actuated by an unfair state of mind.

Admissibility of evidence as to malice.

1292. Whatever be the ground, it is clear that on the defence of fair comment or criticism evidence that the defendant was actuated by malice towards the plaintiff is admissible, and that proof of malice may take a comment or criticism that is *primâ facie* fair outside the limits of fair comment (*p*).

Defence fails if comment is dishonest.

1293. If the commentator states as an inference that which he does not believe to be a true inference, the comment is dishonest and the defence fails. A dishonest comment is not a fair comment (*q*).

But comment must be fair as well as honest.

On the other hand, just as the honest belief of the defendant that he had a duty or interest to make a statement to the person to whom he made it does not create an occasion of qualified privilege if in truth he had no such duty or interest, so the honest belief of a commentator in the fairness of his comment will not make that fair comment which is unfair comment (*r*). The comment itself must be fair.

SUB-SECT. 3.—*Personal Attacks.*

Personal imputations do not destroy the defence as a matter of law.

1294. A personal imputation does not destroy a plea of fair comment as a matter of law. On the contrary, the need for the plea does not arise unless there is an imputation on the plaintiff. It is precisely where the criticism would otherwise be actionable as a libel or slander that the plea of fair comment arises. It is a matter of

(*p*) *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A. Compare the passage from the judgment of FLETCHER MOULTON, L.J., in *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, C. A., at p. 418, quoted by COLLINS, M.R., in *Thomas* v. *Bradbury, Agnew & Co., Ltd., supra*, at p. 642: "I am clear that, both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue." But as to the effect of motive, see *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, *per* BLACKBURN, J., at p. 781, quoted by COLLINS, M.R. in *Thomas* v. *Bradbury, Agnew & Co., Ltd., supra*, at p. 641.

(*q*) In *Campbell* v. *Spottiswoode*, *supra*, COCKBURN, C.J., said: "One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation." Compare *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73, *per* COCKBURN, C.J., at p. 96, and *Walker* (*Peter*) *& Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, C. A., *per* BUCKLEY, L.J., at p. 253. As to honest belief, see also *Hunter* v. *Sharpe* (1866), 4 F. & F. 983, 1003, 1006.

(*r*) If the critic "imputes to the person whom he is criticising base and sordid motives, which are not warranted by facts, I cannot think for a moment that because he *bonâ fide* believes that he is publishing what is true, that is any defence in point of law" (*Campbell* v. *Spottiswoode*, *supra*, *per* CROMPTON, J., at p. 778, quoted with approval in *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, 298, C. A.).

law for the judge to determine whether a personal attack can be reasonably inferred from the facts upon which it purports to be a comment; but it is for the jury to decide whether the inference ought to be drawn in the particular case (*s*).

Imputation of wicked motives.

1295. Literary criticism can rarely be protected in practice if it imputes wicked motives to the plaintiff. Comment on public men may often in practice be protected, though it imputes wicked motives. But assuming that the comment or criticism is on a matter of public interest, and is honest and is otherwise fair, neither comment nor criticism will as a matter of law cease to be protected because it imputes wicked motives to the plaintiff (*t*).

(*s*) *Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., H. L., *per* Lord LOREBURN, L.C., at p. 327, and *per* Lord ATKINSON, at p. 329; *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, *per* CROMPTON, J., at p. 778; *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A., *per* FLETCHER MOULTON, L.J., at pp. 319, 320; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, C. A.; and the passage from the judgment of COZENS-HARDY, M.R., in *Hunt* v. *Star Newspaper Co., Ltd.*, *supra*, at p. 317 (quoted in *Walker* (*Peter*) *& Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, 251, C. A.), to the effect that the defence of fair comment only arises in the event of the plea of justification failing; but there still arises the question, if (but only if) the facts are substantially true, whether the comment by the defendant, based on those true facts, was fair, and such as might, in theopinion of the jury, be reasonably made. The Master of the Rolls seems here to be referring not to the facts stated in the comment alone, but also to the facts relied upon by the defendant at the trial as the basis of the fair comment which could not be made the subject of a plea of justification.

(*t*) *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100, C. A. See *Joynt* v. *Cycle Trade Publishing Co.*, *supra*, following *Campbell* v. *Spottiswoode*, *supra*, and distinguishing *McQuire* v. *Western Morning News Co.*, *supra*. The judgment of the Court of Appeal in *Joynt* v. *Cycle Trade Publishing Co.*, *supra*, must be read in the light of the later decisions. A personal attack which imputes base and sordid motives is not necessarily, as a matter of law, outside the limits of fair comment or criticism; see the judgment of Lord ATKINSON in *Dakhyl* v. *Labouchere*, *supra*, at p. 329, pointing out that in the passage from the judgment of CROMPTON, J., in *Campbell* v. *Spottiswoode*, *supra* (see p. 699, *ante*), no distinction is drawn between literary and other criticism. In literary criticism the author supplies the facts, which makes a distinction in practice. As to criticism being so irrelevant as to be outside the domain of criticism altogether, see *McQuire* v. *Western Morning News Co.*, *supra*, *per* COLLINS, M.R., at p. 110, citing the passage from the judgment of BOWEN, L.J., in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275, C. A., to the effect that in the case of literary criticism it is not easy to conceive what would be outside the reasonable limits of fair criticism unless the writer went out of his way to make a personal attack on the author of the work he was criticising. So also *McQuire* v. *Western Morning News Co.*, *supra* (where the plaintiff was a playwright and actor, who complained of the criticism of one of his plays), the Court of Appeal held that there was no evidence to support a rational verdict for the plaintiff; see also *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606. It was not suggested there was any evidence of actual malice, there were no personal imputations, nor could any statement of fact be impugned (*McQuire* v. *Western Morning News Co.*, *supra*, at p. 108). COLLINS, M.R. (*ibid.*, at p. 111), said: "It is always for the judge to say whether the document is capable in law of being a libel. It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel, *i.e.*, that it travels beyond the limit of fair criticism, and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury." The Court of Appeal held that when it is admitted that the criticism is on a matter of public

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SUB-SECT. 4.—*Function of Jury.*

To what extent the jury may be critics.

1296. It is not for the jury to substitute their own opinion as to the merits of a work criticised for that of the critic. But if a critic imputes to the person whose works or acts he criticises motives not warranted by the facts, or reflects upon the plaintiff as a man, he cannot successfully plead fair comment if the jury find that the imputations were not warranted by the facts. To this extent the jury are critics, that in such a case they may decide whether the inferences were reasonable conclusions (*u*).

Burden of proof and functions of jury.

1297. Where a comment is on a matter of public interest (which is a matter for the judge to decide) it is for the defendant to satisfy the jury that he has made no misstatement of facts; and that the comment which is based on the facts is warranted by them, that is to say, is a reasonable inference therefrom. It is for the jury to say whether the imputation represented the opinion of the person who gave expression to it, and the burden of proof would seem to be on the plaintiff (*v*). Where the comment is otherwise fair, it is for the plaintiff to prove to the satisfaction of the jury that the state of the defendant's mind was malicious if he relies on that as evidence material to the issue of fairness or unfairness (*w*).

SUB-SECT. 5.—*Justification and Fair Comment Compared.*

Fair comment distinguished from justification.

1298. The defence of fair comment differs from a defence of justification. The difference is more apparent perhaps in those cases where, as in the case of literary criticism, the plaintiff supplies the materials on which the comment is and purports to be based. But in all cases the distinction is essential (*a*).

interest, the burden is on the plaintiff to show that it travels beyond the limits of fair criticism, and it is for the judge to say whether it is reasonably capable of being so interpreted.

(*u*) See note (*t*), p. 710, *ante*.

(*v*) See, in addition to the cases cited in note (*t*), p. 710, *ante*, *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A., *per* BUCKLEY, L.J., at p. 324. In that case the Court of Appeal ordered a new trial on the application of the defendants on the ground of misdirection. See also *Odger* v. *Mortimer* (1873), 28 L. T. 472 (comment on public character: question of fair comment for jury); *Wason* v. *Walter* (1868), L. R. 4. Q. B. 73, *per* COCKBURN, C.J. (criticism of conduct or motives of individuals: question of fair comment for jury).

(*w*) See the judgment of COLLINS, M.R., in *Thomas* v. *Bradbury, Agnew & Co., Ltd.*, [1906] 2 K. B. 627, C. A. In *South Hetton Coal Co.* v. *North-Eastern News Association*, [1894] 1 Q. B. 133, C. A., LOPES, L.J., said, at p. 143: "But is the comment fair and *bonâ fide?* This is essentially a question for the jury, provided there is any evidence on which they may so find." After issue had been joined on defences of justification and fair comment, the Court of Appeal held that the defendants were not entitled to interrogate the plaintiffs as to whether they intended to set up that the defendants in publishing were actuated by express malice, and, if so, to call on them to state generally the facts relied on by the plaintiffs as showing express malice (*Lever Brothers* v. *Associated Newspapers*, [1907] 2 K. B. 626, C. A.).

(*a*) See *Walker (Peter) & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 239, C. A., *per* BUCKLEY, L.J., at p. 253; *Dakhyl* v. *Labouchere* (1907), [1908] 2 K. B. 325, n., H. L.; *Hunt* v. *Star Newspaper Co., Ltd., supra*, at p. 320; the direction of KENNEDY, J., in *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, 294, C. A.; and *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769, referred to by BUCKLEY, L.J., in *Walker (Peter) & Son. Ltd.* v. *Hodgson*, [1909]

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Where the defendant pleads by way of defence, first, justification, and, secondly, fair comment, he will fail on the first plea unless he justifies every injurious imputation which the jury may find to be conveyed. Assuming the plea of justification to fail because the defendant has not satisfied the jury of the truth in fact of every imputation, the defendant may nevertheless succeed on his plea of fair comment if he shows that the imputation of which the plaintiff complains, although defamatory, and although not proved to have been true, yet was an imputation in a matter of public interest, made fairly and *bonâ fide* as the honest expression of the opinion which the defendant held upon the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair-minded man might upon those facts *bonâ fide* hold that opinion (*b*). The defendant must show that there is a foundation of facts well and truly laid on which the comment is based; to that extent the two defences are similar. But the conclusions inferred as matters of opinion have not to be proved as facts. On the other hand, the mental attitude of the commentator is material to the issue of fair comment, but immaterial to the issue of justification. If the commentator states his conclusions in the form of statements of fact he must justify. He may not assert simply that a man has acted fraudulently (*c*), though he alleges facts from which that inference might be drawn, if he does not make it appear that his imputation is made as an inference (*b*). Lastly, the occasion for a defence of fair comment does not arise if a defence of justification can be established (*d*).

SECT. 5.—*Effect of Express Malice.*

SUB-SECT. 1.—*As avoiding Qualified Privilege.*

Absence of malice is *primâ facie* presumption in qualified privilege.

1299. The proper meaning of a privileged communication is a statement published without malice on a privileged occasion (*e*). The absence of malice is a *primâ facie* presumption in the case of qualified privilege (*f*). The presence or absence of malice is immaterial in the case of absolute privilege.

1 K. B. 239, C. A., at p. 254. As to the effect of a plea in the form sanctioned by the Divisional Court in *Penrhyn* v. "*Licensed Victuallers' Mirror*" (1890), 7 T. L. R. 1, see note (*a*), p. 700, *ante*. As to the distinction between comments and assertions of imputations as facts, see also *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, P. C., *per* Lord HERSCHELL, L.C. It has been held that the general rule, that a defamatory statement cannot be justified where the same person has alleged the facts and comments on them, unless both the facts are true and the comments thereon are fair, does not apply where one person alleges the facts and another comments on them (*Mangena* v. *Wright*, [1909] 2 K. B. 958, *per* PHILLIMORE, J., at p. 977).

(*b*) See note (*a*), p. 710, *ante*.

(*c*) As to the use of the word "fraudulently," see *Hunt* v. *Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, C. A., *per* FLETCHER MOULTON, L.J., at p. 320.

(*d*) See *Dakhyl* v. *Labouchere*, (1907), [1908] 2 K. B. 325, n., H. L., *per* Lord LOREBURN, L.C., at p. 327; *Hunt* v. *Star Newspaper Co., Ltd.*, *supra*, *per* COZENS-HARDY, M.R., at p. 317, quoted in *Walker (Peter) & Son, Ltd.* v. *Hodgson*, *supra*, at p. 251.

(*e*) See *Wright* v. *Woodgate* (1835), 2 Cr. M. & R. 573; and as to privileged occasions, see pp. 686 *et seq.*, *ante*.

(*f*) See *Wright* v. *Woodgate*, *supra*; and *Jenoure* v. *Delmege*, [1891] A. C. 73,

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What is malice.

1300. The malice which avoids privilege is a wrong feeling or motive existing in the mind (*g*) of the defendant (*h*) at the time of the publication (*i*) and actuating it. It is actual malice, or malice in fact, and is usually termed express malice to distinguish it from implied malice, or that malice in law which is presumed to exist from the publication of defamatory matter without justification or excuse (*j*).

What does not amount to malice.

What the plaintiff must prove.

1301. It is not enough for the plaintiff to show that the defendant in making a statement on such an occasion was rash, improvident, credulous, or stupid, or that he did not do or say what a man of the world would do or say on such an occasion (*k*). It the defendant made the statement believing it to be true, he will not lose the protection arising from the occasion because he had no reasonable grounds for his belief (*l*). The plaintiff must satisfy the jury that

P. C. This is so in all cases of qualified privilege at common law (*Jenoure* v. *Delmege*, [1891] A. C. 73, P. C.). As to qualified privilege, see pp. 685 *et seq.*, *ante*. The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4, follows the common law in this respect; see p. 698, *ante*. As to the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 3, see pp. 697, 698, *ante*.

(*g*) See *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A., *per* BRETT, L.J., at p. 247; *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A., *per* Lord ESHER, M.R., at p. 169.

(*h*) Thus, in an action of libel against the publisher of a magazine it was held that evidence of the writer's personal malice against the plaintiff was inadmissible. It did not actuate the defendant (*Robertson* v. *Wylde* (1838), 2 Mood. & R. 101).

(*i*) *Hemmings* v. *Gasson* (1858), E. B. & E. 346.

(*j*) See the consideration of *Bromage* v. *Prosser* (1825), 4 B. & C. 247, in *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A., *per* BRETT, L.J., at p. 247.

(*k*) These illustrations are taken from the judgments of BRAMWELL, BRETT, and COTTON, L.JJ., in *Clark* v. *Molyneux*, *supra*.

(*l*) This was the decision in *Clark* v. *Molyneux*, *supra*. So, too, in *Collins* v. *Cooper* (1902), 19 T. L. R. 118, C. A., where the jury found that the defendant did not "reasonably" believe the statement complained of, but that he had not any improper or indirect motive in making it, it was held that there must be a new trial and that the jury must be asked whether the defendant honestly believed what he said to be true.

It seems, however, to have been assumed by the Court of Appeal in allowing interrogatories in recent cases that insufficient inquiry into the truth of the statement may be evidence of a want of belief in its truth, and thus evidence of express malice. In *Elliott* v. *Garrett*, [1902] 1 K. B. 870, C. A. (where the defendant pleaded that the words were spoken on a privileged occasion, *bonâ fide*, and without malice), the Court of Appeal (following *Martin* v. *British Museum (Trustees)* (1893), 10 T. L. R. 215, explaining *Hennessy* v. *Wright* (No. 2) (1888), 24 Q. B. D. 445, n., C. A., and distinguishing *Parnell* v. *Walter* (1890), 24 Q. B. D. 441) allowed interrogatories as to what information the defendant had which induced him to believe that the statement, alleged by him to have been made, on a privileged occasion, was true, and what steps he had taken before speaking the words to ascertain whether they were true. *Elliott* v. *Garrett*, *supra*, was followed in *White & Co.* v. *Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, C. A., where, in an action of libel against a trade protection society, in which the defendants *inter alia* pleaded that they published the matter complained of in good faith and without malice under such circumstances as rendered the occasion privileged, the Court of Appeal allowed interrogatories as to what inquiries the defendants made and from whom they obtained the information, but not an interrogatory requiring them to give the names of those to whom a certain publication of the defendants containing the statements complained of had been supplied or shown

the defendant acted maliciously. This he may do by satisfying the

by or through the defendants or their agents. In *Edmondson* v. *Birch & Co., Ltd.*, [1905] 2 K. B. 523, C. A., the Court of Appeal, while again laying down that it has jurisdiction in a proper case where privilege is pleaded to allow the plaintiff, with a view to rebut that plea, to administer an interrogatory to the defendant asking what inquiries the defendant made as to the truth of the statements complained of before publishing them, and from whom he obtained the information on which he relied in publishing those statements, disallowed that portion of an interrogatory which asked from whom the information was derived, on the ground that the court was of opinion that that portion of the question was asked with an illegitimate motive not *bonâ fide* for the purposes of that action, and in order to enable the plaintiff to bring an action against a person or persons from whom the information was derived, but the court allowed that portion of the interrogatory which asked what information the defendants had received, detrimental or otherwise to the character of the plaintiff, before the despatch of the cablegram complained of. In *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, C. A. (an action of libel against the publishers of a trade periodical in respect of an article therein), the defendants pleaded that in so far as the words complained of consisted of expressions of opinion, they were fair comment made in good faith and without malice on a matter of public interest, and in so far as they consisted of allegations of fact, they were true in substance and in fact. The plaintiffs administered to the defendants interrogatories (among others) to the following effect:—(5) What information had you, when you published the said words which induced you to believe that the expressions of opinion, or any and which of them, in the said words contained, and which you allege are fair comment made in good faith and without malice, were true? Did you then in fact believe that the said opinions were true? (7) From whom did you obtain the information upon which you relied in publishing the said expressions of opinion, or any and which of them? The defendants objected to answer these interrogatories. It was held that the fifth interrogatory was admissible, but that, according to the general rule of practice in actions of libel against the publishers of periodical publications, the seventh interrogatory was, in the absence of special circumstances, inadmissible. As to the fifth interrogatory, it was said that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege, since in either case the question raised is really as to the state of mind of the defendant (*ibid., per* VAUGHAN WILLIAMS, L.J., at p. 413). In either case, "the state of mind of the defendant when he published the alleged libel is a matter directly in issue, and therefore the question what information was there before him is so directly relevant to the issue as to form fit subject for an interrogatory" (*ibid., per* FLETCHER MOULTON, L.J., at p. 418). In *Maass* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543, C. A., in an action for malicious prosecution (the plaintiff having been committed for trial and acquitted upon a charge of stealing gas brought against him by the defendants), the plaintiff sought to administer the following interrogatories (among others):—"(4) What information (if any) had you that induced you to prosecute the plaintiff for stealing gas? What steps (if any) had you taken before commencing the said prosecution to ascertain whether the charge was true or not? What grounds (if any) had you for supposing that the plaintiff had committed the offence charged? Did you before you commenced the said prosecution take any and what precautions or make any and what inquiries as to the truth of the said charge, and what was the result of each such inquiry? (5) What are the facts and circumstances on which you rely as showing that you had reasonable and proper cause for the said prosecution?" The fifth interrogatory was not pressed by counsel for the plaintiff, and was disallowed. As to the fourth interrogatory, it was held by COZENS-HARDY, M.R., VAUGHAN WILLIAMS, FLETCHER MOULTON, FARWELL, and BUCKLEY, L.JJ. (KENNEDY, L.J., dissenting), that, in the absence of special circumstances, such an interrogatory as the fourth interrogatory ought not to be allowed. "As a general rule, and in the absence of special circumstances, the judge, whose duty it is to exercise his discretion, will probably consider that such an interrogatory as No. 4 ought not to be allowed in

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jury that the defendant acted from an indirect and wrong motive (*m*) such as spite or ill-will (*n*), or an unreasoning and blind prejudice in regard to the subject-matter, as to which he has a duty to perform (*o*), or with a knowledge that the statement was untrue, or acted recklessly, without caring whether it was true or false, and not for the reason which would otherwise render it privileged (*p*). But though it is sufficient as a rule for the plaintiff to show that the defendant made the statement without honestly believing it to be true, yet there

an action for malicious prosecution" (*Maass* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543, C. A., *per* COZENS-HARDY, M.R., at p. 545). The judgments in that case did not refer specially to libel actions, but many of the cases cited in argument were cases of libel actions. During the argument VAUGHAN WILLIAMS, L.J., said (*ibid.*, at p. 545): "There is no reason for supposing that the refusal of discovery in actions for libel in newspapers went upon any principle not generally applicable; those cases are only well-marked instances of the principle of refusing discovery because of the oppression it would involve." See as to this *Hennessy* v. *Wright* (No. 2) (1888), 24 Q. B. D. 445, n., C. A.; *Parnell* v. *Walter* (1890), 24 Q. B. D. 441; *Hope* v. *Brash*, [1897] 2 Q. B. 188, C. A.; *Plymouth Mutual Co-operative and Industrial Society, Ltd.* v. *Traders' Publishing Association, Ltd.*, [1906] 1 K. B. 403, C. A.; and, as to oppression, see *White & Co.* v. *Credit Reform Association and Credit Index, Ltd.*, [1905] 1 K. B. 653, C. A. See also the following other cases cited in *Maass* v. *Gas Light and Coke Co.*, [1911] 2 K. B. 543, C. A., namely, *Elliott* v. *Garrett*, [1902] 1 K. B. 870, C. A.; *Whateley* v. *Crowter, Carew* v. *Davies* (1855), 5 E. & B. 709; *Marriott* v. *Chamberlain* (1886), 17 Q. B. D. 154, C. A.; *Hooton* v. *Dalby*, [1907] 2 K. B. 18, C. A., *per* BUCKLEY, L.J., at p. 21; *Lever Brothers* v. *Associated Newspapers*, [1907] 2 K. B. 626, C. A.; *Ridgway* v. *Smith & Son* (1890), 6 T. L. R. 275; *Caryll* v. *Daily Mail Publishing Co.* (1904), 90 L. T. 307, C. A.; *Arnold and Butler* v. *Bottomley*, [1908] 2 K. B. 151, C. A. See, further, title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 100, 106, and note (*g*), p. 705, *ante*.

(*m*) As to the tests, see *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A.

(*n*) In *Wright* v. *Woodgate* (1835), 2 Cr. M. & R. 573, PARKE, B., at p. 577, said that the burden is on the plaintiff to prove that "there was malice in fact, that the defendant was actuated by motives of personal spite or ill-will independent of the occasion." In *Clark* v. *Molyneux, supra*, per BRETT, L.J., at p. 246 (in which case the above passage had been referred to in the argument, at p. 242), it was said that, if the defendant uses the occasion to gratify his anger, he uses it not for the reason which makes it privileged, but from an indirect and wrong motive. Anger at times is, and at other times is not, a wrong motive. It is not because strong or angry language is used that the privilege will be avoided; the jury must go further and see not merely whether the expressions are angry, but whether they are malicious (*Shipley* v. *Todhunter* (1836), 7 C. & P. 680). As to motives, see also the judgments of Lord ESHER, M.R., and LOPES, L.J., in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., at pp. 444, 454. Unreasoning prejudice in regard to the subject-matter, though impersonal, may be an indirect and wrong motive (*ibid.*, *per* Lord ESHER, M.R., at p. 444). As to malice in sending a fair report of legal proceedings to newspapers, see *Stevens* v. *Sampson* (1879), 5 Ex. D. 53, C. A. In that case the defendant who sent the report was not a reporter on the staff of the paper, but a solicitor who had appeared for a plaintiff in an action in a county court. The jury found (1) that it was in substance a fair report; (2) that it was sent with a certain amount of malice, and found a verdict for the plaintiff, with 40*s.* damages: COCKBURN, C.J., directed judgment to be entered for the plaintiff for that amount. The appeal of the defendant was dismissed.

(*o*) See *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson, supra, per* Lord ESHER, M.R., at p. 444.

(*p*) *Clark* v. *Molyneux, supra, per* BRETT, L.J., at p. 247. If a man is proved to have stated that which he knew to be false, it is assumed that he was malicious; that he did do a wrong thing from some wrong motive (*ibid.*).

may be occasions where a person is under a duty to communicate a statement made to him, or a rumour which he has heard, to another who has a duty to receive it, although it contains matter defamatory of the plaintiff which the person whose duty it is to communicate it knows or believes to be untrue. In such a case the person making the communication makes it honestly, and in the performance of the duty which creates the privileged occasion, although he has no belief in its truth, or may even know it to be untrue, and therefore in such a case the statement is not made with actual malice (*q*).

Duty to communicate.

1302. If there is evidence of malice, whether intrinsic (that is, contained in the statement itself (*r*)), or extrinsic (that is, outside the statement (*r*)), to displace the immunity derived from the occasion, that question must be determined by the jury; but if there is no such evidence, the judge should not leave the question of malice to the jury (*s*).

When question should and should not be left to jury.

The judge having determined that the statement was made on a privileged occasion, it is not necessary for the plaintiff, in order to entitle him to have the question of express malice left to the jury, to show circumstances necessarily leading to the conclusion that actual malice existed, or such as are inconsistent with its non-existence, but there must be circumstances such as to raise a probability of malice and more consistent with its existence than with its non-existence (*t*). It has been said that it is usually

(*q*) This is not an exception to the rule; but the question "Did the defendant honestly believe the statement to be true?" would not, if put to the jury, meet the case. See *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A., *per* BRAMWELL, L.J., at p. 244.

(*r*) As to these expressions, see *Wright* v. *Woodgate* (1835), 2 Cr. M. & R. 573, 578; *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A., *per* LOPES, L.J., at p. 171. The decision of the Court of Appeal in the latter case was affirmed on the ground that the statement was not capable of a defamatory meaning, and the House of Lords would have been prepared to hold, if necessary, that it was true that the occasion was privileged, that the finding of the jury that, in making the statement, the defendants had exceeded the privileged occasion which entitled them to give notice of the agency being at an end was insufficient, and that there was no evidence of malice to go to the jury (*Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68).

(*s*) See *Spill* v. *Maule* (1869), L. R. 4 Exch. 232, 237, Ex. Ch.; *Laughton* v. *Sodor and Man* (*Bishop*) (1872), L. R. 4 P. C. 495, 508; *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, 170, 172, C. A.; affirmed, [1897] A. C. 68; *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A.; *Edmondson* v. *Birch & Co., Ltd., and Horner*, [1907] 1 K. B. 371, 381, C. A. See also *Child* v. *Affleck* (1829), 9 B. & C. 403; *Somerville* v. *Hawkins* (1851), 10 C. B. 583; *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; *Gardner* v. *Slade* (1849), 13 Q. B. 796. Compare *Rogers* v. *Clifton* (1803), 3 Bos. & P. 587; *Fountain* v. *Boodle* (1842), 3 Q. B. 5. For a case where it was held that there had been misdirection and that the verdict was against the weight of evidence, see *Clark* v. *Molyneux*, *supra*. As to when a judge ought or ought not to direct a non-suit, see *Jackson* v. *Hopperton* (1864), 16 C. B. (N. S.) 829; *Caulfield* v. *Whitworth* (1868), 18 L. T. 527. As to the interpretation of a libel by the jury, see *Gilpin* v. *Fowler* (1854), 9 Exch. 615, Ex. Ch. See also, generally, on this subject, *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, and *Wright* v. *Woodgate*, *supra*.

(*t*) *Somerville* v. *Hawkins*, *supra*.

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safer to leave the question to the jury, but that this is subject to the rule that the case should not be left to the jury where the facts stated by the plaintiff are equally compatible with the absence and existence of malice (*a*).

Intrinsic evidence.

1303. To submit the language used on privileged occasions to a strict scrutiny and to hold all excess beyond the absolute exigency of the occasion to be evidence of express malice would greatly limit, if not altogether defeat, the protection which the law gives to statements made on such occasions (*b*). Where the excess is merely that the statement is too strong, such excess may be evidence of actual malice; but it is not in every case in which the words are somewhat too strong that there is a case for the jury. They must be too strong to a substantial extent (*c*). A man may use excessive language and yet have no malice in his mind (*d*).

Extrinsic evidence.

1304. If there is no intrinsic evidence of malice, but there is extrinsic evidence from which the jury may infer that the defendant did not honestly believe the imputations to be true (*e*), or was actuated by some sinister motive and not by an honest desire to use the occasion for the reason for which it is privileged, the judge is bound to leave the case to the jury (*f*). Such extrinsic evidence may be evidence of what the defendant did or said before, or at, or since the publication, so long as it is evidence from which the jury may infer malice existing at the time of the publication and actuating

(*a*) See *Spill* v. *Maule* (1869), L. R. 4 Exch. 232, Ex. Ch., *per* COCKBURN, C.J., at p. 237. There the defendant on a privileged occasion described the conduct of the plaintiff as "most disgraceful and dishonest." The conduct so described was of an equivocal nature and might honestly and *bonâ fide* be supposed by the defendant to be such as he described it, and it was held that there was no evidence of actual malice to go to the jury and that the judge had properly directed a verdict for the defendant.

(*b*) *Laughton* v. *Sodor and Man* (*Bishop*) (1872), L. R. 4 P. C. 495, 508, approved in *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, 172, C. A.; compare *R.* v. *Perry* (1883), 15 Cox, C. C. 169.

(*c*) *Nevill* v. *Fine Arts and General Insurance Co.*, *supra*, *per* LOPES, L.J., at p. 172.

(*d*) *Ibid.*, *per* Lord ESHER, M.R., at p. 170. Excess of language is only material as being evidence of malice; and where the jury decline to find actual malice the finding of the jury that the privilege was exceeded has no effect (*ibid.*). See *Nevill* v. *Fine Arts and General Insurance Co.*, [1897] A. C. 68, referred to in note (*r*), p. 715, *ante*. See also *Edmondson* v. *Birch & Co., Ltd. and Horner*, [1907] 1 K. B. 371, 381, C. A., and the other cases cited in note (*s*), p. 715, *ante*; *Cowles* v. *Potts* (1865), 34 L. J. (Q. B.) 247; compare *Cook* v. *Wildes* (1855), 5 E. & B. 328; *Fryer* v. *Kinnersley* (1863), 15 C. B. (N. S.) 422.

(*e*) This is subject to what is said at pp. 714, 715, *ante*, and in note (*q*), p. 715, *ante*.

(*f*) As to when the judge ought and when he ought not to direct a nonsuit, see note (*s*), p. 715, *ante*. Proof that the words are false is not in itself sufficient (*Caulfield* v. *Whitworth*, *supra*); compare *Palmer* v. *Hummerston* (1883), Cab. & El. 36. Proof that the defendant knew that part was false is evidence of malice (*Blagg* v. *Sturt* (1846), 10 Q. B. 899, Ex. Ch.). For the distinction between a statement made by a mere mistake and one wilfully false, see *Hancock* v. *Case* (1862), 2 F. & F. 711. As to the burden on the plaintiff of proving the existence of a wrong and indirect motive, see *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, C. A.; *Jenoure* v. *Delmege*, [1891] A. C. 73, P. C.

it (*g*). Thus, evidence of other defamatory statements (*h*) or of a previous dispute (*i*) may be extrinsic evidence of malice. But the mere fact that a justification is pleaded and fails is not evidence of malice (*k*).

SUB-SECT. 2.—*As Affecting Fair Comment.*

Evidence of malice material to defence.

1305. Evidence is admissible to show that a writer has been influenced by actual malice when the defence of fair comment on a matter of public interest is set up (*l*).

SUB-SECT. 3.—*As Affecting Damages.*

Malice as affecting damages.

1306. It has been seen that the mere absence of malice does not create a privileged occasion. If the defendant being under a duty to make a communication to another makes it to that person from a sense of duty, the occasion and the communication are both privileged. If, however, either he has no duty or interest to make it or the person to whom he makes it has no duty or interest to receive it, the fact that the defendant acted from a sense of duty is immaterial on the question of privilege; but the fact that he acted under a sense of duty, though mistaken, is matter proper to be considered by the jury on the question of damages (*m*).

SECT. 6.—*Other Defences.*

Other defences.

1307. Other defences, which are not dealt with in detail in this title, are referred to in other parts of this work (*n*).

(*g*) See *Hemmings* v. *Gasson* (1858), E. B. & E. 346, as to directing the jury in relation to subsequent statements. The cases which have been decided on the question of damages being influenced by the animus which actuated the publication should be referred to (see pp. 721 *et seq.*, *post*). As to matters before publication being evidence of malice, see *Simpson* v. *Robinson* (1848), 12 Q. B. 511 (admission by defendant after publication of a previously existing dispute); *Barrett* v. *Long* (1851), 3 H. L. Cas. 395 (earlier publications admissible though statute-barred); *Jackson* v. *Adams* (1835), 1 Hodg. 78 (writ of inquiry in former suit). As to statements since publication, see *Hemmings* v. *Gasson*, *supra*, and p. 721, *post*.

(*h*) See *Camfield* v. *Bird* (1852), 3 Car. & Kir. 56. It is not necessary that the statement should be to the same person or actionable (*Mead* v. *Daubigny* (1792), Peake, 168 [125]).

(*i*) *Simpson* v. *Robinson*, *supra*.

(*k*) *Camfield* v. *Bird*, *supra*. But in an action for words *primâ facie* privileged, where the defendant justified and the plaintiff offered during the trial to accept an apology and a verdict for nominal damages if the defendant would withdraw the plea of justification, which he refused to do, though he did not attempt to prove it, this conduct was held proper to be left to the jury both on the question of malice and on the question of damages. As to costs where the jury find for the plaintiff on the plea of justification and for the defendant on the question of express malice, see *Brown* v. *Houston*, [1901] 2 K. B. 855, C. A. It is not right to say that the truth or falsehood of the allegation is material on the question of express malice; what is material is the knowledge of the defendant of its truth or falsehood—the state of his mind in regard to the allegations (*Brown* v. *Houston*, *supra*, *per* VAUGHAN WILLIAMS, L. J., at p. 859, considering *Harrison* v. *Bush* (1855), 5 E. & B. 344).

(*l*) See p. 707, *ante*, and *Thomas* v. *Bradbury*, *Agnew & Co.*, *Ltd.*, [1906] 2 K. B. 627, C. A., and the cases there discussed.

(*m*) As to evidence of motive as affecting the damages, and as to to the existence of malice as aggravating the damages, see pp. 721 *et seq.*, *post*. As to malice in actions for slander of title, see note (*l*), p. 628, *ante*, p. 736, *post*, and title TORT.

(*n*) As to accord and satisfaction and traverse, see, generally, title PLEADING.

Part V.—Damages.

SECT. 1. Introductory.

SECT. 1.—*Introductory* (*o*).

Recovery of damages in—(i.) actions of libel; (ii.) actions of slander for words actionable *per se*;

1308. In actions of libel and in actions of slander for words which are actionable *per se* it is not necessary for the plaintiff to allege in his statement of claim that he has suffered special damage (*p*). If, however, in such actions he wishes to recover special damage, he must allege and prove it (*q*). If he fails to prove special damage, he still has the right to resort to and recover general damages (*r*). For the law presumes that the publication of a libel or a slander which is actionable *per se* has of itself a natural and necessary tendency to injure the plaintiff. Special damage is not the gist of those actions, but a consequence only of the right of action (*s*); and, though the plaintiff offers no evidence of actual damage, the jury are not obliged to award nominal damages only (*a*). On the other hand, the jury may award nominal damages only where no real injury is proved (*b*).

In practice, the proof of general damage is attended with greater difficulty in actions of slander for words actionable *per se* than in actions of libel. It is only in exceptional cases that a defendant is liable for the repetition of a slander originally uttered by him. Where he is not so liable, the plaintiff cannot recover damages which flow, not from the original utterance, but from a repetition for which he is not responsible (*c*).

As to pleading the appropriate Statute of Limitations, see titles LIMITATION OF ACTIONS; PLEADING. As to tender, apology, and payment into court, see pp. 726 *et seq.*, *post* (as to apology); pp. 728 *et seq.*, *post* (as to payment into court); and, generally, title PLEADING. As to reply, see, generally, title PLEADING.

(*o*) Part V. of this title is supplementary to title DAMAGES, Vol. X., pp. 301 *et seq.* In particular, as to the meaning of "general" and "special" damage, see *ibid.*, pp. 303, 304; as to the meaning of "nominal" damages, see *ibid.*, p. 305; as to when actual damage need not be proved, see *ibid.*, p. 309; as to intervention of third persons, see *ibid.*, pp. 312, 319; as to damages for defamation, see *ibid.*, p. 324; as to pleading and proof of damages, see *ibid.*, pp. 346 *et seq.* As to costs, see titles PRACTICE AND PROCEDURE; SOLICITORS.

(*p*) See *Lowe* v. *Harewood* (1628), W. Jo. 196; *Malachy* v. *Soper* (1836), 3 Bing. (N. C.) 371, *per* TINDAL, C.J., at p. 382. As to special damage, see p. 730, *post*.

(*q*) See p. 732, *post*.

(*r*) *Smith* v. *Thomas* (1835), 2 Bing. (N. C.) 372, *per* TINDAL, C.J., at p. 380.

(*s*) *Malachy* v. *Soper*, *supra*, *per* TINDAL, C.J., at p. 382.

(*a*) In *Tripp* v. *Thomas* (1824), 3 B. & C. 427, a verdict by a sheriff's jury for £40 was upheld on an inquiry as to damages, the plaintiff's counsel having merely addressed the jury without tendering evidence.

(*b*) *Wakelin* v. *Morris* (1860), 2 F. & F. 26. As to when the verdict of a jury in respect of damages will be set aside, see pp. 719, 720, *post*.

(*c*) In *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., BOWEN, L.J., at p. 530, in delivering the judgment of the Court of Appeal, said: "The very speaking of words which are actionable *per se* apart from all damage constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the general case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander.

SECT. 1. Introductory.

(iii.) actions of slander for words not actionable *per se*;

(iv.) actions on the case.

1309. On the other hand, the plaintiff in an action of slander for words which are not actionable *per se* must allege and prove special damage. Otherwise the defendant is entitled to judgment (*d*). Further, the plaintiff is not entitled to general damages in addition to the special damage which he alleges and proves (*e*).

In actions on the case for false and malicious statements, oral and written (not being actions of libel and slander properly so called), such as actions for slander of title and actions where there is no defamatory statement reflecting on the plaintiff personally, it is necessary for the plaintiff to allege and prove special damage (*f*) and actual malice also (*g*).

SECT. 2.—*General Principles.*

Damages, the province of the jury.

1310. The amount of damages is peculiarly the province of the jury (*h*), and the judge must not himself decide the amount. The

Verbal defamatory statements may indeed be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorised repetition. [*Ward* v. *Weeks* (1830), 7 Bing. 211; *Holwood* v. *Hopkins* (1600), Cro. Eliz. 787; *Dixon* v. *Smith* (1860), 5 H. & N. 450.] General loss of custom cannot be proved in a slander of this kind, when it has been uttered in such circumstances that its repetition does not follow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slander actionable *per se* general damage must be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. *Evans* v. *Harries*" [(1856), 1 H. & N. 251] "was a slander uttered in such a manner." See also, as to repetition, pp. 664 and 666, *ante*, and as to "general loss of custom" and "loss of particular customers," p. 732, *post*.

(*d*) As to the reason for this, see *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A., *per* Lord HERSCHELL, at pp. 800, 801.

(*e*) See *Dixon* v. *Smith* (1860), 5 H. & N. 450.

(*f*) As to such actions, see *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., and the cases there cited, and pp. 732, 736, *post*. See, in particular, *Malachy* v. *Soper* (1836), 3 Bing. (N. C.) 371 (slander of title), following *Lowe* v. *Harewood* (1628), W. Jo. 196; *Tasburgh* v. *Day* (1618), Cro. Jac. 484; *Manning* v. *Avery* (1673), 3 Keb. 153; and *Cane* v. *Golding* (1649), Sty. 169, 176; see also the cases cited in note (*l*), p. 628, *ante*, as to actions of defamation which do not reflect on the plaintiff personally. As to injunctions in such actions, see pp. 734, 736, *post*. If words are not defamatory, special damage does not make them actionable (*Kelly* v. *Partington* (1834), 3 Nev. & M. (K. B.) 116; *Sheahan* v. *Ahearne* (1875), 9 I. R. C. L. 412). As to slander of title generally, see title TORT.

(*g*) As to actions on the case, see pp. 628, 630, *ante*, and p. 736, *post*; and also (as to slander of title) 1 Wms. Saund., notes to *Craft* v. *Boite* (1669), 1 Saund. 247, 325, citing *Hargrave* v. *Le Breton* (1769), 4 Burr. 2423; *Smith* v. *Spooner* (1810), 3 Taunt. 246; *Brook* v. *Rawl* (1849), 4 Exch. 521; *Carr* v. *Duckett* (1860), 5 H. & N. 783; *Wren* v. *Weild* (1869), L. R. 4 Q. B. 730; *Steward* v. *Young* (1870), L. R. 5 C. P. 122; *Pitt* v. *Donovan* (1813), 1 M. & S. 639.

(*h*) *Jones* v. *Hulton* (*E.*) *& Co.*, [1909] 2 K. B. 444, C. A., *per* FARWELL, L.J., at p. 483; and see *ibid.*, *per* Lord ALVERSTONE, C.J., at p. 457. The decision of the Court of Appeal both on the issue of publication and damages was upheld in the House of Lords (S. C. [1910] A. C. 20). As to assessing damages in actions by partners, see *Gregory* v. *Williams* (1844), 1 Car. & Kir. 568, where it was held that the jury could consider the prospective injury to the partnership. Injury

SECT. 2. General Principles.

Court of Appeal will very rarely interfere with the verdict of the jury on the ground that the damages are excessive or inadequate.

Facts to be considered by jury.

1311. The jury in assessing the damages are entitled to look at the whole conduct of the defendant from the time of publication down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial.

When new trial granted on ground of excessive damages.

1312. If the defendant seeks a new trial on the ground that the damages are excessive, the court will interfere with the verdict if it sees that the jury in assessing the damages have been guilty of misconduct, or have made some gross blunder, or have been misled by the speeches of counsel; but the court ought not to interfere merely because the court would have given less damages, if the damages are not so large that twelve reasonable men could not reasonably have given them (*i*). There will be a case for interference by the court if the amount is so great that no reasonable proportion exists between it and the circumstances of the case (*k*), or if the court is satisfied that the jury have not acted reasonably on the evidence, but have been misled by prejudice or passion (*l*).

New trial on ground of inadequacy of damages.

1313. There is no inexorable rule of practice by which the court is precluded from ever granting a new trial on account of the smallness of damages (*m*).

Where the smallness of damages shows that the jury have made a compromise, and instead of deciding the issue of liability have agreed to find for the plaintiff for nominal damages only, a new trial will be granted, such a case being in effect as if the jury had been discharged without a verdict (*n*). If the words are grossly slanderous, and there is no evidence whatever that the plaintiff has done anything to reduce the damages, a farthing damages may be treated by the court as a species of compromise and no true verdict at all, even though the plaintiff may not have proved any actual damage (*o*). But if there has been no misconduct on the part of the jury and they have decided the question of liability, the court never grants a new trial because the damages are low, unless there has been

to the feelings of the partners is not joint damage (*Haythorn* v. *Lawson* (1827), 3 C. & P. 196). As to the invalidity of a judgment on an assessment of entire damages upon several counts of slander, one of which counts discloses no cause of action, see *Day* v. *Robinson* (1835), 4 Nev. & M. (K. B.) 884, Ex. Ch.; *Pemberton* v. *Colls* (1847), 10 Q. B. 461. *Aliter*, where some words actionable, and others not actionable, are contained in one count, and entire damages are given (*Griffiths* v. *Lewis* (1846), 8 Q. B. 841).

(*i*) *Praed* v. *Graham* (1889), 24 Q. B. D. 53, C. A., *per* Lord ESHER, M.R., at p. 54. See also title DAMAGES, Vol. X., pp. 349, 350.

(*k*) This statement was in *M'Grath* v. *Bourne* (1876), 10 I. R. C. L. 160, attributed by PALLES, C.B., to FITZGERALD, J., and was approved in *Praed* v. *Graham*, *supra*, *per* Lord ESHER, M.R., at p. 55; see also *Harris* v. *Arnott* (1890), 26 L. R. Ir. 55, C. A.

(*l*) *Watt* v. *Watt*, [1905] A. C. 115, *per* Lord HALSBURY, L.C., at p. 118, C. A.; and see title DAMAGES, Vol. X., p. 350, note (*b*).

(*m*) *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686, *per* BLACKBURN, J., at p. 697, approved in *Falvey* v. *Stanford* (1874), L. R. 10 Q. B. 54.

(*n*) *Falvey* v. *Stanford*, *supra*, at p. 56.

(*o*) *Ibid.*

some mistake on the part of the judge or in the calculation of figures by the jury (*p*).

Plaintiff's conduct.

1314. In actions of libel and slander, not resulting in special damage which can be matter of computation, the court should be very chary in interfering with the province of the jury, and the least which can be required of the plaintiff who complains of the inadequacy of the damages is that he should be able to show that he has not afforded by his conduct any legitimate ground upon which the jury could fairly and reasonably have acted in estimating the damages at a nominal sum (*q*). There can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings the jury may fairly consider the plaintiff's conduct and the degree of respect which he has himself shown for the feelings of others (*r*).

SECT. 3.—*Effect of Express Malice.*

Proof or disproof of actual malice.

1315. Either party may, with a view to the damages, give evidence to prove or disprove a malicious motive in the mind of the publisher of defamatory matter (*s*).

(*p*) The words in the text, *supra*, "the court . . . by the jury," are the words of TINDAL, C.J., in *Rendall* v. *Hayward* (1839), 5 Bing. (N. C.) 424. There the jury gave only 20*s.* damages in the case of slander, where it was said that the plaintiff was a thief and had stolen two pairs of sheets, and the defendant had repeated the charge, which indicated malice, and had refused an apology. TINDAL, C.J., thought that a more complete measure of justice would have been attained if the jury had given higher damages; but he and the rest of the court refused a rule for a new trial on the above ground. This statement was quoted in *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686, *per* MELLOR, J., at p. 695, and was approved in *Forsdike* v. *Stone* (1868), L. R. 3 C. P. 607, *per* BYLES, J., at p. 612, in which case both BYLES, J., and WILLES, J., said that the jury may reasonably take into account what the defendant ought to pay as well as what the plaintiff ought to receive. It was there also intimated by WILLES, J., that if there had appeared to have been any compromise leading to a verdict clearly inadequate the court might interfere. It has therefore, in accordance with the subsequent cases above mentioned, been thought necessary to prefix the words "if there has been no misconduct . . . liability" to the passage quoted from *Rendall* v. *Hayward*, *supra*. The statement that the granting of a new trial is not allowed in actions of slander because the damages are too small (*Armytage* v. *Haley* (1843), 4 Q. B. 917) is certainly too wide.

(*q*) *Kelly* v. *Sherlock*, *supra*, *per* MELLOR, J., at p. 696. It is for the jury under all the circumstances to say what damages the plaintiff is entitled to (*Cooke* v. *Brogden & Co.* (1885), 1 T. L. R. 497).

(*r*) *Kelly* v. *Sherlock*, *supra*, *per* BLACKBURN, J., at p. 698. In that case the jury gave one farthing damages. It was held (BLACKBURN and MELLOR, JJ., SHEE, J., dissenting) that although, on account of the grossness and repetitions of the libel, the verdict might well in the opinion of the court have been for larger damages, it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to, and that the court ought not to interfere; see also *Gibbs* v. *Tunaley* (1845), 1 C. B. 640, *per* TINDAL, C.J., at p. 641, where it was said that it is not usual to grant a new trial on the ground that the damages are smaller than the court may think reasonable. As to adducing evidence of provocation in mitigation of damages, see p. 726, *post*. As to costs where a jury has given a verdict for nominal damages, see titles DAMAGES, Vol. X., p. 305; PRACTICE AND PROCEDURE; SOLICITORS.

(*s*) *Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700, *per* TINDAL, C.J., at p. 719.

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The defendant cannot, indeed, be heard to say on the issue of publication that he did not intend the true meaning of his words as interpreted by relevant surrounding circumstances; but such evidence is admissible in mitigation of damages as negatives express malice (*t*). On this principle the defendant is allowed to give evidence palliating, though not justifying, his act in publishing a libel (*a*).

On the other hand, the plaintiff may give in evidence any words, as well as any act, of the defendant to show *quo animo* he spoke the words or made the statements which are the subject of the action (*b*). If the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it (*c*), though the omission of the judge to give such warning is not such a misdirection as will be a ground for a new trial (*d*). If such evidence is offered merely for the purpose of obtaining damages for such subsequent injury it will be properly rejected (*e*).

Express malice.

1316. The malice which avoids qualified privilege is actual or express malice, which the jury finds existed as a fact at the time of the communication, and inspired or coloured it. It may be inferred from the words or acts of the defendant before, at, or after the time of the communication. But when the plaintiff seeks to prove express malice on the issue of privileged communication by means of subsequent statements, the judge ought, especially if there is a long interval between the publication and the subsequent statements, to direct the jury to consider whether such subsequent statements may not refer to subsequent events so as not to show malice at the time when the libel was published (*f*).

Defendant's conduct.

On the other hand, the subsequent conduct of the defendant may affect the question of damages, though it does not show that at the moment of publication he was actuated by express malice, as, for example, where, a newspaper proprietor who has published a libel which is a pure fabrication negligently delays to publish any

(*t*) *Jones* v. *Hulton* (*E.*) *& Co.*, [1909] 2 K. B. 444, C. A., *per* FARWELL, L.J., at p. 479.

(*a*) *Saunders* v. *Mills* (1829), 6 Bing. 213, approved in *Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700, 719.

(*b*) The statement of Lord ELLENBOROUGH to this effect in *Rustell* v. *Macquister* (1807), 1 Camp. 49, n., was approved in *Pearson* v. *Lemaitre*, *supra*. See also *Plunkett* v. *Cobbett* (1804), 2 Selwyn, Law of Nisi Prius, 1042; 5 Esp. 136, and *Geare* v. *Britton* (1746), Buller, Law of Nisi Prius, 7, to the same effect: these cases and *Pearce* v. *Ornsby* (1835), 1 Mood. & R. 455, and *Symmons* v. *Blake* (1835), 1 Mood. & R. 477, were considered in *Pearson* v. *Lemaitre*, *supra*. As to the two latter cases, see note (*e*), *infra*.

(*c*) *Pearson* v. *Lemaitre*, *supra*, at p. 720. In *Defries* v. *Davis* (1835), 7 C. & P. 112, it was held that the plaintiff may give evidence of subsequent statements to show malice, provided they be not the subject of another action; but see note (*e*), *infra*.

(*d*) *Darby* v. *Ousely* (1856), 1 H. & N. 1.

(*e*) *Pearson* v. *Lemaitre*, *supra*, *per* TINDAL, C.J., at p. 720, criticising *Pearce* v. *Ornsby*, *supra*, and *Symmons* v. *Blake*, *supra*, and saying that perhaps they went no further than the statement in the text, which is as laid down in *Pearson* v. *Lemaitre*, *supra*.

(*f*) *Hemmings* v. *Gasson* (1858), E. B. & E. 346

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contradiction until after action brought, although the plaintiff promptly complained and exposed its falsity (*g*).

Failure to prove justification.

1317. The mere fact that the defendant has pleaded and fails to establish justification is not of itself evidence of express malice (*h*). But the circumstance that the justification is pleaded recklessly or is improperly persisted in may increase the damages (*i*).

Liability of publisher.

1318. The publisher of a libel is not to be charged with vindictive damages on account of the personal malice which another person who wrote the libel had against the plaintiff (*k*).

Conduct of defendant's representatives.

1319. If counsel cross-examines a plaintiff with a view to show that he had been guilty of that of which he has been acquitted, the libel is thereby aggravated (*l*) ; and generally the defendant will

(*g*) *Smith* v. *Harrison* (1856), 1 F. & F. 565.

(*h*) *Caulfield* v. *Whitworth* (1868), 18 L. T. 527.

(*i*) In *Wilson* v. *Robinson* (1845), 7 Q. B. 68, the defendant abandoned his plea of justification at the trial and relied on privilege. It was held that the plea of justification was no evidence that the communication was made *malâ fide*, but that it might be considered by the jury in aggravation of the damages after they had found that the communication was not privileged owing to the express malice of the defendant. On the issue of privileged communication it is important to consider whether the statement was published wilfully or by mistake (*Hancock* v. *Case* (1862), 2 F. & F. 711). But proof of an utterly untrue statement having been made may be of itself *primâ facie* evidence of express malice (*Palmer* v. *Hummerston* (1883), Cab. & El. 36). Usually, however, the defendant's knowledge of the falsity must be shown, unless the statement is obviously in excess of the occasion (see *Caulfield* v. *Whitworth* (1868), 18 L. T. 527). As to giving in evidence other statements to show animus, see the cases cited in the notes to p. 722, *ante;* and see *Camfield* v. *Bird* (1852), 3 Car. & Kir. 56; *Jackson* v. *Adams* (1835), 1 Hodg. 78; *Mead* v. *Daubigny* (1792), Peake, 168 [125]. It was held in *Lee* v. *Huson* (1792), Peake, 223 [166], that in an action for libel other papers which are themselves libels on the plaintiff may be given in evidence to increase the damages; but see p. 722, *ante*, and *Cook* v. *Field* (1788), 3 Esp. 133. As to subsequent publications of the same libel, see *Delegal* v. *Highley* (1837), 8 C. & P. 444; *Macleod* v. *Wakley* (1828), 3 C. & P. 311; *Barwell* v. *Adkins* (1840), 1 Man. & G. 807. It was held in *Plunkett* v. *Cobbett* (1804), 5 Esp. 136, that in an action for libel in a weekly periodical, a witness might prove the purchase of a copy after, as well as before, action to show that the paper was deliberately circulated, but that this was not evidence for the purpose of aggravation; and see *Gathercole* v. *Miall* (1846), 15 M. & W. 319. As to the Statute of Limitations, where a first count to which the Statute of Limitations was pleaded was founded on a libel in a newspaper seventeen years old, and other counts for recent libels referred to it, and a publication, within six years, of the libel in the first count was proved, it was held that the judge was not bound to direct the jury to limit the damages on the first count to the single publication proved (*Brunswick* (*Duke*) v. *Harmer* (1849), 14 Q. B. 185). Where the defendant puts in a plea under the Libel Act, 1843 (6 & 7 Vict. c. 96), denying malice and stating an apology, it is open to the plaintiff in order to prove malice to tender other publications of the defendant more than six years before the publication complained of (*Barrett* v. *Long* (1851), 3 H. L. Cas. 395); and see title LIMITATION OF ACTIONS. As to pleading, see, generally, title PLEADING.

(*k*) *Robertson* v. *Wylde* (1838), 2 Mood. & R. 101. TINDAL, C.J., there refused to admit evidence of the personal malice of the writer in an action against the publisher of a magazine.

(*l*) *Risk Allah Bey* v. *Whitehurst* (1868), 18 L. T. 615. In *Goslin* v. *Corry* (1844), 7 Man. & G. 342, in an action for a libel charging the plaintiff with fraud and offering a reward for his arrest, evidence of the arrest after action

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have to bear any increase of damages caused by the way in which his representatives have conducted his case; but in extreme cases the courts ought not to allow an extravagant result, even though the defendant may have led to it by the conduct of his representatives at the trial (*m*).

Proof of manner of publication.

1320. The manner of publication may always be proved by the plaintiff with a view to the damages, even though the defendant by his pleading admits the publication (*n*).

The injury to the plaintiff, speaking generally, varies directly with the extent of the circulation of the libel (*o*).

SECT. 4.—*Mitigation of Damages.*

SUB-SECT. 1.—*In General.*

At common law.

General evidence of plaintiff's bad reputation.

1321. An action of libel or slander is an action for damages for injury to the reputation of the plaintiff. Therefore the defendant is entitled by the common law to give general evidence in such an action of the plaintiff's bad reputation (*p*). But the defendant

brought having been given with the consent of the defendant's counsel, it was held that the defendant could not afterwards complain that the jury were not warned by the judge not to take the subsequent arrest into consideration in estimating the damages.

(*m*) See *Watt* v. *Watt*, [1905] A. C. 115, *per* Lord HALSBURY, L.C., at p. 118. As to giving particulars of facts relied on by way of mitigation as condition of giving evidence in chief, see R. S. C., Ord. 36, r. 37, and p. 728, *post*. As to cross-examination, see, further, note (*t*), p. 729, *post*.

(*n*) *Vines* v. *Serell* (1835), 7 C. & P. 163.

(*o*) Thus in an action for libel published in a newspaper, evidence that copies containing the libel had been gratuitously circulated in the plaintiff's neighbourhood is admissible to show the extent of the circulation of the paper and the consequent injury to the plaintiff though they are not shown to have been sent by the defendant, the publisher (*Gathercole* v. *Miall* (1846), 15 M. & W. 319). The place of publication (as in the case cited, the plaintiff's neighbourhood) may naturally increase the damages. Similarly proof that the plaintiff had been made the subject of laughter at a public meeting is admissible, as identifying him with the subject of a libel and as proof of the consequences which had necessarily resulted to him from its publication (*Cook* v. *Ward* (1830), 6 Bing. 409, *per* TINDAL, C.J., at p. 415). It was there objected that the plaintiff could have no claim for damages because he had told the story himself. If it could have been shown that he had authorised the publication of the story the court would have granted a new trial; but it was pointed out that there is a great difference between a man telling a ludicrous story of himself to a circle of his own acquaintance and a publication of it to all the world through the medium of a newspaper (*ibid.*).

(*p*) See *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, where CAVE, J., at pp. 499, 501, referred to the following cases as supporting that proposition:—*Kirkman* v. *Oxley* (undated), Phillipps, Law of Evidence, 189; Starkie, Law of Evidence, 3rd ed., 538; *Ellershaw* v. *Robinson* (1824), Starkie, Law of Evidence, 3rd ed., 538; *Mawby* v. *Barber* (1826), Starkie, Law of Evidence, 3rd ed., 538, n. (v); *Moore* v. *Oastler* (1836), Starkie, Law of Evidence, 3rd ed., 538, n. (v); *Hardy* v. *Alexander* (1837), Starkie, Law of Evidence, 3rd ed., 538, n. (v). The decision in *Scott* v. *Sampson*, *supra*, was approved in *Wood* v. *Cox* (1888), 4 T. L. R. 652, 655. The admissibility of the evidence was doubted in *Wood* v. *Durham* (*Earl*) (1888), 21 Q. B. D. 501. But it has been recognised as recently as 1909 in *Mangena* v. *Wright*, [1909] 2 K. B. 958, 979, where PHILLIMORE, J., held that R. S. C., Ord. 36, r. 37, does not change the common law as laid down in *Scott* v. *Sampson*, *supra*. In *Bracegirdle* v. *Bailey* (1859), 1 F. & F. 536 (an

is not entitled to adduce evidence of particular facts as tending to show the character and disposition of the plaintiff (*q*); nor is he entitled to give evidence of rumours and suspicions to the same effect as the defamatory matter complained of (*r*).

Evidence of repetition and disclosure of name of informant.

1322. The mere fact that the defendant copied the libel complained of from another source is not in itself evidence in mitigation of damages (*s*); and evidence that the libel complained of was already in circulation is not admissible in mitigation (*a*). But the defendant may show in mitigation of damages that he copied the libel from another source, and that the libel complained of disclosed or referred to the source as containing the defamatory matter imputed to the

action for slander imputing a forgery), BYLES, J., after consulting WILLES, J., held that the plaintiff, not having been examined in chief, could not in mitigation of damages be cross-examined as to his past conduct or life. *Bracegirdle* v. *Bailey* (1859), 1 F. & F. 536, is referred to in *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, at p. 502, as illustrating the inadmissibility of evidence of particular facts tending to show the disposition of the plaintiff and not as any authority against the proposition in the text. As to cross-examining to credit, see note (*t*), p. 729, *post*. As to pleading matter in mitigation of damages, and as to R. S. C., Ord. 36, r. 37, see note (*s*), p. 729, *post*; and see title EVIDENCE, Vol. XIII., pp. 454, 455.

(*q*) *Scott* v. *Sampson*, *supra* (see note (*p*), p. 724, *ante*), where CAVE, J., was of opinion that both principle and authority were against the admissibility of such evidence. See *Bracegirdle* v. *Bailey*, *supra*, and *Jones* v. *Stevens* (1822), 11 Price, 235, referred to by CAVE, J., in *Scott* v. *Sampson*, *supra*, at p. 500, in support of the proposition in the text.

(*r*) See *Scott* v. *Sampson*, *supra*, where CAVE, J., in support of this view, cited the doubts as to the admissibility of such evidence expressed by ABBOTT, C.J., in *Waithman* v. *Weaver* (1822), 11 Price, 257, n., and by COLERIDGE, J., in *Thompson* v. *Nye* (1850), 16 Q. B. 175 (where the other judges declined to express an opinion as to whether the evidence would be admissible if limited to rumours in existence at the date of the alleged slander), the decisions against its admissibility by FITZGERALD and HUGHES, BB., in *Bell* v. *Parke* (1860), 11 I. C. L. R. 413, and by the whole Court of Exchequer in *Jones* v. *Stevens*, *supra*, contrary to *Eamer* v. *Merle* (not reported and undated), cited 24 Q. B. D. 499, and *Richards* v. *Richards* (1844), 2 Mood. & R. 557, the decision of MANSFIELD, C.J. (against his own judgment), in *Leicester* (*Earl*) v. *Walter* (1809), 2 Camp. 251, and the opinion of PIGOT, C.B. in *Bell* v. *Parke*, *supra*. As to estoppel, see note (*a*), p. 616, *ante*. As to the jury disregarding actions pending against other persons who have published the libel, see *Harrison* v. *Pearce* (1858), 1 F. & F. 567. But as to libels in newspapers, see the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6, and p. 728, *post*. As to consolidation of actions brought for the same or substantially the same libel, see the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 5, and p. 729, *post*.

(*s*) In *Saunders* v. *Mills* (1829), 6 Bing. 213, such evidence was received at the trial. In *Talbutt* v. *Clark* (1840), 2 Mood. & R. 312, evidence that the libel was published on the communication of a correspondent was held inadmissible in mitigation of damages.

(*a*) This evidence was rejected at the trial in *Saunders* v. *Mills*, *supra*, and was there held to have been rejected properly; compare *Creery* v. *Carr* (1835), 7 C. & P. 64, where in an action for libel against a newspaper it was held that the defendant cannot go into evidence in mitigation of damages to show that the same libel has appeared in another newspaper, from which the plaintiff has already recovered damages. But at the trial of an action for a libel contained in any newspaper, the fact that the plaintiff has already recovered damages for the same libel, or a libel to the like effect, is, in the present state of the law, evidence in mitigation; see the Law of Libel Amendment Act 1888 (51 & 52 Vict. c. 64), s. 6, and p. 728, *post*.

SECT. 4. Mitigation of Damages.

plaintiff (*b*). Similarly, the defendant in an action of slander may prove in reduction of damages that at the time of the utterance of the slander he disclosed the name of his informant (*c*).

Evidence rebutting existence of actual malice.

But the restriction above referred to as to the admissibility of evidence as mitigation of damages is subject to the overriding principle that it is always competent for the defendant to give in evidence in mitigation of damages facts which negative the existence of actual malice (*d*). Thus a defendant may show in mitigation of damages that he copied the libel from another paper, omitting several passages reflecting on the plaintiff (*e*).

Evidence of provocation of plaintiff.

1323. The defendant may show in mitigation of damages that the plaintiff provoked the libel of which he complains (*f*). For this purpose the defendant may adduce evidence that the plaintiff used expressions, oral and written, reflecting on the defendant, which were calculated to provoke the defendant to publish the libel (*g*), and which came to the knowledge of the defendant before he published the libel (*h*). General evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible (*i*): the libels relied on in mitigation must relate to the same subject (*k*).

SUB-SECT. 2.—*Apology.*

Offer of apology. Lord Campbell's Act, s. 1.

1324. In an action for defamation the defendant may, after notice in writing of his intention to do so duly given to the plaintiff at the time of filing or delivering his defence, give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before action, or so soon afterwards as he had an opportunity of so doing, if the action has been commenced before there was an opportunity of making or offering such apology (*l*).

(*b*) *Mullett* v. *Hulton* (1803), 4 Esp. 248.

(*c*) *Bennett* v. *Bennett* (1834), 6 C. & P. 588.

(*d*) *Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700, *per* TINDAL, C.J., at p. 719. In *Davis* v. *Cutbush* (1859), 1 F. & F. 487, it was held sufficient to justify nominal damages that the libel in a newspaper was honestly taken from a previous privileged communication.

(*e*) *Creevy* v. *Carr* (1835), 7 C. & P. 64. Each case depends on its own facts.

(*f*) *Trapley* v. *Blaby* (1835), 7 C. & P. 395; S. C., *sub nom. Tarpley* v. *Blabey* (1836), 2 Bing. (N. C.) 437; *Watts* v. *Fraser* (1837), 7 Ad. & El. 223; (1835) 7 C. & P. 369; *Moore* v. *Oastler* (1836), Starkie, Law of Evidence, 3rd ed., 538, n. (v); *Pasquin's* (*Anthony*) *Case* (where Lord KENYON wrongly held that libels by the plaintiff were admissible even in bar of the action), cited in *Finnerty* v. *Tipper* (1809), 2 Camp. 72, 76, and *Tabart* v. *Tipper* (1808), 1 Camp. 350. As to pleading matter in mitigation of damages, and as to R. S. C., Ord. 36, r. 37, see p. 728, *post.*

(*g*) See cases cited in note (*f*), *supra.*

(*h*) *Watts* v. *Fraser* (1837), 2 Nev. & P. (K. B.) 157.

(*i*) *Wakley* v. *Johnson* (1826), Ry. & M. 422; *Finnerty* v. *Tipper* (1809), 2 Camp. 72, 76. The evidence must be specific and provoke the libel; see *Trapley* v. *Blaby*, *supra*; S. C., *sub nom. Tarpley* v. *Blabey*, *supra.*

(*k*) See *Finnerty* v. *Tipper*, *supra*, and *May* v. *Brown* (1824), 3 B. & C. 113, where all the judges expressed strong views as to the inconvenience of admitting evidence of other libels by the plaintiff. Some of these objections are now met by R. S. C., Ord. 36, r. 37; see p. 728, *post.*

(*l*) Libel Act, 1843 (known as Lord Campbell's Act) (6 & 7 Vict. c. 96),

SECT. 4. Mitigation of Damages.

1325. In an action for a libel contained in a public newspaper or other periodical publication, the defendant may plead that such libel was inserted therein (1) without actual malice; and (2) without gross negligence; and (3) that before action, or at the earliest opportunity afterwards, he inserted therein a full apology for the said libel, or, if the newspaper or periodical publication in which it appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical to be selected by the plaintiff in such action; and the plaintiff may reply generally to such defence denying the whole of such defence (*m*). But the defendant may not file such defence without (4) at the same time making a payment of money into court by way of amends; and every such defence so filed without payment of money into court shall be deemed, and may be treated by the plaintiff as, a nullity (*n*).

Libel action against newspaper or periodical.

Defence under Lord Campbell's Act, s. 2.

1326. If the defendant thus pleading fails to establish his defence in respect of any one of the four requirements, the defence fails, and he cannot avail himself of the payment into court as being a payment under Ord. 22, r. 1, of the Rules of the Supreme Court, because of the exception which excepts actions and counterclaims for libel and slander from that rule (*o*).

Failure of defence.

s. 1. For forms of letters demanding apology, and of apology, both before and after action brought, see Encyclopædia of Forms and Precedents, Vol. I., pp. 576—579.

(*m*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2, as varied by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). "Full apology" means an apology not merely sufficient in its terms, but inserted in a proper manner as to type and position (*Lafone* v. *Smith* (1858), 3 H. & N. 735).

(*n*) The Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2, as varied by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), which repealed the words "as provided by the said Act" (*i.e.*, "as provided by Lord Campbell's Act, 1843" (see note (*l*), p. 726, *ante*)) after the words "by way of amends."

(*o*) In *Oxley* v. *Wilkes*, [1898] 2 Q. B. 56, C. A., the defendants pleaded under the Libel Act, 1843 (6 & 7 Vict. c. 96) s. 2, and brought £5 into court in order to make a good defence under the Act. The damages were assessed at £5. The jury found for the defendants on all points, except that they found that the publication had not been without gross negligence. The defendants sought to treat the payment into court as a general payment into court, and contended that as the plaintiff did not recover more than £5 they were entitled to judgment. But it was held that the payment into court was a necessary part of the defence under the Libel Act, 1843 (6 & 7 Vict. c. 96), without which it would have been bad, and that if that payment into court were treated as a separate defence in itself under R. S. C., Ord. 22, r. 1 (as to which see, further, note (*q*), p. 728, *post*), then the defendants would be pleading it together with another defence to the action, which, the action being an action of defamation, they were not entitled to do under the rule (*Oxley* v. *Wilkes*, *supra*, at p. 59). In *Sley* v. *Tillotson & Son* (1898), 14 T. L. R. 545, BRUCE, J., refused to deprive the plaintiff of his costs in an action of libel, where he recovered less than a sum paid into court with an apology under the Libel Act, 1843 (6 & 7 Vict. c. 96), the apology being admittedly insufficient. As to the former practice, where the defendant failed on some point, see *Lafone* v. *Smith* (1858), 3 H. & N. 735; *Jones* v. *Mackie* (1867), L. R. 3 Exch. 1. It was held in an Irish case (*Harris* v. *Arnott* (1889), 24 L. R. Ir. 404) that the plaintiff could not take out money paid into court and proceed with the action for the purpose of recovering greater damages. As to slander actions, see *Kinnell* v. *Walker* (1910), 27 T. L. R. 67 (verdict for sum smaller than that paid into court), affirmed (1911), 27 T. L. R. 257, C. A.

SECT. 4. Mitigation of Damages.

SUB-SECT. 3.—*Damages already Recovered.*

Other actions for same libel.

Law of Libel Amendment Act, s. 6.

1327. At the trial of an action for a libel contained in any newspaper the defendant is at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered, or has brought actions for, damages, or has received or agreed to receive compensation, in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought (*p*).

SECT 5.—*Practice.*

Payment into court.

R. S. C., Ord 22, r. 1.

1328. Payment into court in an action of libel and slander with a denial of liabilty is forbidden (*q*). If, however, liabilty is admitted payment into court may be pleaded in an action of libel or slander as in any other action. The mere fact that the defence contains such a statement as that an apology was made does not preclude the defendant from relying at the trial on the payment into court as a general payment into court under the rule (*r*).

Particulars of facts as to circumstances of publication and character of plaintiff.

R. S. C., Ord. 36, r. 37.

1329. In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled at the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence (*s*). Even in

(*p*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6. As to the meaning of "newspaper," see note (*p*), p. 744, *post*. In *Harrison* v. *Pearce* (1858), 1 F. & F. 567, it was held in an action by the proprietor of a newspaper against the proprietor of a rival newspaper for a libel contained in an advertisement in the defendant's newspaper, that the jury was not bound to consider that other actions were pending against other parties who had published the libel, but that they might give the plaintiff such damages as they thought had arisen from the decline of circulation, even after action, and this as general damage. As to *Frescoe* v. *May* (1860), 2 F. & F. 123, see note (*a*), pp. 616, 617, *ante*.

(*q*) R. S. C., Ord. 22, r. 1. As to denying part of an innuendo and admitting part, and pleading the Libel Act, 1843 (6 & 7 Vict. c. 96), with a payment into court, without stating in respect of what part payment is made, see *Mackay* v. *Manchester Press Co.* (1889), 54 J. P. 22. The defence ought to say to what part the payment applies (*Mackay* v. *Manchester Press Co.*, *supra*; *Fleming* v. *Dollar* (1889), 23 Q. B. D. 388); see *Davis* v. *Billing* (1891), 8 T. L. R. 58, C. A.

(*r*) See *Oxley* v. *Wilkes*, [1898] 2 Q. B. 56, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 61, where the defence was, and was intended to be, a plea under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2. As to pleading matter in mitigation of damages, see note (*s*), *infra*.

(*s*) R. S. C., Ord. 36, r. 37. As to pleading facts which merely go to mitigate damages, see title DAMAGES, Vol. X., p. 346, and the cases there cited. There (*ibid.*, note (*n*)) reasons are given for preferring the construction put upon R. S. C., Ord. 19, r. 4, in *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, to the construction put upon it in *Wood* v. *Durham* (*Earl*) (1888), 21 Q. B. D. 501. It is, on the other hand, to be observed that the rule speaks not of "material facts" simply, but of "material facts on which the party pleading relies for his claim or defence." See R. S. C., Ord. 19, r. 4, and also Ord. 19, rr. 15, 17, and Ord. 21, r. 4. The construction put upon Ord. 19, r. 4, in *Wood* v. *Durham* (*Earl*), *supra* (where Ord. 19, rr. 4, 15, and Ord. 21, r. 4, were considered), appears to be inconsistent with the construction of Ord. 19, r. 4, in the earlier case of *Scott* v *Sampson*, *supra*. A plea under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2, is a

mitigation of damages when justification is not pleaded the defendant cannot at the trial go into evidence which if proved would constitute a justification (*t*).

Consolidation of actions. Law of Libel Amendment Act, 1888, s. 5.

1330. The court or a judge upon an application by or on behalf of two or more defendants in actions in respect to the same or substantially the same libel brought by one and the same person may make an order for the consolidation of such actions, so that they may be tried together. After such an order has been made, and before the trial of the actions, the defendants in any new actions instituted in respect of the same, or substantially the same, libel are also entitled to be joined in a common action, upon a joint application being made by such new defendants and the defendants in the actions already consolidated (*a*).

Assessment of damages.

In a consolidated action under the above provision the jury must assess the whole amount of the damages (if any) in one sum, but a separate verdict must be taken for and against each

defence. As to payment into court, see p. 727, *ante*. As to notice under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 1, see p. 726, *ante*. R. S. C., Ord. 36, r. 37, does not change the common law as laid down in *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, as to the admissibility of evidence in mitigation of damages, and the case of *Scaife* v. *Kemp & Co.*, [1892] 2 Q. B. 319, is not an authority to the contrary (*Mangena* v. *Wright*, [1909] 2 K. B. 958, *per* PHILLIMORE, J., at p. 979). Where the defendant has given particulars under R. S. C., Ord. 36, r. 37, he may interrogate so far as relates to the particulars given, but not beyond; see *Yorkshire Provident Life Assurance Co.* v. *Gilbert and Rivington*, [1895] 2 Q. B. 148, C. A.; and see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 101.

(*t*) In *Watt* v. *Watt*, [1905] A. C. 115, Lord HALSBURY, L.C., at p. 118, not only considered that the proposition was settled law, and referred to *Watson* v. *Christie* (1800), 2 Bos. & P. 224, and *Speck* v. *Phillips* (1839), 5 M. & W. 279, but expressed his opinion that it makes no difference that the evidence is offered in cross-examination. In *Speck* v. *Phillips*, *supra*, the evidence which it was held was rightly rejected was evidence in chief offered by the defendant who had pleaded payment into court of £5 5*s*., which plea was met by a replication by the plaintiff that he had sustained damages to a greater amount. In *Watson* v. *Christie*, *supra*, the action was for assault; the plea was "not guilty," and it was held by Lord ELDON, C.J., that the only question was whether the defendant was guilty of the beating, and what damages the plaintiff had sustained in consequence, and that the defendant could not give evidence under this plea in mitigation of damages of the necessity of discipline which might have been pleaded. In neither of these cases was anything said in the judgments as to cross-examination in mitigation of damages. In a note by the reporters in *Watson* v. *Christie*, *supra*, several cases are set forth, including a decision of Lord HALE, in *Abbot* v. *Chapman* (1673), 2 Lev. 81, in which he admitted evidence in mitigation of damages; and a later case of *Dennis* v. *Pawling* (1716), 12 Vin. Abr. 159, tit. Evidence (I. b.), pl. 16, in which he refused to admit anything in evidence which tended to justify the words though in mitigation of damages, saying that "anything in evidence which tended to show a provocation or any transaction between the parties giving occasion for speaking the words was proper in the defendant to make out, because these matters cannot be pleaded." In none of those cases was the admission of evidence in cross-examination in mitigation of damages discussed. As to giving in evidence facts short of justification, see *East* v. *Chapman* (1827), Mood. & M. 46; *Charlton* v. *Watton* (1834), 6 C. & P. 385; 1 Wms. Saund. 149, notes to *Lake* v. *King* (1668), 1 Saund. 133. As to the effect of cross-examination on damages, see *Watt* v. *Watt*, [1905] A. C. 115, *per* Lord HALSBURY, L.C., at p. 118. As to pleading matter in mitigation of damages, see note (*s*), p. 728, *ante*.

(*a*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 5. As to practice generally, see title PRACTICE AND PROCEDURE.

SECT. 5. Practice.

defendant as if the actions had been tried separately; and if the jury have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they must proceed to apportion the amount of damages which they have so found between and against the last-mentioned defendants, and the judge at the trial, if he awards to the plaintiff the costs of the action, must thereupon make such order as he deems just for the apportionment of such costs between and against such defendants (*b*).

SECT. 6.—*Special Damage.*

Special damage.

1331. Special damage is the loss of some material temporal advantage (*c*), pecuniary or capable of being estimated in money (*d*), which flows directly and in the ordinary course of things (*e*) from the act of the defendant or an act for which he is responsible (*f*).

(*b*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 5.

(*c*) *Roberts* v. *Roberts* (1864), 5 B. & S. 384. On the subject of special damage, see title DAMAGES, Vol. X., pp. 303, 304, 305, 309, 312, 319, 324, 346 *et seq.* See also note (*i*), p. 620, *ante*, and 1 Wms. Saund. 310, notes to *Craft* v. *Boite* (1669), 1 Saund. 246.

(*d*) See *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407, C. A. The plaintiff alleged there that he was a candidate for a club, but was not elected; that a meeting of members was called to consider an alteration of the rules as to electing new members; that the defendant falsely and maliciously uttered words not actionable *per se* as to the conduct of the plaintiff at another club; that thereby the defendant induced the committee of the club to which the plaintiff had not been elected to retain the regulations under which he had been rejected and thereby prevented the plaintiff from again seeking to be elected to the club. It was held on demurrer that the claim disclosed no cause of action, for the words complained of must be supported by special damage, and the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words. See also *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 532, C. A. ("actual temporal loss").

(*e*) This expression is used throughout the judgment in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A. Another expression used is "natural and probable result". (*Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407, C. A.); see also *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, where the expression "natural and legal" result was criticised adversely. In so far as *Vicars* v. *Wilcocks* (1806), 8 East, 1, decided that the result must be the "legal" result, the decision is not good law. Thus in *Société Française des Asphaltes* v. *Farrell* (1885), Cab. & El. 563, it was held that the wrongful refusal of a third party to fulfil a contract might give a right to special damage for a slander if such refusal is the probable consequence of the utterance of the slander. It is not necessary that the person whose act constitutes the special damage should have believed the charge, provided he acted in consequence of the words having been spoken (*Knight* v. *Gibbs* (1834), 3 Nev. & M. (K. B.) 467; but see *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, *per* LOPES, L.J., at p. 232 (see note (*d*), p. 666, *ante*, and *Speake* v. *Hughes*, [1904] 1 K. B. 138, C. A.). As to *Lynch* v. *Knight*, *supra*, see note (*g*), p. 667, *ante*. The expression "natural and reasonable" is there used. This means a result which might reasonably be expected, taking human nature as it is, with all its infirmities. In *Speake* v. *Hughes*, *supra*, somewhat similar expressions were used. In *Haddan* v. *Lott* (1854), 15 C. B. 411, it was held that to make words actionable, which are not actionable *per se*, the special damage must be such as naturally or reasonably arises from the use of the words. The expression "natural and necessary" goes too far, but such a result cannot be too remote; see *Ward* v. *Weeks* (1830), 7 Bing. 211. On the whole the expression in the text or the expression "natural and probable" seems best to represent the present state of the law. The damage must be "direct," *i.e.*, not too remote. As to repetition of slanders, see pp. 666 *et seq.*, *ante*.

(*f*) See *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 529—532, C. A. As to

1332. The following are examples of what does not amount to special damage :— Example of what is not special damage.

Mere injury to the feelings (*g*); the illness of the plaintiff (*h*); the illness of any other person (*i*); the death of any other person (*i*); the mere loss of the society, as contrasted with the material hospitality, of friends (*k*); the loss of membership of some society or congregation constituted for religious purposes, the membership of which does not carry with it material temporal advantages (*l*); any damage not pecuniary or capable of being estimated in money (*m*).

1333. The following are examples of what does amount to special damage (*n*) :— Examples of special damage.

Loss of consortium of husband (*o*); loss of marriage (*p*); loss of material hospitality (*q*); loss of employment (*a*); loss of a dealing, even though it might have turned out unprofitable (*b*); loss of

repetition of libel, see p. 664, *ante;* as to repetition of slander, see pp. 666 *et seq.*, *ante;* as to remoteness, see title DAMAGES, Vol. X., pp. 318, 319.

(*g*) *Weldon* v. *De Bathe* (1884), 54 L. J. (Q. B.) 113, C. A., *per* BRETT, M.R., at p. 116.

(*h*) See *Allsop* v. *Allsop* (1860), 5 H. & N. 534 (approved in *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577), where it was held that the fact that defamatory words not actionable *per se* have occasioned illness does not constitute special damage so as to give a right of action to the person defamed or (if a married woman) to her husband, illness not being the natural or immediate result of the words spoken.

(*i*) As to the inadmissibility of evidence to show that the plaintiff's wife had become ill and died soon after the publication of the libels complained of, see *Guy* v. *Gregory* (1840), 9 C. & P. 584. A plaintiff cannot maintain an action for a libel on one of his performers who was thereby deterred from appearing on the stage (*Ashley* v. *Harrison* (1793), Peake, 256 [194]).

(*k*) As to *consortium vicinorum*, see *Roberts* v. *Roberts* (1864), 5 B. & S. 384; *Weldon* v. *De Bathe*, *supra*. As to loss of hospitality, see *Moore* v. *Meagher* (1807), 1 Taunt. 39, Ex. Ch.; *Davies* v. *Soloman* (1871), L. R. 7 Q. B. 112; *Evans* v. *Harries* (1856), 1 H. & N. 251; *Riding* v. *Smith* (1876), 1 Ex. D. 91.

(*l*) *Roberts* v. *Roberts*, *supra;* and see *Dwyer* v. *Meehan* (1886), 18 L. R. Ir. 138, where it was held that, assuming the words complained of were spoken of the plaintiff as a novice, they were, in the then state of the law, not actionable *per se*, and the suggested special damage was not sufficient.

(*m*) See *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407, C. A. See also *Michael* v. *Spiers and Pond, Ltd.* (1909), 101 L. T. 352.

(*n*) But it often happens that in actions for words not actionable *per se* the damage is too remote, though otherwise the loss would amount to special damage. For cases where such damage was not too remote, see *Knight* v. *Gibbs* (1834), 3 Nev. & M. (K. B.) 467; *Kendillon* v. *Maltby* (1842), Car. & M. 402 (but as to this case, see *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A.). For cases where the damage was held too remote, see *Speake* v. *Hughes*, [1904] 1 K. B. 138, C. A.; *Tunnicliffe* v. *Moss* (1850), 3 Car. & Kir. 83; see also *Michael* v. *Spiers and Pond, Ltd.*, *supra*. As to *Vicars* v. *Wilcocks* (1806), 8 East 1, see note (*e*), p. 730, *ante;* as to repetition of slander, see pp. 666 *et seq.*, *ante*.

(*o*) See *Lynch* v. *Knight*, *supra;* *Roberts* v. *Roberts*, *supra;* and pp. 668, 730, *ante*.

(*p*) See *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, C. A.

(*q*) See note (*k*), *supra*.

(*a*) See the cases cited in note (*n*), *supra*.

(*b*) *Storey* v. *Challands* (1837), 8 C. & P. 234 (summing up of Lord DENMAN, C.J.). But the loss of a dealing which, had it taken place, would certainly have resulted in loss is not, it might be supposed, special damage. As to a

SECT. 6. Special Damage.

particular customers (*c*); and any other material loss (*d*), such as has already been defined (*e*).

Loss of general custom.

1334. In some actions of defamation a loss of general custom may be alleged and proved generally (*f*); and this applies in some cases where the words are not actionable *per se* and special damage is of the essence of the action. Such special damage may be in some cases alleged and proved generally, by proving total general damage, without proving loss resulting from the falling off of the turnover in the case of particular customers.

Loss of particular customers.

In all actions of defamation the loss of particular customers must be pleaded specially. Evidence of such a loss is inadmissible unless it is so pleaded (*g*).

In actions of slander for words actionable *per se*.

1335. In an action of slander for words actionable *per se*, the law as to alleging and proving the loss of general custom is the same in theory as in the case of an action of libel (*h*). If the loss of general custom flows directly and in the ordinary course of things from the original utterance of the defendant, or from a repetition for which the defendant is responsible, it is sufficient to allege and prove such loss generally (*i*). If the loss of particular customers is relied on, this is special damage which must be pleaded specially, and no evidence of such loss is admissible unless it is so pleaded.

In actions of slander for words not actionable *per se*.

1336. Special damage is the gist of an action for words not actionable *per se*, and actual temporal damage must be alleged and proved. Such special damage must be alleged in the statement of claim and proved; and it must be alleged and proved with certainty

refusal to deliver to the plaintiff goods without payment alleged as special damage, see *King* v. *Watts* (1838), 8 C. & P. 614. Defendant's counsel may in such a case ask the vendor in cross-examination whether he did not refuse delivery in consequence of what other persons said of the plaintiff and what those persons did say (*ibid.*).

(*c*) *Bateman* v. *Lyall* (1860), 7 C. B. (N. S.) 638; and see the text, *infra*.

(*d*) See note (*c*), p. 730, *ante*.

(*e*) See p. 730, *ante*.

(*f*) See *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 529, C. A., approving the statement of POLLOCK, C.B., in *Harrison* v. *Pearce* (1859), 32 L. T. (O. S.) 298, that such damage is not special damage strictly so called, but general damage resulting from the kind of injury the plaintiff has sustained.

(*g*) *Bluck* v. *Lovering* (1885), 1 T. L. R. 497, approved in *Ratcliffe* v. *Evans*, *supra*; compare *Ingram* v. *Lawson* (1838), 9 C. & P. 326; (1840) 6 Bing. (N. C.) 212 (action on the case for libel on a ship).

(*h*) *Ratcliffe* v. *Evans*, *supra*, at p. 530. As to the practical difficulty, see the passage quoted in note (*c*), p. 718, *ante*. As to repetition of slander, see also p. 666, *ante*. See also *Evans* v. *Harries* (1856), 1 H. & N. 251, cited in *Ratcliffe* v. *Evans*, *supra*, as an instance where the court held that general evidence of the decline of business was rightly receivable. Compare *M'Louglin* v. *Welsh* (1846), 10 I. L. R. 19 (cited in *Ratcliffe* v. *Evans*, *supra*), as another instance. If in such a case the statement of claim alleges the loss of special customers in addition to a general allegation of loss of business, the jury may assess damages for a general loss or decrease of trade (if proved), although the loss of particular customers is not proved (*Evans* v. *Harries*, *supra*), and this principle applies to actions of libel also.

(*i*) *Ratcliffe* v. *Evans*, *supra*.

and precision (*k*). But the degree of certainty and precision required depends upon the facts of the case (*l*). SECT. 6. Special Damage.

For instance, the loss of particular customers obviously admits of greater particularity than the diminution in the total business. If it is impossible, having regard to the nature of the particular case, to allege and prove the loss of particular customers, it is sufficient to allege and prove loss of custom with less certainty and precision, so long as the loss of custom is alleged with as great certainty and precision as the nature of the particular case allows (*m*).

Part VI.—Injunctions.

SECT. 1.—*Jurisdiction of the Court* (*n*).

1337. The High Court of Justice has undoubted jurisdiction to grant injunctions at or before the trial to restrain the publication of a libel (*o*). To restrain publication of: (i.) Libel;

(*k*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 532, C. A., referring to *Malachy* v. *Soper* (1836), 3 Bing. (N. C.) 371; *Lowe* v. *Harewood* (1628), W. Jo. 196; *Cane* v. *Golding* (1649), Sty. 176; *Tasburgh* v. *Day* (1618), Cro. Jac. 484; *Evans* v. *Harlow* (1844), 5 Q. B. 624.

(*l*) *Ratcliffe* v. *Evans*, *supra*, at p. 532, referring to *J'Anson* v. *Stuart* (1787), 1 Term Rep. 748, 754; *Arlington* (*Lord*) v. *Merricke* (1672), 2 Saund. 411; *Grey* v. *Friar* (1850), 15 Q. B. 907, Ex. Ch.; see Co. Litt. 303 a; *Westwood* v. *Cowne* (1816), 1 Stark. 172; *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486; *Hargrave* v. *Le Breton* (1769), 4 Burr. 2422, and criticising *Riding* v. *Smith* (1876), 1 Ex. D. 91.

(*m*) *Ratcliffe* v. *Evans*, *supra*, where *Hartley* v. *Herring* (1799), 8 Term Rep. 130, was cited as a possible instance of a proof of loss of general custom being admitted in an action of slander for words not actionable *per se*. In *Hartley* v. *Herring*, *supra*, an action for slander by a dissenting minister for loss of profit arising from an imputation of incontinence, in consequence of which he alleged that his congregation would not let him preach and discontinued giving him the profits he had usually received and would otherwise have received, it was held that it was not necessary to give the names of the members of the congregation; compare *Evans* v. *Harries* (1856), 1 H. & N. 351 (innkeeper suing for a slander which was actionable *per se*, namely, a slander on him in the way of his trade). As to repetition of slander, see also pp. 666, *et seq.*, *ante*. In *Ratcliffe* v. *Evans*, *supra* (an action on the case, where special damage was of the essence of the action), it was held on the facts of that case sufficient to allege and prove loss of custom generally. As to actions on the case, see note (*l*), p. 628, *ante*. As to the necessity of alleging some particular damage in such actions as a general rule, see 1 Wms. Saund. 310, notes to *Craft* v. *Boite* (1669), 1 Saund. 246, citing *Malachy* v. *Soper*, *supra*; *Brook* v. *Rawl* (1849), 4 Exch. 521; *Evans* v. *Harlow*, *supra*. The general rule is subject to the qualifications laid down in *Ratcliffe* v. *Evans*, *supra*.

(*n*) As to the general law as to injunction, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*, and, as to defamation, *ibid.*, pp. 260, 261. See also title EQUITY, Vol. XIII., pp. 46 *et seq.*

(*o*) In this respect KAY, L.J., in *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, C. A., at p. 285, agreed with the judgment of the rest of the full Court of Appeal (Lord COLERIDGE, C.J., Lord ESHER, M.R., LINDLEY, BOWEN and LOPES, L.JJ.). The court did not there intimate that the jurisdiction was confined to libels affecting the trade or property of the plaintiff. It was there pointed out that the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 79, 81, 82, conferred on the courts of common law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort,

SECT. 1. Jurisdiction of the Court.

(ii.) Slander.

In principle there is no such distinction between libel and slander as to deprive the court of jurisdiction to grant an injunction in actions of slander, though the jurisdiction requires to be exercised with even greater caution than in the case of libel (*p*).

Further, the jurisdiction is not confined to those libels and slanders which affect the trade, business, or property of the plaintiff (*q*).

Interim injunction.

Exercise of jurisdiction.

1338. To justify the court in granting an interim injunction (*r*) it must come to a decision upon the question of libel or no libel before the jury decides whether it is a libel or not. Therefore, the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must

with no limit as to defamation, though there was no reported instance of the exercise by a court of common law of this jurisdiction till *Saxby* v. *Easterbrook* (1878), 3 C. P. D. 339. The jurisdiction therefore must be taken to have existed, although subsequently in *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671, C. A., LOPES, L.J., at p. 693, considered the point doubtful. He, however, was of opinion that the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8), conferred a larger jurisdiction than existed before the Act, and considered it unnecessary to consider cases which occurred before 1873 Further, in *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud, supra*, Lord HALSBURY expressed his opinion that the Judicature Acts rendered idle discussions as to whether the Court of Chancery before those Acts granted injunctions in cases of libel at all or so far only as they were injurious to trade, and expressed his opinion that the protection of a man's character is much more important than the protection of his trade. In *White* v. *Mellin*, [1895] A. C. 154, Lord HERSCHELL, L.C., at p. 163, explained *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, C. A., as deciding that the powers of the courts of common law under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), had passed to the High Court of Justice. It was held in *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30, C. A. (see also *Kitts* v. *Moore*, [1895] 1 Q. B. 253, C. A.), that the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8), which enacts that an injunction may be granted by an interlocutory order of the court in all cases when it shall appear to the court to be just or convenient, has not enlarged the jurisdiction of the court so as to enable it to grant an injunction where before the Act it could not have done so. But this decision does not, having regard to the authorities quoted in the preceding portion of this note, affect the jurisdiction of the court to grant injunctions before or at the trial in actions of libel.

(*p*) See *Hermann Loog* v. *Bean* (1884), 26 Ch. D., C. A., where the jurisdiction was exercised.

(*q*) See *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud, supra, per* Lord HALSBURY, at p. 690, and note (*o*), p. 733, *ante*. In *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud, supra*, DAVEY, L.J., said, at p. 698, that he could see no logical distinction between a libel affecting trade or property and one affecting character only. So, too, in *Salomons* v. *Knight*, [1891] 2 Ch. 294, C. A., it was held by NORTH, J., and by the Court of Appeal, that though the court has jurisdiction to grant an interlocutory injunction to restrain further publication of a libel, an interlocutory injunction ought not to be granted in that case because there was no reason to apprehend pressing injury to person or property. Compare *Dockrell* v. *Dougall* (1898), 78 L. T. 840, where RIDLEY, J., held that an injunction will not be granted to restrain the unauthorised use of a person's name, even though such use is calculated to injure him in his profession, unless such use is shown to be injurious to the plaintiff's reputation or property. As to slander of title, see p. 736, *post*, and title TORT.

(*r*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, (8), and note (*o*) p. 733, *ante*.

also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It follows from those three rules that the court can only on the rarest occasions exercise the jurisdiction (*s*). This has been said to be an absolute rule of practice with regard to the circumstances under which an interlocutory injunction ought to be granted pending the trial of an action of libel (*t*) (or slander).

(*s*) This statement is taken *verbatim* from the judgment of Lord ESHER, M.R., in *Coulson & Sons* v. *Coulson & Co.* (1887), 3 T. L. R. 846, C. A. It has been approved by the Court of Appeal in *Liverpool Household Stores Association* v. *Smith* (1887), 37 Ch. D. 170, C. A., by the full Court of Appeal in *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, C. A., and by the Court of Appeal in *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671, C. A. See also *Poulett* v. *Chatto and Windus* (1887), 4 T. L. R. 142, C. A. In the above cases an interlocutory injunction was refused; but in *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, *supra*, Lord HALSBURY and LOPES, L.J., would have granted the injunction as coming within the rule in *Bonnard* v. *Perryman*, *supra*, but for the further affidavits, which raised a question of acquiescence by the plaintiff. In *Hill* v. *Hart Davies* (1882), 21 Ch. D. 798, 802, referred to in *Liverpool Household Stores Association* v. *Smith*, *supra*, an interlocutory injunction was granted by KAY, J., where a member of a friendly society issued, to persons not members of the society, circulars containing inaccurate statements as to the financial condition of the society. In *Collard* v. *Marshall*, [1892] 1 Ch. 571, CHITTY, J., granted an interlocutory injunction in a case which appeared to him to satisfy the conditions laid down in the judgment of Lord ESHER in *Coulson & Sons* v. *Coulson & Co.*, *supra*. In *Collard* v. *Marshall*, *supra*, the defendant did not require the case to be submitted to a jury and was willing to treat the motion as the trial of the action.

(*t*) *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, *supra*, *per* LOPES and DAVEY, L.JJ., they (as also did COTTON, L.J., in *Liverpool Household Stores Association* v. *Smith*, *supra*, at p. 181, treating the words which follow "clearest cases" as epexegetical. Lord HALSBURY, however, in *Monson* v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, *supra*, at p. 690, said that the decision in *Bonnard* v. *Perryman*, *supra*, adopting the language of Lord ESHER, M.R., in *Coulson & Sons* v. *Coulson & Co.*, *supra*, cannot be considered as laying down an absolute rule limiting the statutory jurisdiction (see p. 734, *ante*) given to the court to grant an interlocutory order when it shall appear to the court to be just or convenient.

The following cases in addition to those referred to in notes (*o*)—(*r*), pp. 733, 734, *ante*, and notes (*s*) and (*t*), *supra*, may be referred to as showing when the court will or will not grant injunctions, by way of final or interlocutory order, to restrain the publication of a libel. Interlocutory order:—*Thorley's Cattle Food Co.* v. *Massam* (1877), 6 Ch. D. 582 (refused); *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501, C. A. (refused on the grounds (1) that the alleged libel was not proved to be untrue and that as a general rule the plaintiff who applies for an interlocutory injunction must show the statement to be untrue; (2) that the injunction was to restrain future publication, whereas the mischief, if mischief there was, had been done; (3) that the circular complained of appeared on its face to be in the nature of a privileged communication, and that even if there were evidence of want of *bona fides* a judge should hesitate before he decides a question of privilege on an interlocutory application, the only answer being express malice (*ibid.*, *per* JESSEL, M.R., at pp. 508, 509)); *Armstrong* v. *Armit* (1886), 2 T. L. R. 887 (refused on grounds that the only affidavit did not state that the whole of the libels were untrue and that there was also a question of fair comment); *Pink* v. *Trades and Labour Unions Federation* (1892), 8 T. L. R. 216, 711 (granted and subsequently made perpetual); *Allinson* v. *General Council of Medical Education and Registration* (1892), 8 T. L. R. 727, 784, C. A. (Court of Appeal affirming the dissolution of order restraining the publication of an erasure of plaintiff's name from dental register); *Champion & Co.* v. *Birmingham Vinegar Brewery*

SECT. 2. Actions on the Case.

Actions on the case not being actions of libel or slander properly so called.

SECT. 2.—*Actions on the Case.*

1339. An action does not lie at common law for slander of title (oral or written) or for slander of goods (oral or written), not being an action of libel or slander properly so called but an action on the case, unless the following conditions are fulfilled:—(1) The statement must be made and published by the defendant of and concerning the plaintiff's title or goods; (2) in disparagement thereof; (3) falsely; (4) with actual malice; (5) and cause special damage to the plaintiff which he must allege and prove (*a*).

Co. (1893), 10 T. L. R. 164 (order set aside, the occasions of the publications of the alleged libels being all occasions on which, unless abused, privilege might exist); *Jarrahdale Timber Co.* v. *Temperley & Co.* (1894), 11 T. L. R. 119 (order made restraining an advertisement that the defendants were the only importers of certain timber); *Newton* v. *Amalgamated Musicians' Union* (1896), 12 T. L. R. 623 (order refused, because question was one for a jury); *London and Northern Bank* v. *Newnes (George), Ltd.* (1899), 16 T. L. R. 76 (where the paragraph stated that the plaintiffs were in liquidation and it was clear that the statement was unfounded and an interlocutory order was made, the case being so exceptional); *Lloyds Bank* v. *Royal British Bank* (1903), 19 T. L. R. 548, 604, C. A. (order made by BYRNE, J.; case settled in Court of Appeal); *Corelli* v. *Wall* (1906), 22 T. L. R. 532 (order refused, no sufficient case being made out on either of the grounds relied on—that the post cards were libellous and that they were published without plaintiff's authority). Final order:—*Thomas* v. *Williams* (1880), 14 Ch. D. 864 (order made as to one circular). As to granting injunctions in actions on the case where no actual damage is proved, see *White* v. *Mellin*, [1895] A. C. 154, and the explanation of *White* v. *Mellin*, *supra*, given in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Maison Talbot* (1903), 20 T. L. R. 88, *per* WALTON, J., at p. 89; *Thorley's Cattle Food Co.* v. *Massam* (1880), 14 Ch. D. 763, C. A. (order made: this was a case of a common law libel on a man in the way of his trade, at any rate in respect of the circular which used the word "foist"); *Kerr* v. *Gandy* (1886), 3 T. L. R. 75 (order made: advertisement against goods of another); *Hayward & Co.* v. *Hayward & Sons* (1886), 34 Ch. D. 198 (order made, where the circular complained of contained an untrue statement of the effect of the judgments in a former action and was a libel on the plaintiffs in the way of their trade); *White* v. *Mellin*, *supra* (order refused); *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, *supra* (order made).

(*a*) As to conditions (1), (2), (3), and (5), see *White* v. *Mellin*, *supra*, at p. 167. As to (4), see note (*l*), p. 628, *ante*. As to actions on the case generally, see note (*l*), p. 628, p. 719, note (*m*), p. 733, and p. 734, *ante*. As to (5), see also note (*l*), p. 628, *ante*. As to (2) and (4), see further, *Hubbuck & Sons* v. *Wilkinson, Heywood and Clerk*, [1899] 1 Q. B. 86, C. A., where the defendants' circular having stated that the defendants' white zinc was equal to and, indeed, somewhat better than the plaintiffs', it was held that such a statement, even if untrue, and the cause of loss to the plaintiffs was not a cause of action, that an allegation that the statement was made maliciously is not enough to convert a statement which is *primâ facie* lawful into one which is *primâ facie* unlawful (see *Allen* v. *Flood*, [1898] A. C. 1), that it is not unlawful to say that one's goods are better than other people's, and that judgment must be entered for the defendants under R. S. C., Ord. 25, r. 4, though if the defendants had gone beyond stating that the plaintiff's goods were inferior to, or at all events not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right to strike out the claim summarily. In *Lee* v. *Gibbings* (1892), 67 L. T. 263, KEKEWICH, J., refused a motion by an author to restrain the publication of a book otherwise than in the form in which it was prepared by the author, the ground of the motion being that the publication in the form complained of caused an injury to the plaintiff's reputation as an author, without expressing any opinion whether what had been done was injurious to the plaintiff's reputation or not, which would be a question for a jury. As to trade libel and slander of goods, see also title TRADE AND TRADE UNIONS

SECT. 2. Actions on the Case.

If a plaintiff in an action for slander of goods does not aver that he has sustained any special damage and only claims an injunction, he is not entitled to an injunction (*b*), at any rate not unless he satisfies the court that such damage will necessarily be occasioned to him in the future (*c*) or is so highly probable that it may properly be described as imminent (*d*).

SECT. 3.—*Parliamentary Candidates.*

Defamation of parliamentary candidates.

1340. Any person who makes or publishes any false statement of fact in relation to the personal character or conduct of a candidate for any parliamentary election (*e*) may be restrained by interim or perpetual injunction from any repetition thereof (*f*).

Part VII.—Criminal Proceedings.

SECT. 1.—*Introductory* (*g*).

Distinctions between civil and criminal law.

1341. The law of libel hereinbefore set forth is, generally, applicable alike to civil actions and to criminal prosecutions for defamatory libel.

(*b*) *White* v. *Mellin*, [1895] A. C. 154, *per* Lord HERSCHELL, L.C., at p. 163.

(*c*) *Ibid.*, *per* Lord WATSON, at p. 167.

(*d*) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Maison Talbot* (1903), 20 T. L. R. 88, where WALTON, J., granted a final injunction before any actual damage had been sustained and (*ibid.*, pp. 89, 90) said that the view which the House of Lords took in *White* v. *Mellin*, *supra*, must be considered in connection with the view which they took of the facts. As to injunctions in the case of trade libels, see further the cases cited in the earlier notes to pp. 734 *et seq.*, *ante*, many of which were actions on the case. As to injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*, and in particular pp. 260, 261; as to injunctions in connection with trade marks and patents, see titles PATENTS; TRADE MARKS, TRADE NAMES AND DESIGNS. As to speeches or writings tending to defeat the ends of justice, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 284 *et seq.*

(*e*) See title ELECTIONS, Vol. XII., pp. 298, 299; Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), s. 1. As to exemption for reasonable belief, and competence of defendant and the husband or wife of the defendant as witnesses, see *ibid.*, s. 2.

(*f*) See title ELECTIONS, Vol. XII., p. 540; compare Municipal Elections Corrupt and Illegal Practices Act, 1911 (1 & 2 Geo. 5, c. 7), s. 1 (3). As to a case where the Court of Appeal granted an interim order, see *Bayley* v. *Edmunds, Byron and Marshall* (1895), 11 T. L. R. 537, C. A.

(*g*) The object of Part VII. of this title is to set forth the law (chiefly statutory) which is specially applicable to criminal prosecutions for defamatory libel without repeating at length the general provisions of the law of libel which have been already discussed or the practice and procedure in criminal proceedings which have been dealt with in title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 225 *et seq.* This part does not deal with obscene, blasphemous or seditious libels or contempts of court, or with offences under the Corrupt and Illegal Practices Act, 1895, or, indeed, with any offences other than defamatory libels. See, as to obscene libels, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 538; as to the Obscene Publications Act, 1857 (20 & 21 Vict. c. 83), s. 1, see titles. COURTS, Vol. IX., p. 79; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 259, 310; and as to the Indecent Advertisements Act, 1889 (52 & 53

SECT. 1. Introductory.

The following existing distinctions have been already indicated:—

(1) Truth is a complete defence to an action for libel. Truth never was at common law, and truth alone is not now, a defence to a prosecution for a common law defamatory libel (*h*).

(2) Publication to support an action for libel must be publication to a third person. Publication to the person defamed alone may support a criminal prosecution (*i*).

(3) The maxim *respondeat superior* applies equally at common law to the publication of libels, whether they are the subject of civil actions or criminal proceedings. But the rigour of the common law rule has been relaxed by statute in the case of prosecutions for libel (*k*).

(4) It has been suggested that a married woman might sue her husband by action for a libel on her in her trade, as being for the protection and security of her separate estate. It has been decided that she is not entitled to institute criminal proceedings against her husband (*l*).

SECT. 2.—*Defamatory Libels and their Punishment.*

SUB-SECT. 1.—*Misdemeanours at Common Law.*

Criminal law: defamatory libel and its punishment. Statutory limitation of punishment.

1342. The publication of a defamatory libel is a common law misdemeanour, and by the common law a person convicted thereof was liable to imprisonment for any period (without hard labour), and to a fine, or to either of those punishments (*m*). By a statutory provision, which came into force in 1843 (*n*) (which does not create a new offence or purport to give a definition (*o*) of an existing offence, but provides for the application to that which already was an offence at common law of the appropriate punishment on

Vict. c. 18), see titles COURTS, Vol. IX., p. 78; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 303, 539. As to the distinction between obscene libels and other libels in that it is by statute unnecessary to set out the obscene passages in the indictment, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 339, 539, and p. 741, *post*. As to blasphemy, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 530 *et seq*. As to seditious libels, see title *ibid*., p. 460, and *R.* v. *Aldred* (1909), 74 J. P. 55; as to libels on the Constitution, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 463; on the Succession to the Crown, *ibid*., p. 464. As to contempt of court generally and its summary punishment, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 279 *et seq*., 307. As to the misdemeanour of contempt of court, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 461, 501 *et seq*. As to the Corrupt and Illegal Practices Act, 1895 (58 & 59 Vict. c. 40), ss. 1, 3, see title ELECTIONS, Vol. XII., pp. 298, 299, 540, and p. 737, *ante*.

(*h*) See pp. 605 *et seq*., 669, *ante*, and p. 743, *post*. But the defendant is not guilty under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 4, unless he knew the libel to be false. Though he be acquitted of this, he may be convicted of the common law offence; see p. 739, *post*.

(*i*) See p. 606, *ante*, and note (*r*), p. 656, *ante*.

(*k*) See note (*q*), p. 655, *ante*, and pp. 741 *et seq*., *post*.

(*l*) *R.* v. *London* (*Lord Mayor*) (1886), 16 Q. B. D. 772; and see p. 613, *ante*.

(*m*) See Bac. Abr., tit. Libel (C), and the authorities there cited; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 410, 569.

(*n*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 5.

(*o*) As to the definition of libel and the respects in which an actionable libel differs from a criminal libel, see pp. 606 *et seq*., *ante*.

conviction of that offence) (*p*), it is enacted that any person (*q*) who maliciously (*r*) publishes (*s*) any defamatory libel (*a*), being convicted thereof, shall be liable to a fine (*b*), or imprisonment, or both, as the court may award, such imprisonment (which is imprisonment without hard labour) (*c*) not to exceed the term of one year.

SUB-SECT. 2.—*Aggravated Libel.*

Aggravated defamatory libel.

Lord Campbell's Act.

1343. Any person who maliciously publishes any defamatory libel, knowing the same to be false, being convicted, shall be liable to be imprisoned (*i.e.*, without hard labour) for any term not exceeding two years, and to pay such fine as the court may award (*d*).

Conviction at common law on prosecution for publication "knowing the same to be false."

1344. Before 1843 the indictment for the common law offence usually contained an averment that the defendant published the libel "knowing it to be false." But this was not essential to the common law offence. Consequently the defendant could not set up that he did not know the libel to be false as an answer to the charge. Now it is competent to the jury on an indictment for publishing a defamatory libel "knowing the same to be false" to acquit the defendant of that portion of the charge which is statutory and convict him of the residue (*e*).

(*p*) *R.* v. *Munslow*, [1895] 1 Q. B. 758, C. C. R., *per* Lord RUSSELL OF KILLOWEN C.J., at p. 761. There the indictment charged the defendant with "unlawfully" publishing a defamatory libel, but omitted to aver that it was published "maliciously." It was held that at common law an averment of malice was unnecessary, and that the indictment was good. See also p. 608, *ante*. As to alleging in the indictment an intent to provoke a breach of the peace, see note (*r*), p. 656, *ante*.

(*q*) This includes a corporation which may be fined; see title CORPORATIONS, Vol. VIII., p. 391). As to companies, see title COMPANIES, Vol. V., p. 311. As to directors, see *R.* v. *Allison* (1888), 16 Cox, C. C. 559, C. C. R. As to capacity to commit crime, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239 *et seq.* As to newspapers, see pp. 744 *et seq.*, *post*.

(*r*) See note (*p*), *supra*. As to implied malice, see pp. 608, 685 *et seq.*, *ante* As to express malice, see pp. 721 *et seq.*, *ante*. As to the defence of absolute privilege, see pp. 677 *et seq.*, *ante*. As to the defence of qualified or conditional privilege, see pp. 685 *et seq.*, *ante*. As to fair and accurate reports, see pp. 694 *et seq.*, *ante*. As to the defence of fair comment, see pp. 699 *et seq.*, *ante*. As to the defence of truth and public benefit, see pp. 670, 688 *et seq.*, *ante*, and p. 743, *post*.

(*s*) As to publication, see pp. 655 *et seq.*, *ante*. The publication need not be to a third person to support a criminal prosecution; see p. 656, *ante*. As to the mitigation of the rule *respondeat superior* in the case of a criminal prosecution for "a libel," see the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7, and p. 744, *post*; see also p. 656, *ante*.

(*a*) As to what is a defamatory libel, see pp. 606, 618 *et seq.*, *ante*. As to a libel on a dead person, see note (*b*), p. 606, and p. 613, *ante*. As to libels on a class, see p. 614, *ante*. As to trivial libels in registered newspapers, see p. 745, *post*. As to the special procedure in the case of libels in newspapers, see p. 744, *post*.

(*b*) As to fines and as to recognisances to keep the peace, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 412. As to fines for trivial libels in newspapers, see p. 745, *post*. As to fines on corporations, see note (*q*), *supra*.

(*c*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 410, 411, note (*e*).

(*d*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 4. As to *ibid.*, s. 5, see note (*n*), p. 738, *ante*.

(*e*) *Boaler* v. *R.* (1888), 21 Q. B. D. 284.

SECT. 2. SUB-SECT. 3.—*Extortion.*

Defamatory Libels and their Punishment.

Extortion.

Lord Campbell's Act.

1345. If any person publishes (or threatens to publish) any libel upon any other person (or directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from printing or publishing, or directly or indirectly offers to prevent the printing or publishing of any matter (which does not necessarily mean libellous matter (*f*)) touching another person) with intent (*g*) to extort any money or security for money or any valuable thing from such or any person, or with intent to induce any person to confer or procure for any person any appointment or office of profit (*h*) or trust, he is liable to be imprisoned, with or without hard labour, for any term not exceeding three years (*i*).

SECT. 3.—*Prosecution.*

SUB-SECT. 1.—*By Information.*

(i.) By information.

When information can be granted.

1346. Criminal proceedings by information *ex officio* by the King's Attorney-General are almost obsolete (*k*). Informations by the master of the Crown Office in the case of libels are rarely granted. They are only granted in the case of libels at the suit of persons who are in some public office or position and not at the suit of private persons (*l*).

SUB-SECT. 2.—*By Indictment.*

(ii.) By indictment.

1347. The modern practice is to prosecute in the case of defamatory libels by indictment (*m*).

(*f*) *R.* v. *Coghlan* (1865), 4 F. & F. 316, *per* BRAMWELL, B. As to what is insufficient evidence, see *R.* v. *Yates* (1853), 6 Cox, C. C. 441.

(*g*) As to what is not evidence of intent to extort money, see *R.* v. *Coghlan*, *supra*. BRAMWELL, B., withdrew the count as to extortion from the jury. As to the second count for libel he directed the jury as to the law, leaving them to apply it with his opinion that there was no libel. The jury returned a verdict of not guilty.

(*h*) See the address of PICKFORD, J., to the jury in *R.* v. *Plaisted* (1909), 22 Cox, C. C. 5, as to the inadmissibility of evidence as to motive, and as to the question for the jury.

(*i*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 3, which also provides that nothing therein is to alter or affect any law then in force in respect of the sending or delivery of threatening letters or writings. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 410, 411, 569, 668. As to extortion by threats, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 664 *et seq.*; and see *ibid.*, p. 668.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 329, note (*v*); as to cases, see *ibid.*

(*l*) *Ibid.*, p. 330; and see Shortt on Informations, Mandamus and Prohibition there referred to. Since *R.* v. *Labouchere* (1884), 12 Q. B. D. 320, which settled the modern practice, the usual procedure has been by indictment. For recent instances of criminal information at the instance of justices, see *R.* v. *Masters* (1889), 6 T. L. R. 44; *R.* v. *Russell*, *Ex parte Morris* (1905), 93 L. T. 407. As to where an information will not lie, see *Ex parte Littleton* (*Postmistress*) (1888), 52 J. P. 264.

(*m*) For the general principles relating to proceedings preliminary to indictment, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 290 *et seq.*; as to preliminary examination before justices, see *ibid.*, pp. 311 *et seq.*; as to evidence, see *ibid.*, p. 318. As to the need of obtaining the order of a judge at chambers before commencing proceedings against any proprietor, editor, or

Comparison between pleading and indictment.

1348. Generally, there is no difference in substance between the pleading in a statement of claim and an indictment for libel (*n*). As it is necessary in actions for libel or slander to set forth the actual words complained of in the statement of claim with proper innuendoes, so also it is necessary to do so in an indictment where words are of the essence of the offence (*o*). But it is no longer necessary to set out, in any indictment or other judicial proceeding, instituted against the publication of any obscene libel, the obscene passage, but it is sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, columns and lines in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceeding (*p*).

person responsible for the publication of a "newspaper" for any libel published therein, see p. 746, *post;* and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 293, 462, 531, 538. As to a court of summary jurisdiction dismissing the case on hearing a charge against such persons for libels in "newspapers," see p. 745, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 318, 320, 462. As to such a court summarily convicting such persons for trivial libels in newspapers, see p. 745, *post*, and titles COURTS, Vol. IX., p. 81; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 269. As to what is not a sufficient reason for adjourning the inquiry in the case of libel, see *ibid.*, p. 319.

(*n*) As to indictments, see *ibid.*, pp. 329 *et seq.*

(*o*) *Ibid.*, p. 339. See also pp. 643, 645 *et seq.*, *ante*.

(*p*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7. As to the necessary contents of indictments, defective averments, and amendment, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 334 *et seq.*, 343, 344. As to pleading in civil actions and criminal prosecutions for libels, see note (*n*), pp. 643, 644, *ante*, and *Cook* v. *Cox* (1814), 3 M. & S. 110, *per* Lord ELLENBOROUGH, C.J., at pp. 113, 114, 116; *Newton* v. *Stubbs* (1685), 2 Show. 435; *Sacheverell's* (*Dr.*) *Case* (1710), 15 State Tr. 1, 466, 467; *Solomon* v. *Lawson* (1846), 8 Q. B. 823, 839; *Heymann* v. *R.* (1873), L. R. 8 Q. B. 102, *per* BLACKBURN, J., at p. 105; and the conclusion of BRAMWELL, L.J., after reviewing those authorities in *Bradlaugh* v. *R.* (1878), 3 Q. B. D. 607, C. A., to the effect that "where words constitute the offence, they must be stated in the indictment; and the authorities distinctly show that when a defamatory libel is complained of . . . it must be stated in the indictment." As to the possible need of greater stringency in forming an indictment than in pleading a statement of claim in libel, see the judgment of BRAMWELL, L.J., in *Bradlaugh* v. *R.*, *supra*, and the cases cited there and in note (*n*), p. 643, *ante*. The principles are the same in either case. *Bradlaugh* v. *R.*, *supra*, though no longer an authority as to obscene libels, is an authority as to other libels. As to every libel or alleged libel being an offence within the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), see the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 6; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 331. As to the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 318, note (*d*), 320, 329, 331 *et seq.*, 447 (costs). As to trial of indictments, see *ibid.*, pp. 351 *et seq.* As to the general rules of evidence, see title EVIDENCE, Vol. XIII., pp. 415 *et seq.* As to the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 5, see note (*t*), p. 745, *post*. It is a rule of prudence rather than law that requires more stringent proof in criminal than in civil cases. As to this, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 377, note (*f*), and the cases there cited. The Law of Libel

SECT. 4. **Statutes applicable to Criminal Proceedings.**

SECT. 4.—*Statutes applicable to Criminal Proceedings.*

SUB-SECT. 1.—*In General.*

(i.) Fox's Libel Act, 1792.

Functions of judge and jury.

General verdict of "guilty," or "not guilty."

1349. The Libel Act, 1792 (*q*), is intituled an Act to remove doubts respecting the functions of juries in cases of libel. It recites that doubts had arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues were joined between the King and the defendant on the plea of not guilty pleaded, it was competent to the jury to give their verdict upon the whole matter in issue, and it was therefore enacted that, on every such trial, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant guilty merely on the proof of the publication by him of the paper charged to be a libel and of the sense ascribed to the same in such indictment or information (*r*). This is subject to the proviso that—

Judge stating his opinion.

(1) On every such trial the court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue in like manner as in other criminal cases (*s*);

Special verdict.

(2) Nothing in the Act shall extend or be construed to extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases (*a*);

Motion in arrest of judgment.

(3) In case the jury shall find the defendant guilty it shall be lawful for him to move in arrest of judgment on such ground and in such manner as by law he might have done before the passing of the Act (*b*).

Fox's Libel Act declaratory of common law.

1350. The Libel Act, 1792 (*q*), is in terms confined to criminal proceedings. But it is declaratory of the common law as to the functions of the court and jury in actions and prosecutions for libel. Both in actions and prosecutions for libel the judge may withdraw the case from the jury if in his opinion the libel properly construed is not defamatory. The jury may always find a general verdict for the defendant, even though in the opinion of the judge the words are defamatory. If the defendant can get either the court or the

Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 9, as to the competence of husband or wife of a defendant to give evidence in a prosecution for a libel, is of no practical importance since the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 317, 402 *et seq.*, 405, 407. As to appeals, see *ibid.*, pp. 432 *et seq.*; as to costs, see *ibid.*, pp. 445 *et seq.*

(*q*) 32 Geo. 3, c. 60, known as "Fox's Libel Act." See title CRIMINAL LAW AND PROCEDURE Vol. IX., pp. 369, 463.

(*r*) Libel Act, 1792 (32 Geo. 3, c. 60), s. 1.

(*s*) *Ibid.*, s. 2. As to judge's summing up, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 369.

(*a*) Libel Act, 1792 (32 Geo. 3, c. 60), s. 3. As to special verdicts, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 374.

(*b*) Libel Act, 1792 (32 Geo. 3, c. 60), s. 4. As to arrest of judgment, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 375.

jury to be in his favour, he succeeds. The prosecutor cannot succeed unless he gets both the court and the jury to decide for him (*c*).

(ii.) Libel Act, 1843.

1351. The Libel Act, 1843 (*d*), provides that—

When truth may be inquired into.

(1) On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as is hereinafter mentioned, the truth of the matters charged may be inquired into, but does not amount to a defence, unless it was for the public benefit that the matters charged should be published.

Plea of truth and public benefit.

(2) To entitle the defendant to give evidence of the truth of such matters charged as a defence, it is necessary for the defendant in pleading to the indictment or information to allege the truth of the said matters charged in the manner at the date of the Act (*e*) required in pleading a justification to an action for defamation (*f*); and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published.

Particulars.

Reply.

(3) The prosecutor is at liberty to reply generally to the plea, denying the whole thereof.

Effect of plea and evidence if defendant convicted.

(4) If after such plea the defendant is convicted, the court may, in pronouncing sentence, consider whether the guilt of the defendant is aggravated or mitigated by such plea and by the evidence given to prove or disprove it.

No inquiry as to truth without plea

(5) The truth of the matters charged in the alleged libel complained of cannot in any case be inquired into without such plea of justification.

Additional plea "not guilty."

(6) It is competent to the defendant in addition to such plea to plead "not guilty."

(7) Nothing in the Act (*e*) takes away or prejudices any defence under the plea of not guilty which it was at the date of the Act (*e*) competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel (*g*).

(*c*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, *per* Lord BLACKBURN, at p. 776. As to the history, and as to the Libel Act, 1792 (32 Geo. 3, c. 60), being declaratory, see the judgment from which the words in the text are quoted. See also pp. 652, 654, *ante*.

(*d*) 6 & 7 Vict. c. 96 (known as "Lord Campbell's Act"), s. 6; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 318. The Libel Act, 1843 (6 & 7 Vict. c. 96), ss. 1, 2, relate only to actions. As to *ibid.*, s. 3 (extortion), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 410, note (*d*), 569, 668, and p. 740, *ante*. As to the Libel Act, 1843 (6 & 7 Vict. c. 69), s. 4 (aggravated defamatory libel), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 569, and p. 739, *ante*). As to the Libel Act, 1843 (6 & 7 Vict. c. 69), s. 5 (defamatory libel and its punishment), see p. 738, *ante*. As to the Libel Act, 1843 (6 & 7 Vict. c. 69), ss. 6, 7, see the text, *infra*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 235, 355. The Libel Act, 1843 (6 & 7 Vict. c. 96), s. 8 (as to costs), is repealed; see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*

(*e*) 6 & 7 Vict. c. 96; the date of the Act is 24th August, 1843.

(*f*) See p. 669, *ante*.

(*g*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 6.

SECT. 4. Statutes applicable to Criminal Proceedings.

1352. It was no answer to criminal proceedings for libel that the libel was true or that the defendant did not know it to be false. The Libel Act, 1843 (*h*), enables truth and the public benefit to be pleaded as an answer to a criminal prosecution for libel; but truth by itself is still no answer (*i*).

Truth by itself no answer to prosecution for libel.

Proof of publication without authority.

1353. Whenever on the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence has been given which establishes a presumptive case of publication against the defendant by the act of any other person by his authority, it is competent to the defendant to prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part (*k*).

(iii.) Quarter Sessions Act, 1842.

1354. The publication of a defamatory libel is an offence not triable at quarter sessions (*l*).

SUB-SECT. 2.—*Newspapers.*

(i.) Newspaper Libel and Registration Act, 1881.

1355. A court of summary jurisdiction, on the hearing of a charge against a proprietor (*m*), publisher (*n*), or editor, or any person (*o*) responsible for the publication of a newspaper (*p*) for a libel published therein, may receive evidence as to the publication being

(*h*) 6 & 7 Vict. c. 96.

(*i*) As to the reason of the difference between actions and prosecutions for libel in this respect, see pp. 605, 606, *ante*. As to prosecutions for the publication of a defamatory libel "knowing the same to be false," see Libel Act, 1843 (6 & 7 Vict. c. 96), s. 4, and p. 739, *ante*.

(*k*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 7. As to responsibility for publication, see note (*q*), p. 655, *ante*, and title CRIMINAL LAW AND PROCEDURE. Vol. IX., p. 235.

(*l*) Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 1. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 459, note (*i*). As to courts of Quarter Sessions, see title MAGISTRATES.

(*m*) As to the definition of a "proprietor," see Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 1.

(*n*) As to printers, see *R.* v. *Allison* (1888), 16 Cox, C. C. 559, C. C. R. The whole court was there of opinion that the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 3, did not authorise the granting of a fiat by the public prosecutor in respect of the printer, and, that, as there was no evidence that the directors of the company who printed the paper (assuming a prosecution could lie against them in any case), sold and delivered anything but the bulk of each issue of the paper to the proprietors, or knew or saw the contents of the paper which contained the libel, either before or after its publication, the conviction could not be supported.

(*o*) Compare title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 148, note (*j*).

(*p*) "Newspaper" means "any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers. Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements" (Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 1). In the construction of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), the word "newspaper" has the same definition as in the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60); and see titles COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 147; PRESS AND PRINTING.

for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under any Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the charge (*q*).

Dismissal of charge.

1356. If a court of summary jurisdiction (*r*), upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper (*s*) for a libel published therein, is of opinion that, though the person charged is shown to have been guilty, the libel was of a trivial character, and that the offence may be adequately punished by the fine mentioned below, the court must cause the charge to be reduced into writing and read to the person charged and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding £50 (*t*).

Summary conviction and fine.

Trivial libels.

1357. A fair and accurate report in any newspaper (*u*) of proceedings publicly heard before any court exercising judicial authority, if published contemporaneously with such proceedings, is privileged, provided that nothing is published of a blasphemous or indecent matter (*v*). This provision applies to actions as well as to prosecutions (*a*).

(ii.) Law of Libel Amendment Act, 1888.

Reports of judicial proceedings.

(*q*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 4; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 318, 320, 462. As to the common law, see *ibid.*, p. 318. Truth is no defence by itself to a prosecution for a common law libel or a prosecution under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 5. As to aggravated libels published with knowledge that they were false, see *ibid.*, s. 4, and p. 737, *ante*.

(*r*) As to courts of summary jurisdiction, see title MAGISTRATES.

(*s*) See note (*p*), p. 744, *ante*.

(*t*) Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 5; see titles COURTS, Vol. IX., p. 81; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 268, note (*o*). By the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 5, the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were enacted by the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). As to proof of entries in or extracts from the register of newspaper proprietors and as to registration generally, see titles COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 154; EVIDENCE, Vol. XIII., p. 474; PRESS AND PRINTING.

(*u*) As to newspapers, see note (*p*), p. 744, *ante*.

(*v*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 3; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 538. The provision is in addition to the common law privilege. As to qualified or conditional privilege, see p. 677, *ante*. As to absolute privilege, see p. 685, *ante*. As to reports of parliamentary proceedings, see p. 683, *ante*.

(*a*) See pp. 694 *et seq.*, *ante*.

SECT. 4. Statutes applicable to Criminal Proceedings.

Proceedings at public meetings.

1358. Fair and accurate reports published in any newspaper (*b*) of the proceedings of a public meeting are also privileged (*c*). This provision applies to actions as well as to prosecutions (*d*).

Order of judge at chambers.

1359. No criminal prosecution may be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper (*b*) for any libel published therein without the order of a judge at chambers. The application for such order must be made on notice to the person accused, who must have an opportunity of being heard against the application (*e*). No appeal lies from the order of the judge allowing a prosecution (*f*).

(*b*) As to newspapers, see note (*p*), p. 744, *ante*.

(*c*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 4. See p. 698, *ante*, where the provision is also referred to; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 538.

(*d*) See p. 698, *ante*.

(*e*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 293, 463, 531, 539. In *Yates* v. *R.* (1885), 14 Q. B. D. 648, C. A. (decided under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 3, now repealed and substituted by the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8), it was held that the repealed provision did not apply to a criminal information for libel filed by order of the court.

(*f*) *Ex parte Pulbrook*, [1892] 1 Q. B. 86; see the cases there cited, the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 50, and R. S. C., Ord. 6.

LIBRARIES.

See LITERARY AND SCIENTIFIC INSTITUTIONS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

LICENCES.

See ALIENS; ANIMALS; AUCTION AND AUCTIONEERS; BANKRUPTCY AND INSOLVENCY; BILLS OF SALE; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; BURIAL AND CREMATION; CLUBS; CONSTITUTIONAL LAW; COPYHOLDS; COPYRIGHT AND LITERARY PROPERTY; CORPORATIONS; COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; CUSTOM AND USAGES; EASEMENTS AND PROFITS À PRENDRE; ECCLESIASTICAL LAW; ELECTRIC LIGHTING AND POWER; EXPLOSIVES; FISHERIES; FOOD AND DRUGS; GAME; GAMING AND WAGERING; HUSBAND AND WIFE; INTOXICATING LIQUORS; LANDLORD AND TENANT; LUNATICS AND PERSONS OF UNSOUND MIND; MARKETS AND FAIRS; MEDICINE AND PHARMACY; MINES, MINERALS, AND QUARRIES; PATENTS AND INVENTIONS; PAWNS AND PLEDGES; PUBLIC HEALTH AND LOCAL ADMINISTRATION; REAL PROPERTY AND CHATTELS REAL; REVENUE; SHIPPING AND NAVIGATION; STREET AND AERIAL TRAFFIC; TELEGRAPHS AND TELEPHONES; THEATRES AND OTHER PLACES OF ENTERTAINMENT; TRADE AND TRADE UNIONS; TRESPASS.

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